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# THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through  
the Legislative Session of 1951

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

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

*Under the Direction of*

A. HEWSON MICHIE, S. G. ALRICH, W. M. WILLSON  
AND BEIRNE STEDMAN

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Volume 1C

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THE GENERAL STATUTES OF  
NORTH CAROLINA

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# Scope of Volume

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## Statutes:

Full text of Chapters 15 through 27 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1951 heretofore contained in Volume 1 of the General Statutes of North Carolina and the 1951 Cumulative Supplement thereto.

## Annotations:

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

- North Carolina Reports volumes 1-233 (p. 312).
- Federal Reporter volumes 1-300.
- Federal Reporter 2nd Series volumes 1-186 (p. 744).
- Federal Supplement volumes 1-95 (p. 248).
- United States Reports volumes 1-340 (p. 366).
- Supreme Court Reporter volumes 1-71 (p. 473).
- North Carolina Law Review volumes 1-29 (p. 226).

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# Abbreviations

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(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

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Volume 1 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 1A, 1B and 1C. These new volumes contain Chapters 1 through 27 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1951 Session. Chapter 1 appears in volume 1A, Chapters 2 through 14 are in volume 1B, and Chapters 15 through 27 are in volume 1C. The Constitution of North Carolina and the Constitution of the United States, appearing under Division I in original volume 1, have been transferred to Division XIX-A in recompiled volume 4A. As will be noted, this transfer is not shown in the Table of Contents appearing in Volumes 2A through 3C.

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 1 and the 1951 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. In Volumes 2A through 2C, there is no particular designation to show that an act is from Potter's Revisal. However, in the other volumes such an act is followed by "P. R.," meaning Potter's Revisal.

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.*

June 12, 1953.



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§ 15-1. **Statute of limitations for misdemeanors.** — The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars, and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years

after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State. (1826, c. 11; R. C., c. 35, s. 8; Code, s. 1177; Rev., s. 3147; 1907, c. 408; C. S., s. 4512; 1943, c. 543.)

**Cross Reference.**—As to what are misdemeanors, see §§ 14-1 and 14-3 and annotations thereto.

**Editor's Note.**—The 1943 amendment rewrote the part of this section appearing before the proviso.

**General Consideration.**—The time between the commission of the offense and the bringing into court of the presentment should be estimated in determining whether the prosecution is barred. *State v. Cooper*, 104 N. C. 890, 10 S. E. 510 (1889). The time stated in the indictment does not govern, *State v. Newsom*, 47 N. C. 173 (1855). The State can go back two years prior thereto although the indictment marks the beginning of the prosecution. The indictment arrests the running of the statute of limitations and the statute does not begin to run from an entry of nol. pros. "with leave." *State v. Williams*, 151 N. C. 660, 65 S. E. 908 (1909).

**Meaning of Malicious Misdemeanors.**—When, in the former wording of this section, the legislature used the words "other malicious misdemeanors," which immediately followed the words "malicious mischief," it evidently intended to describe offenses of which malice was a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the court might consider in imposing the punishment. *State v. Frisbee*, 142 N. C. 671, 55 S. E. 722 (1906).

**Meaning of "Secret Manner."**—For construction of former provision, see *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895). See for example *State v. Watts*, 32 N. C. 369 (1849).

**"Deceit" as Used in Former Section.**—There has never been such an indictable offense as "deceit" but the meaning of this section has always been that misdemeanors, the gist of which was a malice or deceit, were within the exception of the section as formerly appearing. In *State v. Christiansbury*, 44 N. C. 46 (1852), it was held that there being no such offense as "deceit" it would apply to "cheating by false token" of which deceit

was the gist but would not include "conspiracy to cheat" the gist of which offense is the conspiracy and the cheating but an aggravation. That decision did not restrict deceit to "cheating by false token" but instanced that as an offence coming within the general description of misdemeanors by deceit. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

**What Offences Barred.**—Slandering an innocent woman is not barred within two years. *State v. Claywell*, 98 N. C. 731, 3 S. E. 920 (1887). No length of possession can bar an action to abate a public nuisance. *State v. Holman*, 104 N. C. 861, 10 S. E. 758 (1889). Seduction is not barred. *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

A malicious assault cannot be the basis of an action two years after commission. *State v. Frisbee*, 142 N. C. 671, 55 S. E. 722 (1906).

The section has no application to conspiracy which is a felony. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651 (1899). Bastardy proceedings are not governed by this section. *State v. Perry*, 122 N. C. 1043, 30 S. E. 139 (1898).

**What Constitutes a Presentment.**—See *State v. Morris*, 104 N. C. 837, 10 S. E. 454 (1889).

**Trial on Second Bill after Two Years Barred.**—Even an indictment within the time will not uphold a trial and conviction on a second bill found after the statutory period. *State v. Tomlinson*, 25 N. C. 32 (1842); *State v. Hedden*, 187 N. C. 803, 123 S. E. 65 (1924).

**Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial.** *State v. Sanderson*, 213 N. C. 381, 196 S. E. 324 (1938).

**Preliminary Warrants Not Included.**—There is no saving clause in this section as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards. *State v. Hedden*, 187 N. C. 803, 123 S. E. 65 (1924).

**Necessity for Pleading Statute.**—For a person charged with the commission of a

criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. *State v. Brinkley*, 193 N. C. 747, 138 S. E. 138 (1927).

Whether or not the court below will allow the statute of limitations as a defense to the action, where the same has not been pleaded or mentioned until the argument before the jury, is a matter of discretion. *Privett v. Calloway*, 75 N. C. 23 (1876).

Upon a trial on indictment for the sale of intoxicants where there was evidence of sales at undisclosed times, it would not be

presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded this section, or in apt time called it to the court's attention or offered evidence as to the dates of sale. *State v. Colson*, 222 N. C. 28, 21 S. E. (2d) 808 (1942).

**Wrong Name in Bill of Indictment.**—A bill of indictment against a person by a wrong name, which is pleaded to in abatement, and the plea found, is, nevertheless, the same cause of action, and the elapse of two years is no bar to prosecution. *State v. Hailey*, 51 N. C. 42 (1858).

**§ 15-2. Issue and return of criminal process.**—All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable. (1777, c. 115, s. 15, P. R.; R. C., c. 35, s. 9; Code, s. 1178; Rev., s. 3148; C. S., s. 4513.)

**§ 15-3. Date of receipt and service indorsed on process.**—Every sheriff or other officer shall indorse on all process and subpoenas issuing in criminal cases, whether for the State or defendant, the day when such process and subpoenas came to hand, and also the day of their execution; and on failure of any sheriff or other officer to perform either of said duties he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the State, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits for failure to make due return of process delivered to them. (1850-1, c. 57; R. C., c. 35, s. 10; Code, s. 1179; Rev., s. 3149; C. S., s. 4514.)

**Cross References.**—As to forfeitures in criminal liability for failure to return process, see §§ 162-14 and 2-41. As to

**§ 15-4. Accused entitled to counsel.**—Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (1777, c. 115, s. 85, P. R.; R. C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C. S., s. 4515.)

**Cross References.**—As to court's power to limit argument, see § 84-14. As to constitutional provisions for counsel, see the N. C. Constitution, Art. I, § 11, and the sixth amendment to the U. S. Constitution.

**A Constitutional Right.**—In all criminal prosecutions every man has the right to have counsel for his defence. Const. Art. I, § 11. *State v. Sykes*, 79 N. C. 618 (1878). See also *State v. Hardy*, 189 N. C. 799, 128 S. E. 152 (1925).

**Right Is a Mandate in Capital Felony Cases.**—The right to have counsel as well as the right of confrontation is guaranteed. Art. I, § 11, N. C. Const. Where the crime charged is a capital felony this right becomes a mandate. *State v. Farrell*, 223 N. C. 321, 26 S. E. (2d) 322 (1943); *State v. Hedgebeth*, 228 N. C. 259, 45 S. E. (2d) 563 (1947); *In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749 (1948); *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857 (1949).

See note to § 15-5. As to right made statutory, see § 15-4.1.

**And Discretionary in Cases Less than Capital.**—The appointment of counsel for a defendant charged with felonies less than capital is within the discretion of the trial court. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857 (1949).

A defendant has the constitutional right to be represented by counsel, and to have counsel assigned if requested where the circumstances are such as to show apparent necessity of counsel to protect his rights, but in the absence of request the propriety of providing counsel for a person accused of an offense less than a capital felony rests in the sound discretion of the trial judge. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

**Petition for Writ of Coram Nobis Granted for Failure to Appoint Counsel.**—Where verified petition for leave to apply to the superior court for writ of error



coram nobis, the record in the cases in which petitioner was convicted, and habeas corpus proceedings instituted by him, make it appear that petitioner was confronted with indictments for capital offenses and indictments for felonies less than capital, and that the trial court failed to appoint counsel to represent him notwithstanding his alleged inability to employ counsel and his request for counsel, the petition will be allowed in respect of the capital felonies and denied in respect of the felonies less than capital upon such prima facie showing. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857 (1949).

**Counsel Allowed Reasonable Time to**

**§ 15-4.1. Appointment of counsel for indigent defendants in capital cases; continuance where appointment delayed.**—When any person is bound over to the superior court to await trial for an offense for which the punishment may be death, the clerk of the superior court in the county shall, if he believes that the accused may be unable to employ counsel, within five days notify the resident judge of the district or any superior court judge holding the courts of the district and request the immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel, he shall appoint counsel to represent the accused as soon as may be practicable. He may appoint counsel at any time regardless of whether notified by the clerk and before preliminary examination.

In any capital case where the appointment of counsel is delayed until the term of court at which the accused is arraigned, on motion of counsel for the accused the case shall be continued until the next ensuing term of criminal court. (1949, c. 112.)

**Editor's Note.**—For brief comment on this section, see 27 N. C. Law Rev. 422.

**§ 15-5. Fees allowed counsel assigned to defend in capital case.**—Whenever an attorney is appointed by the judge to defend a person charged with a capital crime, he shall receive such fee for performing this service as the judge may allow; but the judge shall not allow any fee until he is satisfied that the defendant charged with the capital crime is not able to employ counsel. The fees so allowed by the judge shall be paid by the county in which the indictment was found. (1917, c. 247; C. S., s. 4516; 1937, c. 226.)

**Local Modification.**—Franklin: 1941, c. 211; Wayne: 1941, c. 33.

**Editor's Note.**—Prior to the 1937 amendment the fee allowed was not to exceed twenty-five dollars.

**Counsel in Capital Cases Mandatory.**—This section indicates that in capital felo-

**Prepare Case.**—The two—the right to counsel and the right of confrontation—are closely interrelated and, together, form an integral part of a fair trial. Hence, this requirement as incorporated in this section, was not intended to be a mere formality. It does not contemplate that counsel shall “be compelled to act without being allowed reasonable time within which to understand the case and prepare for the defense.” *State v. Farrell*, 223 N. C. 321, 26 S. E. (2d) 322 (1943). See note to Art. I, § 11, N. C. Const.

**Stated in** *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527 (1932).

nies the provisions of § 11, Article I of the Constitution and G. S., § 15-4 relative to counsel are regarded as not merely permissive but mandatory. *State v. Hedgebeth*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

**§ 15-6. Imprisonment to be in county jail.**—No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county. (1797, c. 474, s. 3, P. R.; R. C., c. 35, s. 6; 1879, c. 12; Code, s. 1174; Rev., s. 3151; C. S., s. 4517.)

**§ 15-7. Post-mortem examinations directed.**—In all cases of homicide, any officer prosecuting for the State may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be sum-

moned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the county. (R. C., c. 35, s. 49; Code, s. 1214; Rev., s. 3152; C. S., s. 4518.)

**Cross Reference.**—See also, §§ 90-217 and 152-7, paragraph 6.

**Section Valid.**—This section is a valid exercise of the police power of the State. *Withers v. Board*, 163 N. C. 341, 79 S. E. 615 (1913).

**Left to Discretion of Trial Judge.**—The board of commissioners of the county are not parties to a proceeding under this section, nor are they entitled to any notice before such orders are made. The matter is left to the sound discretion of the trial judge, and unless such discretion is grossly abused, the Supreme Court will not inter-

fere. *Withers v. Board*, 163 N. C. 341, 79 S. E. 615 (1913).

**Coroner and physicians performing autopsy may be held liable by father of deceased for wrongful mutilation** when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can confer no immunity upon the physicians. *Gurganious v. Simpson*, 213 N. C. 613, 197 S. E. 163 (1938).

**§ 15-8. Stolen property returned to owner.**—Upon the conviction of any person for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose. (21 Hen. VIII, c. 11; R. C., c. 35, s. 34; Code, s. 1201; Rev., s. 3153; C. S., s. 4519; 1943, c. 543.)

**Editor's Note.**—The 1943 amendment substituted near the beginning of the sec-

tion the word "person" for the word "felon."

**§ 15-9. Magistrate may associate another with him.**—Any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as by law provided, may associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by the two magistrates so associated. (1868-9, c. 178, subc. 3, s. 28; Code, s. 1159; Rev., s. 3154; C. S., s. 4520.)

**Section Constitutional.**—This section is in harmony with the provision of the Constitution, Art. IV, § 12, conferring power

upon the General Assembly to allot and distribute judicial powers. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718 (1891).

**§ 15-10. Speedy trial or discharge on commitment for felony.**—When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the State could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months. (1868-9, c. 116, s. 33; Code, s. 1658; Rev., s. 3155; 1913, c. 2; C. S., s. 4521.)

**Requirements Peremptory.**—This section is peremptory in its requirements; and where one so committed has formally complied with the provisions of the statute, it is the duty of the court to discharge the prisoner. *State v. Webb*, 155 N. C. 426, 70 S. E. 1064 (1911).

**Remedy Is by Certiorari.**—A certiorari is the proper procedure to review the order of the lower court in refusing to discharge a prisoner from custody under the provisions of this section. *State v. Webb*, 155 N. C. 426, 70 S. E. 1064 (1911).

§ 15-10.1. **Detainer; purpose; manner of use.**—Any person confined in the State prison of North Carolina, subject to the authority and control of the State Highway and Public Works Commission, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any State agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303.)

## ARTICLE 2.

### *Record and Disposition of Seized, etc., Articles.*

§ 15-11. **Sheriffs, etc., to maintain register of personal property confiscated, seized or found.**—Each sheriff, police department and constable in this State is hereby required to keep and maintain a book or register, and it shall be the duty of each sheriff, police department and constable to keep a record therein of all articles of personal property which may be seized or confiscated by him or it, or of which he or it may have become possessed in any way in the discharge of his duty. Said sheriffs, police departments and constables shall cause to be kept in said registers a description of such property, the name of the person from whom it was seized, if such name be known, the date and place of its seizure, and, where the article was not taken from the person of a suspect or prisoner, a brief recital of the place and circumstances concerning the possession thereof by such sheriff, police department, or constable. Such sheriff, police department and constable shall also keep in said register appropriate entries showing the manner, date, and to whom said articles are disposed of or delivered, and, if sold as hereinafter provided, a record showing the disposition of the proceeds arising from such sale. (1939, c. 195, s. 1.)

§ 15-12. **Publication of notice of unclaimed property.**—Unless otherwise provided herein, whenever such articles in the possession of any sheriff, police department or constable have remained unclaimed by the person who may be entitled thereto for a period of one hundred eighty (180) days after such seizure, confiscation, or receipt thereof in any other manner, by such sheriff, police department or constable, the said sheriff, police department or constable in whose possession said articles are may cause to be published one time in some newspaper published in said county a notice to the effect that such articles are in the custody of such officer or department, and requiring all persons who may have or claim any interest therein to make and establish such claim or interest not later than thirty (30) days from the date of the publication of such notice or in default thereof, such articles will be sold and disposed of. Such notice shall contain a brief description of the said articles and such other information as the said officer or department may consider necessary or advisable to reasonably inform the public as to the kind and nature of the article about which the notice relates. (1939, c. 195, s. 2.)

§ 15-13. **Public sale thirty days after publication of notice.**—If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff, police department or constable, as the case may be, for a period of thirty (30) days after the publication of the notice provided for in § 15-12, then the said sheriff, police department, or constable in whose custody such articles may be, is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the

county, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3.)

§ 15-14. **Notice of sale.**—Before any sale of said property is made under the provisions of this article, however, the said sheriff, police department, or constable making the same shall first advertise the sale by publishing a notice thereof in some newspaper published in the said county at least one time not less than ten days prior to the date of sale, and by posting a notice of the sale at the courthouse door and at three other public places in the said county. Said notice shall specify the time and place of sale, and contain a sufficient description of the articles of property to be sold. It shall not be required that the sale lay open for increase bids or objections, but it may be deemed closed when the purchaser at the sale pays the amount of the accepted bid. (1939, c. 195, s. 4.)

§ 15-15. **Disbursement of proceeds of sale.** — From the proceeds realized from the sale of said property, the sheriff, police department, constable or other officer making the same shall first pay the costs and expenses of the sale, and all other necessary expenses incident to a compliance with this article, and any balance then remaining from the proceeds of said sale shall be paid within thirty days after the sale to the treasurer of the county board of education of the county in which such sale is made, for the benefit of the fund for maintaining the free public schools of such county. (1939, c. 195, s. 5.)

§ 15-16. **Nonliability of officers.**—No sheriff, police department, constable, or other officer, shall be liable for any damages or claims on account of any such sale or disposition of such property, as provided in this article. (1939, c. 195, s. 6.)

§ 15-17. **Construction of article.**—This article shall not be construed to apply to the seizure and disposition of whiskey distilleries, game birds, and other property or articles which have been or may be seized, where the existing law now provides the method, manner, and extent of the disposition of such articles or of the proceeds derived from the sale thereof. (1939, c. 195, s. 7.)

**Cross References.**—As to the disposition of liquor seized, see § 18-13. As to disposition of seized distilleries, see § 18-22.

### ARTICLE 3.

#### *Warrants.*

§ 15-18. **Who may issue warrant.**—The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The Chief Justice and the associate justices of the Supreme Court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns. (1868-9, c. 178, subc. 3, s. 1; Code, s. 1132; Rev., s. 3156; C. S., s. 4522.)

**Local Modification.**—City of Concord: 1945, c. 82.

**Cross References.** — As to coroner's power to issue warrants, see § 152-7, paragraph 4. As to warrant of arrest in cases of extradition, see § 15-61. As to power of quarantine officer, see § 130-248.

**Mayor Pro Tem. May Issue.** — The power conferred upon a mayor pro tem. "to exercise the duties" of mayor during his absence includes that of issuing warrants in criminal actions. *State v. Thomas*, 141 N. C. 791, 53 S. E. 522 (1906).

§ 15-19. **Complainant examined on oath.**—Whenever complaint is made to any such magistrate that a criminal offense has been committed within this

State, or without this State and within the United States, and that a person charged therewith is in this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him. (1868-9, c. 178, subc. 3, s. 2; Code, s. 1133; Rev., s. 3157; C. S., s. 4523.)

**Oath Essential.**—This section requires the justice, before issuing a warrant to examine the complainant on oath. *Merrimon v. Commissioners*, 106 N. C. 369, 11 S. E. 267 (1890).

**Examination Must Show Commission of Offense.**—It must appear by this examination that an offense has been committed before any warrant is issued. *State v. Moore*, 136 N. C. 581, 48 S. E. 573 (1904).

**Sufficiency of Evidence.**—It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases *super visum*, to require evidence on oath amounting to a direct charge or creating a strong suspicion of guilt. *Welch v. Scott*, 27 N. C. 72 (1844).

**Complaint Need Not Be Written.**—In *State v. Bryson*, 84 N. C. 780 (1881), *Ashe, J.*, in construing the provisions of the act which is now embodied in this and the next section says that no written affidavit

or complaint is required. *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890).

**Same—No Special Form Required.**—It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment, 12 Cyc., 294. *State v. Gupton*, 166 N. C. 257, 80 S. E. 989 (1914).

**Appellate Court Cannot Look Behind Warrant.**—The appellate court “can only look at the warrant, which is the complaint,” and “cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence.” *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890). See *State v. Bryson*, 84 N. C. 780 (1881).

**Stated in** *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609 (1950).

§ 15-20. **Warrant issued; contents.**—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county. (1868-9, c. 178, subc. 3, s. 3; Code, s. 1134; 1901, c. 668; Rev., s. 3158; C. S., s. 4524.)

**Editor's Note.**—For article discussing requisites of warrant, see 15 N. C. Law Rev. 101.

**General Consideration.**—It is not necessary that a warrant for assault should charge that it was issued upon a sworn complaint. *State v. Price*, 111 N. C. 703, 16 S. E. 414 (1892). The facts constituting the offense must be set out with certainty. *State v. Jones*, 88 N. C. 671 (1883). But the warrant may refer to the affidavit, *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480 (1910), as they will be construed together. *State v. Gupton*, 166 N. C. 257, 80 S. E. 989 (1914).

Appearance waives a defect in a warrant. *State v. Cole*, 150 N. C. 805, 63 S. E. 958 (1909). A warrant need not negative an exception in a statute. *State v. Moore*, 166 N. C. 284, 81 S. E. 294 (1914).

**Amendment of Warrant.**—On appeal to the superior court from a conviction before a justice of the peace, the court can allow an amendment of the warrant. *State v. Carble*, 70 N. C. 62 (1874); *State v.*

*Koonce*, 108 N. C. 752, 12 S. E. 1032 (1891). It is discretionary with the court whether it will exercise the power. *State v. Vaughan*, 91 N. C. 532 (1884); *State v. Crook*, 91 N. C. 536 (1884). But a warrant can not be amended so as to charge a different offense. *State v. Cook*, 61 N. C. 535 (1868); *State v. Vaughan*, 91 N. C. 532 (1884); *State v. Taylor*, 118 N. C. 126z, 24 S. E. 526 (1896).

An order directing an amendment to a warrant by the insertion therein of certain words is self-executing, and the words need not be actually inserted in the complaint or warrant. *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480 (1910). See also, *State v. Winslow*, 95 N. C. 649 (1886); *State v. Davis*, 111 N. C. 729, 16 S. E. 540 (1892); *State v. Sharp*, 125 N. C. 628, 34 S. E. 264 (1899); *State v. Yoder*, 132 N. C. 1111, 44 S. E. 689 (1903).

**Identification of Accused.**—A warrant must sufficiently identify the person accused. *Carson v. Doggett*, 231 N. C. 629, 58 S. E. (2d) 609 (1950).

**Officer Protected When Warrant Defective.**—See *State v. Jones*, 88 N. C. 671 (1883); *State v. Gupton*, 166 N. C. 257, 80 S. E. 989 (1914); *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

**§ 15-21. Where warrant may be executed.**—Warrants issued by any justice of the Supreme Court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this State; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in § 15-22. (1868-9, c. 178, subc. 3, s. 4; Code, s. 1135; Rev., s. 3159; C. S., s. 4525.)

**Cross Reference.**—For statute affecting a city or town, see § 15-22 as amended by this section as to warrants issued by a justice of the peace or by the chief officer of Session Laws 1949, c. 168.

**§ 15-22. Warrant indorsed or certified and served in another county.**—If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the State, in which such indorsement is made, to execute the same. Whenever a justice of the peace or the chief officer of a city or town shall attach to his warrant a certificate under the hand and seal of the clerk of the superior court of his county certifying that he is a justice of the peace of the county or the chief officer of a city or town in the county and that the warrant bears his genuine signature, the warrant may be executed in any part of the State in like manner as warrants issued by justices of the Supreme Court, judges of the superior court, or judges of criminal courts without any indorsement of any justice of the peace or magistrate of the county in which it may be served. (1868-9, c. 178, subc. 3, s. 5; Code, s. 1136; 1901, c. 668; Rev., s. 3160; 1917, c. 30; C. S., s. 4526; 1949, c. 168.)

**Editor's Note.**—The 1949 amendment added the last sentence of this section. See 27 N. C. Law Rev. 451.

**Restricted to Criminal Cases.**—The provision of this section is restricted to criminal cases. *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799 (1891).

**Indorsement of Justice in County of**

**Service.**—Before the 1949 amendment to this section, a warrant issued in one county to be served in another was not given extraterritorial efficacy unless it had the endorsement of a justice of the peace or other authorized officer in the latter county. *Stancill v. Underwood*, 188 N. C. 475, 124 S. E. 845 (1924).

**§ 15-23. Magistrate not liable for indorsing warrant.** — No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of § 15-22, although it should afterwards appear that such warrant was illegally or improperly issued. (1868-9, c. 178, subc. 3, s. 6; Code, s. 1137; Rev., s. 3161; C. S., s. 4527.)

**Endorsing Officer Fully Protected.**—If a warrant issues from competent authority and the extraterritorial efficacy provided by § 15-22 is imparted to it in the county

wherein the accused party was arrested, the justification is full to the officer and all who co-operated with him, and no in-

quiry is admissible into the circumstances under which it was issued. *State v. James*, 80 N. C. 370 (1879).

**§ 15-24. Before what magistrate a warrant returned.**—Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate. (1868-9, c. 178, subc. 3, s. 12; Code, s. 1143; Rev., s. 3162; C. S., s. 4528.)

**Mayor Pro Tem.**—A warrant may be returnable before a mayor pro tem. *State v. Thomas*, 141 N. C. 791, 53 S. E. 522 (1906).

**Authority of Magistrate Issuing Warrant.**—The magistrate who issues the warrant has the authority to make the warrant

returnable before himself or before some officer having like jurisdiction, such a recorder to conduct the preliminary hearing. *State v. Lord*, 145 N. C. 479, 59 S. E. 656 (1907).

**Cited in** *State v. James*, 78 N. C. 455 (1878).

ARTICLE 4.

*Search Warrants.*

**§ 15-25. In what cases issued, and where executed.**—If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, or the clerk of any court inferior to the superior court, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the State of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, and for the clerk of any court inferior to the superior court to grant a warrant, to be executed within the territorial jurisdiction of such court, all such warrants to be directed to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, or any and all personal property and all tickets, books, papers and documents used in connection with and operation of lotteries or any gaming or gambling, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law. (1868-9, c. 178, subc. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179.)

**Cross Reference.** — As to warrant authorizing search for liquor, see § 18-13.

**Editor's Note.**—The 1941 amendment inserted the provisions relating to lotteries, etc. The 1949 amendment authorized the issuance of search warrants by clerks of courts inferior to the superior court.

**At Common Law.**—Warrants to search for stolen goods are authorized by the principles of the common law. *State v. McDonald*, 14 N. C. 468 (1832).

**Ordinarily officers of the law may not invade one's home except under authority of a search warrant issued in accord with**

pertinent statutory provisions. In re Walters, 229 N. C. 111, 47 S. E. (2d) 709 (1948).

Respondent refused to permit officers to enter his home for the purpose of serving civil process on a third person. There was no evidence that the person sought was actually in respondent's home at the time.

It was held that respondent was within his rights in refusing admittance to the officers, and his act in so doing cannot be held for contempt of court on the ground that it tended to obstruct or embarrass the administration of justice. In re Walters, 229 N. C. 111, 47 S. E. (2d) 709 (1948).

**§ 15-26. Nature of warrant and procedure thereon.**—Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as required in other cases of criminal complaint. (1868-9, c. 178, subc. 3, s. 39; Code, s. 1172; Rev., s. 3164; C. S., s. 4530.)

**Cross References.**—As to search warrants for deserting seamen, see § 14-351. As to constitutional prohibition against

general warrants, see N. C. Constitution, Art. 1, § 15.

**§ 15-27. Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.**—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action: Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action. (1937, c. 339, s. 1½; 1951, c. 644.)

**Editor's Note.**—For comment on this section, see 15 N. C. Law Rev. 343.

v. Shermer, 216 N. C. 719, 6 S. E. (2d) 529 (1940).

The 1951 amendment added the proviso.

**The warrant need not aver that an examination of the complainant was had, and what it revealed.** Nothing else appearing, there is a presumption that the requirements of this section have been preserved. State v. Gross, 230 N. C. 734, 55 S. E. (2d) 517 (1949).

**Evidence Obtained by Search without Warrant.**—Before the 1951 amendment this section did not apply to evidence obtained by search without a warrant, the language of the statute being insufficient to require this conclusion, and the statute being in derogation of the common-law rule. State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).

**Where a warrant was signed by complainant in the name of a deputy sheriff and contained the statement that it was made on oath, the warrant was held to be valid.** State v. Gross, 230 N. C. 734, 55 S. E. (2d) 517 (1949).

**An affidavit for a search warrant signed by the chief of police is sufficient compliance with this section, since if the chief of police is not the informant he is "some other person," and the statute does not require that the informant should make the affidavit, or that the person signing the affidavit should state therein who his informant is, and evidence obtained on a search warrant issued on such affidavit is competent.** State v. Cradle, 213 N. C. 217, 195 S. E. 392 (1938).

**Affidavit Based on Information.**—Where the search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information," the affidavit does not negative the assumption that the police officer was examined as to the particulars of his information, and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent. State v. Elder, 217 N. C. 111, 6 S. E. (2d) 840 (1940).

**Officer Need Not Make the Affidavit.**—It is not required that the officer using a search warrant make the affidavit. State



ARTICLE 5.

*Peace Warrants.*

§ 15-28. **Officers authorized to issue peace warrants.**—The following magistrates have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The Chief Justice and associate justices of the Supreme Court, the judges of the superior courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns. (1868-9, c. 178, subc. 2, s. 1; Code, s. 1216; Rev., s. 3165; C. S., s. 4531.)

**A Criminal Action.**—A peace warrant is a criminal action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property, and is within the exclusive jurisdiction of a justice of the peace. *State v. Locust*, 63 N. C. 574 (1869); *State v. Oates*, 88 N. C. 668 (1883).

§ 15-29. **Complaint and examination.**—Whenever complaint is made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined. (1868-9, c. 178, subc. 2, s. 2; Code, s. 1217; Rev., s. 3166; C. S., s. 4532.)

**Applicant Should Not Be Bound Over.**—It is error for a justice of the peace to bind to the superior court an applicant for a peace warrant against whom no charge is made. *State v. Bass*, 75 N. C. 139 (1876).

§ 15-30. **Warrant issued.**—If it shall appear from such examination that there is just reason to fear the commission of any such offense by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant. (1868-9, c. 178, subc. 2, s. 3; Code, s. 1218; Rev., s. 3167; C. S., s. 4533.)

**Warrant Should Contain Allegations.**—A peace warrant in which is alleged no threat, fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed. *State v. Cooley*, 78 N. C. 538 (1878); *State v. Goram*, 83 N. C. 664 (1880).

§ 15-31. **To whom warrant directed.**—The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer. (1868-9, c. 178, subc. 2, s. 4; Code, s. 1219; Rev., s. 3169; C. S., s. 4534.)

**Right of Private Person to Make Arrest.**—A private person has no authority to make an arrest for a riot, rout, affray, or other breach of the peace, without warrant, except when such offenses are being committed in his presence; nor can a justice of the peace confer such authority by a mere verbal order or command. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890).

**Section Confers Extraordinary Power.**—The power conferred by this section is the only extraordinary case in which a justice of the peace is authorized to depute one, who is not an officer, to execute process. *State v. Jones*, 48 N. C. 404 (1856); *Marsh v. Williams*, 63 N. C. 371 (1869); *McKee v. Angel*, 90 N. C. 60 (1884).

§ 15-32. **Defendant recognized to keep the peace.**—Whenever any person complained of on a peace warrant is brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the State of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the State, and particularly towards the person requiring such security. (1879, c. 92, s. 9; Code, ss. 894, 1220; Rev., s. 3170; C. S., s. 4535.)

**Jurisdiction Given to Justices.**—This section gives to justices of the peace exclusive original jurisdiction of peace war-

rants and proceedings thereunder. *State v. Oates*, 88 N. C. 668 (1883).

§ 15-33. **Defendant discharged, or new recognizance required.**—If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken or they may require a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year. (1868-9, c. 178, subc. 2, s. 12; Code, s. 1226; Rev., s. 3171; C. S., s. 4536.)

§ 15-34. **Defendant imprisoned for want of security.**—If such recognizance is given, the party complained of shall be discharged; if such person fails to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required. (1868-9, c. 178, subc. 2, s. 6; Code, s. 1221; Rev., s. 3172; C. S., s. 4537.)

**Prisoner Worked on Roads.** — One committed under this section may be

worked upon the roads. *State v. Yandle*, 119 N. C. 874, 25 S. E. 796 (1896).

§ 15-35. **How discharged from imprisonment.**—Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the Supreme Court, or judge of the superior or criminal court, by giving such other security as may seem sufficient. (1868-9, c. 178, subc. 2, s. 7; Code, s. 1222; Rev., s. 3174; C. S., s. 4538.)

§ 15-36. **Defendant may appeal.**—In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county. (1901, c. 66; Rev., s. 3173; C. S., s. 4539.)

**Editor's Note.**—Previous to the passage of this section it was several times held that there was no appeal in peace warrant proceedings from the justice of the peace

to the superior court. See *State v. Gregory*, 118 N. C. 1199, 24 S. E. 712 (1896), citing *State v. Lyon*, 93 N. C. 575 (1885) and *State v. Walker*, 94 N. C. 857 (1886).

§ 15-37. **Breach of peace in presence of court.**—Every person who in the presence of any magistrate specified in the first section of this article, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided. (1868-9, c. 178, subc. 2, s. 9; Code, s. 1224; Rev., s. 3168; C. S., s. 4540.)

§ 15-38. **Recognizance returned to superior court.** — Every recogni-

zance taken pursuant to the provisions of this article shall be transmitted by the magistrate taking the same to the next term of the superior court for any county in which the offense is charged to have been committed. (1868-9, c. 178, subc. 2, s. 8; Code, s. 1223; Rev., s. 3175; C. S., s. 45-1.)

## ARTICLE 6.

### *Arrest.*

§ 15-39. **Persons present may arrest for breach of peace.**—Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders. (1868-9, c. 178, subc. 1, s. 1; Code, s. 1124; Rev., s. 3176; C. S., s. 4542.)

**Cross References.**—As to arrest in civil cases, see § 1-409 et seq. As to arrest of tramps by persons who are not officers, see § 14-341.

**Editor's Note.**—For an article on the law of arrest in North Carolina, see 15 N. C. Law Rev. 101.

**Authority Strictly Limited.**—The authority given by this section to private persons to make arrests without warrant only extends to the offenses therein mentioned and committed under the conditions therein prescribed. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890).

Arrests for misdemeanors without a warrant are limited strictly to certain misdemeanors committed in the presence of the party making the arrest and unless expressly authorized by law, such arrests can only be made for a breach of the peace as defined in this section. *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

**Same—Breach of Town Ordinance.**—The violation of a town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the

offender. *State v. Belk*, 76 N. C. 10 (1877).

**Same—After Offense Committed.**—After the offenses—misdemeanors—mentioned above have been committed, and the offenders have dispersed, a private person has no authority of himself to arrest the offenders without warrant nor can he go out to make such arrest by the mere order of justice of the peace or any officer. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890).

**Liability When Authority Exceeded.**—If a private person, of his own purpose, without warrant, undertakes to make arrest of a party guilty of only a misdemeanor otherwise than in the cases and in the way pointed out by the section he at once becomes a trespasser, and the party whom he so undertakes to deprive of his liberty may resist him by such force as may be necessary to defend himself successfully. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890).

**Cited in** *State v. Phillips*, 229 N. C. 538, 50 S. E. (2d) 306 (1948).

§ 15-40. **Arrest for felony, without warrant.**—Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest. (1868-9, c. 178, subc. 1, s. 6; Code, s. 1129; Rev., s. 3177; C. S., s. 45-3.)

**Right of Private Person to Arrest.**—A private person may arrest the felon without a warrant, and it is his duty to do so if he is present at the time the felony is committed. *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906). In such case, he may and ought to arrest and, as soon as practicable, take him before a proper officer, to the end that he may be duly held to answer for the offense. In such case, the private person would not be justified unless a felony had actually been committed. It is better and safer to obtain a warrant

when this may be promptly done. *State v. Roane*, 13 N. C. 58 (1828); *Brockway v. Crawford*, 48 N. C. 433 (1856); *State v. Bryant*, 65 N. C. 327 (1871); *State v. Shelton*, 79 N. C. 605 (1878); *Neal v. Joyner*, 89 N. C. 287 (1883); *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890); *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906).

In *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901), the court says: "A private citizen has the right to arrest a felon, whether he is present when the felony is committed or not. When he is not pres-

ent, it devolves on him to show that the felony, for which he arrested, had been committed." 15 N. C. Law Rev. 103.

**As to what constitutes reasonable ground** for believing that accused has committed a felony in the presence of the person making the arrest, see *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921).

**Party Arresting Must State His Purpose.**—A private citizen, attempting to arrest a felon without warrant, must make his purpose known, and for what offense he is attempting arrest. And unless he does so, the party attempted to be arrested has the right to resist the arrest. *State v. Garrett*, 60 N. C. 144 (1863); *State v. Belk*, 76 N. C. 10 (1877); *Neal v. Joyner*, 89 N. C. 287 (1883); *State v. McNinch*, 90 N. C. 695 (1884); *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901). And unless he notifies the felon of his purpose, he will be guilty of a trespass. *State v. Bryant*, 65 N. C. 327 (1871).

**Force Permissible in Arrest.**—Where a private person undertakes to arrest a felon or an escaped felon, and has made his purpose and reason for the arrest known, he must then proceed in a peaceable manner to make the arrest, and if he is resisted he

may use such force as is necessary to overcome the resistance, if used for that purpose alone. But this is put upon the ground that the party attempting to make the arrest becomes personally involved, and he has the right to defend himself. *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901).

**No Right to Shoot Escaping Subject.**—Where the attempted arrest is for a petty larceny, and the party runs off, the party attempting the arrest has no right to shoot and kill him. *State v. Bryant*, 65 N. C. 327 (1871); *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901).

**A federal prohibition officer**, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the federal statute itself provides; and no further power can be acquired by him by virtue of this section, permitting such to be done by a private person, in case of a felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588 (1922).

**Quoted in** *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

**§ 15-41. When officer may arrest without warrant.** — Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest. (1868-9, c. 178, subc. 1, s. 3; Code, s. 1126; Rev., s. 3178; C. S., s. 4544.)

**Cross References.**—As to power of bank examiner to arrest, see § 53-121. As to State forest rangers, see § 113-49. As to arrest of persons escaped from penal and correctional institutions, see § 153-184. As to arrest for violations of the fishery laws, see § 113-141. As to arrest by appointees of superintendents of the State hospitals for the insane, see § 122-33. As to arrest of persons violating the laws regulating intoxicating liquors, see §§ 18-6 and 18-23. As to arrest by the commanding officer of militia, see § 127-106. As to arrest of parolee from the State prison whose parole has been revoked, see § 148-63. As to arrest of parolee or escapee from a reformatory, see § 134-31. As to arrest of a probationer, see §§ 15-200 and 15-205. As to arrest for violation of the weights and measures laws, see § 81-12.

**Editor's Note.**—For a discussion of arrest without warrant, see 15 N. C. Law Rev. 101.

**Common-Law Provisions.**—At common law there is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that an actual felony has been committed. Whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until an inquiry shall be made by the proper authorities. *Neal v. Joyner*, 89 N. C. 287 (1883).

**An Emergency Measure.**—The arrest of a person by an officer without a warrant is allowed upon emergency. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391 (1915).

**Powers of Police Officer.**—A police officer was not known to the common law, and therefore he can exercise powers only within the town limits. *Martin v. Houck*, 141 N. C. 317, 54 S. E. 291 (1906). And is guilty of assault when he arrests with-

out a warrant outside such limits. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903). Nor can a police officer recover under the Workmen's Compensation Act for injuries sustained in pursuing misdemeanor if the accident occurs outside town limits. *Wilson v. Mooresville*, 222 N. C. 283, 22 S. E. (2d) 907 (1942).

**The superintendent of a convict gang** is not such an officer as contemplated by this section. *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901).

**Rearrest of Escaped Convict.**—An escaped convict may be rearrested in any county of the State without new process, by the officer in charge of him, to compel him to complete the service of the sentence imposed by the court. *State v. Finch*, 177 N. C. 599, 99 S. E. 409 (1919).

**Reasonable Ground for Belief Excuses Officer.**—In making an arrest upon personal observation and without a warrant an officer will be excused, though no offense was perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been. *State v. McNinch*, 90 N. C. 695 (1884); *State v. Campbell*, 182 N. C. 911, 110 S. E. 86 (1921). As to what constitutes reasonable ground, see *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644 (1921).

**Same—What Must Be Shown.**—A peace officer may justify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of actual commission of the crime is not necessary. *Neal v. Joyner*, 89 N. C. 287 (1883).

**Arrest of Participants in Indecent Show.**—See *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629 (1913).

**§ 15-42. Sheriffs and deputies granted power to arrest felons anywhere in State.**—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State. (1935, c. 204.)

Quoted in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

**Officer Cannot Shoot at Fleeing Misdemeanant.**—Where a person is fleeing from arrest, charged with a misdemeanor, and is out of the control of the officer, such officer is guilty of an assault if he shoots at the said person. And indeed the use of a pistol in attempting to arrest for a misdemeanor is excessive force. *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903).

**This section applies only to peace officers of the State** and in the enforcement of the State law, and does not affect the conduct or powers of federal officers unless the principles therein are extended to such officers by a federal statute, when in the enforcement of a valid federal law. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588 (1922).

**Admissible Evidence in Action for Unlawful Arrest.**—An officer may make an arrest without a warrant when he acts in good faith and has reasonable grounds to believe that a felony has been committed, and that a particular person is guilty thereof and might escape unless arrested, and in an action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed is held competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs was properly submitted to the jury. *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469 (1936).

**Jailer as other officer**, see *Gowens v. Alamance County*, 216 N. C. 107, 3 S. E. (2d) 339 (1939) (dis. op.).

Applied in *State v. Hooper*, 227 N. C. 633, 44 S. E. (2d) 42 (1947).

Quoted in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

Cited in *State v. Macon*, 198 N. C. 483, 152 S. E. 407 (1930).

**§ 15-43. House broken open to prevent felony.**—All persons are authorized to break open and enter a house to prevent a felony about to be committed therein. (1868-9, c. 178, subc. 1, s. 4; Code, s. 1127; Rev., s. 3179; C. S., s. 4545.)

**§ 15-44. When officer may break and enter houses.**—If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in

a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief. (1868-9, c. 178, subc. 1, s. 5; Code, s. 1128; Rev., s. 3180; C. S., s. 4546.)

**Where an officer comes armed with process** founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to

effect an entrance and if he act in good faith in doing so, both he and his posse comitatus will be protected. 15 N. C. Law Rev. 125, citing *State v. Mooring*, 115 N. C. 709, 20 S. E. 182 (1894).

**§ 15-45. Persons summoned to assist in arrest.**—Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so. (1868-9, c. 178, subc. 1, s. 2; Code, s. 1125; Rev., s. 3181; C. S., s. 4547.)

**Cross Reference.**—As to liability for failure to aid police officers, see § 14-224.

**Protection of Persons Assisting.**—This section makes it imperative on the person so summoned to aid, whether he be present at the perpetration of the offense when summoned, or not. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890). The protection extends to persons aiding. *State v. McMahan*, 103 N. C. 379, 9 S. E. 48 (1889).

**Limits Imposed by Section.**—The power conferred upon officers by this section is limited to the cases mentioned in the section, and while they are actually being perpetrated, or are imminent. It does not go

to the extent of authorizing the persons thus summoned to make arrests, without warrants, where the offense has been accomplished and the offenders have dispersed. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441 (1890).

**Policeman Given Same Authority as Sheriff within Town Limits.**—A policeman has the authority under general statute to depute a citizen to aid him in serving a warrant for breach of the peace, a policeman being given the same authority, within the town limits, in making arrests as a sheriff. *Tomlinson v. Norwood*, 208 N. C. 716, 182 S. E. 659 (1935).

**§ 15-46. Procedure on arrest without warrant.**—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law. (1868-9, c. 178, subc. 1, s. 7; Code, s. 1130; Rev., s. 3182; C. S., s. 4548.)

**Proper Compliance Protects Justice.**—If the justice would comply with this section by carefully examining the complainant, on oath, before issuing his warrant, few cases would arise in which he would not have judgment for his fees. *Merrimon v. Commissioners*, 106 N. C. 369, 11 S. E. 267 (1890).

**Duty of City Police Officer.**—A police officer within the limits of his city may summarily and without warrant arrest a person for a misdemeanor committed in his presence. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate

with counsel and friends. *Perry v. Hurdle*, 229 N. C. 216, 49 S. E. (2d) 400 (1948).

**Liability of Officer for Wrongful Delay.**—A warrant must be procured as soon after the arrest as possible and, where it appears that this was not done, the officer responsible for the arrest is personally answerable in damages. *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391 (1915).

**Custody of Prisoner.**—If offender is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lockup, or even tie him, according to the nature of the offence and the necessity of the case. 15 N. C. Law Rev. 127, citing *State v. Freeman*, 86 N. C. 683 (1882).

**§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.**—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1937, c. 257, ss. 1, 2.)

**Cross Reference.**—As to bail generally, see § 15-102 et seq.

**The violation of this section**, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938).

**When the defendant, upon his arrest, is informed of the charge** against him, and "there is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be

permitted to communicate with friends or with counsel", the provisions of this section are not applicable. *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938).

Where accused persons were informed of the charge against them as required by this section and none of them made a request to be allowed to communicate with relatives or friends or to obtain counsel, objection to the failure of officers to inform them of the charge against them and their right to have counsel, cannot be sustained. *State v. Thompson*, 224 N. C. 661, 32 S. E. (2d) 24 (1944).

## ARTICLE 7.

### *Fugitives from Justice.*

**§ 15-48. Outlawry for felony.**—In all cases where any two justices of the peace, or any judge of the Supreme, superior, or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the State in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the State may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. (1866, c. 62; 1868-9, c. 178, subc. 1, s. 8; Code, s. 1131; Rev., s. 3183; C. S., s. 4549.)

**Cross Reference.**—As to extradition, see § 15-55 et seq., and Appendix VI.

**Fugitive from Justice.**—A fugitive from

justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape pun-

ishment. *State v. Hall*, 115 N. C. 811, 20 S. E. 729 (1894).

**Outlaws Must Be Warned.**—"So careful is the law to protect those who have not been tried and convicted, that the 'out-

laws' are entitled to be 'called upon and warned to surrender' before they are allowed to be slain." *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901) (dis. op.).

§ 15-49. **Fugitives from another state arrested.**—Any justice of the Supreme Court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the State has committed, out of the State and within the United States, any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the State for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary. (1868-9, c. 178, subc. 3, s. 34; Code, s. 1165; 1895, c. 103; Rev., s. 3184; C. S., s. 4550.)

**Editor's Note.** — See Editor's Note under § 15-132. The same defendants, who were freed in the case discussed in that note were rearrested and held under the provisions of this section which then provided for the arrest of "any fugitive in the State" etc. Upon a petition by the defendants for habeas corpus it was decided in *State v. Hall*, 115 N. C. 811, 20 S. E. 729 (1894), that they were not fugitives and hence could not be held for extradition. This section has since been amended by adding after the words "any fugitive" the words "or other person".

For a discussion of this and pertinent sections in connection with the law of arrest in this State, see 15 N. C. Law Rev. 101.

**In General.**—This section prescribes the manner in which criminals escaping from other states may be restored to that having jurisdiction of the offense, and its

directions can not be disregarded. It provides fully a method by which the crime may be punished, and at the same time guards and preserves the personal security of the citizen from lawless invasion. *State v. Shelton*, 79 N. C. 605 (1878).

**Process Necessary.** — No one has authority, without process legally issued in this State, to arrest a person charged with crime in another state and fleeing here for refuge. Such an arrest makes the parties engaged in it guilty of an assault and battery. *State v. Shelton*, 79 N. C. 605 (1878).

**Departure after Crime Is Flight from Justice.** — Departure from a jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law. *In re Sultan*, 115 N. C. 57, 20 S. E. 375 (1894).

**Cited in** *In re Veasey*, 196 N. C. 662, 146 S. E. 599 (1929).

§ 15-50. **Record kept, and copy sent to Governor.**—Every magistrate committing any person under § 15-49, shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the Governor for such action as he may deem fit therein under the law. (1868-9, c. 178, subc. 3, s. 35; Code, s. 1166; Rev., s. 3185; C. S., s. 4551.)

§ 15-51. **Duty of Governor.**—The Governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the President of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case. (1868-9, c. 178, subc. 3, s. 36; Code, s. 1167; Rev., s. 3186; C. S., s. 4552.)

§ 15-52. **Person surrendered on order of Governor.**—Every sheriff or jailer in whose custody any person so committed shall be, upon the order of the Governor, shall surrender him to the person named in such order. (1868-9, c. 178, subc. 3, s. 37; Code, s. 1168; Rev., s. 3187; C. S., s. 4553.)



§ 15-53. **Governor may employ agents, and offer rewards.** — The Governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the State, and of having fled out of the jurisdiction thereof, or who conceals himself within the State to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (1800, c. 561, P. R.; R. C., c. 35, s. 4; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; Code, s. 1169; 1891, c. 421; Rev., s. 3188; C. S., s. 4554; 1925, c. 275, s. 6.)

**Editor's Note.** — This section formerly contained at the end a clause authorizing the Governor to issue warrants on the State Treasurer for sufficient money to carry out the provisions of the section. This clause made the section an exception to § 147-68 which provides that "no monies shall be paid out of the treasury except on the warrant of the auditor." By

the 1925 amendment the provision authorizing warrants by the Governor was stricken out. The same act repealed C. S. § 4556, which contained a similar provision. See *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443 (1894).

**Cited in** *Madry v. Scotland Neck*, 214 N. C. 461, 199 S. E. 618 (1938).

§ 15-54. **Officer entitled to reward.**—Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered, is entitled to such reward, and may sue for and recover the same in any court in this State having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest. (1913, c. 132; 1917, c. 8; C. S., s. 4555.)

**Local Modification.**—Wake: C. S. 4555.

**Editor's Note.**—See 13 N. C. Law Rev. 15, as to whom an offer may be made.

**Law Giving Reward to Sheriff Valid.**—

In view of this and the preceding section, Public Local Laws of 1925, ch. 318, s. 2, providing that the board of commissioners

should pay a reward to the sheriff or other police officers for arresting violators of the prohibition law, is a valid exercise of the police power of the State and not contrary to public policy. *Hutchins v. Commissioners*, 193 N. C. 659, 137 S. E. 711 (1927).

## ARTICLE 8.

### *Extradition.*

§ 15-55. **Definitions.**—Where appearing in this article the term "Governor" includes any person performing the functions of Governor by authority of the law of this State. The term "executive authority" includes the Governor, and any person performing the functions of governor in a state other than this State. The term "state," referring to a state other than this State, includes any other state or territory, organized or unorganized, of the United States of America. (1937, c. 273, s. 1.)

**Cross Reference.**—As to rules of practice of the executive department of North Carolina in making requisitions, see Appendix IV.

**Editor's Note.**—The former extradition law, Public Laws 1931, c. 124, was repealed by Public Laws 1937, c. 273, s. 29. The repealed law seemed to provide for extradition proceedings only when the crime with which the accused was charged

was punishable—in the state where committed — by death or imprisonment for more than one year in the State's prison, or where the crime consisted of abandonment of wife or children. However, the Supreme Court indicated in the case of *In re Hubbard*, 201 N. C. 472, 160 S. E. 569, 81 A. L. R. 547 (1931), that a person could be extradited for any crime. The new extradition law is in accord with In

re Hubbard, specifically providing for the extradition of a person accused of any crime, whether felony or misdemeanor. Furthermore, provision is made for return to a demanding state of a person who intentionally commits an act outside of the demanding state resulting in a crime in the demanding state. At last the extradition laws cover a situation such as existed in

*State v. Hall*, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289 (1894), where a man standing in North Carolina shot and killed a man in Tennessee, and North Carolina refused to return the murderer because he had never been in Tennessee. In other respects the new extradition law is substantially the same as the 1931 law. 15 N. C. Law Rev. 343, 344.

**§ 15-56. Duty of Governor as to fugitives from justice of other states.**—Subject to the provisions of this article, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this State. (1937, c. 273, s. 2.)

**Cross Reference.**—See also, U. S. Constitution, Art. IV, § 2, cl. 1.

**§ 15-57. Form of demand for extradition.**—No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under § 15-60, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand. (1937, c. 273, s. 3.)

**§ 15-58. Governor may cause investigation to be made.**—When a demand shall be made upon the Governor of this State by the executive authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. (1937, c. 273, s. 4.)

**§ 15-59. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.**—When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution in this State is terminated.

The Governor of this State may also surrender on demand of the executive authority of any other state any person in this State who is charged in the manner provided in § 15-77 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily. (1937, c. 273, s. 5.)

**§ 15-60. Extradition of persons not present in demanding state at time of commission of crime.**—The Governor of this State may also surrender, on demand of the executive authority of any other state, any person in this State charged in such other state in the manner provided in § 15-57 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. (1937, c. 273, s. 6.)

**Cross Reference.**—As to criminal liability in this State for act injuring one in another, see § 15-132.

**§ 15-61. Issue of Governor's warrant of arrest; its recitals.**—If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the State seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance. (1937, c. 273, s. 7.)

**§ 15-62. Manner and place of execution of warrant.**—Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the State, and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article to the duly authorized agent of the demanding state. (1937, c. 273, s. 8.)

**§ 15-63. Authority of arresting officer.**—Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance. (1937, c. 273, s. 9.)

**Cross Reference.**—As to liability for refusing to assist, see § 14-224.

**§ 15-64. Rights of accused person; application for writ of habeas corpus.**—No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this State, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. (1937, c. 273, s. 10.)

**Cross Reference.**—As to application for writ of habeas corpus, see § 17-3 et seq.

**§ 15-65. Penalty for noncompliance with preceding section.**—Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in wilful disobedience to § 15-64, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars (\$1,000.00) or be imprisoned not more than six months, or both. (1937, c. 273, s. 11.)

**§ 15-66. Confinement in jail when necessary.**—The officer or person

executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this State with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: Provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this State. (1937, c. 273, s. 12.)

**§ 15-67. Arrest prior to requisition.**—Whenever any person within this State shall be charged on the oath of any credible person before any judge or magistrate of this State with the commission of any crime in any other state and, except in cases arising under § 15-60, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this State, setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state, and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under § 15-60, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this State, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this State, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (1937, c. 273, s. 13.)

Where a justice of the peace of this State issues a warrant for the arrest of a person based upon an affidavit that such person was a fugitive from justice from another state, and the warrant is regular and valid, as provided by this section, in habeas corpus proceedings instituted prior to a hearing upon the warrant before the justice of the peace, an order remanding the petitioner to the custody of the sheriff who had arrested petitioner is not error, but petitioner is entitled to a hearing before the justice of the peace before he is committed to await the issuance of an ex-

tradition warrant. In re Mitchell, 205 N. C. 788, 172 S. E. 350 (1934).

A person arrested upon a warrant of a justice of the peace of this State, issued upon an affidavit that such person was a fugitive from justice from another state, as provided by this section, may not be lawfully delivered to the authorities of such other state until the Governor of this State has honored a requisition for such person from the governor of such other state. In re Mitchell, 205 N. C. 788, 172 S. E. 350 (1934).

**§ 15-68. Arrest without a warrant.**—The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon

reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in § 15-67; and thereafter his answer shall be heard as if he had been arrested on a warrant. (1937, c. 273, s. 14.)

§ 15-69. **Commitment to await requisition; bail.**—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under § 15-60, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in § 15-70, or until he shall be legally discharged. (1937, c. 273, s. 15.)

§ 15-70. **Bail in certain cases; conditions of bond.**—Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this State may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this State. (1937, c. 273, s. 16.)

§ 15-71. **Extension of time of commitment; adjournment.**—If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate may again take bail for his appearance and surrender, as provided in § 15-70, but within a period not to exceed sixty days after the date of such new bond. (1937, c. 273, s. 17.)

§ 15-72. **Forfeiture of bail.**—If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this State. Recovery may be had on such bond in the name of the State as in the case of other bonds given by the accused in criminal proceedings within this State. (1937, c. 273, s. 18.)

§ 15-73. **Persons under criminal prosecution in this State at time of requisition.**—If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this State. (1937, c. 273, s. 19.)

§ 15-74. **Guilt or innocence of accused, when inquired into.**—The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime. (1937, c. 273, s. 20.)

§ 15-75. **Governor may recall warrant or issue alias.**—The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. (1937, c. 273, s. 21.)

§ 15-76. **Fugitives from this State; duty of governors.**—Whenever the Governor of this State shall demand a person charged with a crime or with

escaping from confinement or breaking the terms of his bail, probation or parole in this State from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this State, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this State in which the offense was committed. (1937, c. 273, s. 22.)

**§ 15-77. Application for issuance of requisition; by whom made; contents.**—I. When the return to this State of a person charged with crime in this State is required, the prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this State for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this State is required of a person who has been convicted of a crime in this State and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition. (1937, c. 273, s. 23.)

**§ 15-78. Costs and expenses.**—When the crime shall be a felony, the expenses shall be paid out of the State treasury, on the certificate of the Governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the actual traveling and subsistence costs of the agent of the demanding state, together with such legal fees as were paid to the officers of the state on whose governor the requisition is made. In every case the officer entitled to these expenses shall itemize the same and verify them by his oath for presentation, either to the Governor of the State, in proper cases, or to the board of county commissioners, in cases in which the county pays such expenses. (1937, c. 273, s. 24.)

**Where defendant paid expenses of sheriff** in returning him to State without extradition, it was held error to order the State to pay such expenses of the sheriff under this section. *State v. Patterson*, 224 N. C. 471, 31 S. E. (2d) 380 (1944).

**§ 15-79. Immunity from service of process in certain civil actions.**—A person brought into this State by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned until he has been convicted in the criminal proceeding or, if acquitted until he has had reasonable opportunity to return to the state from which he was extradited. (1937, c. 273, s. 25.)

A **nonresident defendant** is not exempt from service of civil process while his presence in the State is in compliance with the conditions of a bail bond. *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840 (1948).

A nonresident defendant in a criminal proceeding pending in the State is immune from personal service of process in a civil action arising out of the same facts as the criminal proceeding only when he is

brought into the State by, or after waiver of extradition proceeding. By the same token, if such defendant be immune from personal service of such process only under those circumstances, his property within the State would be immune from attachment and garnishment only when so brought into the State by defendant. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

**§ 15-80. Written waiver of extradition proceedings.**—Any person arrested in this State charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in §§ 15-61 and 15-62 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this State a writing which states that he consents to return to the demanding state: Provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in § 15-64.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this State and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent: Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this State. (1937, c. 273, s. 25a.)

**§ 15-81. Non-waiver by this State.**—Nothing in this article contained shall be deemed to constitute a waiver by this State of its right, power or privilege to try such demanded person for crime committed within this State, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this State, nor shall any proceedings had under this article which result in, or fail to result in, extradition be deemed a waiver by this State of any of its rights, privileges or jurisdiction in any way whatsoever. (1937, c. 273, s. 25b.)

**§ 15-82. No right of asylum; no immunity from other criminal prosecution while in this State.**—After a person has been brought back to this State by, or after waiver of, extradition proceedings, he may be tried in this State for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition. (1937, c. 273, s. 26.)

Quoted in *Hare v. Hare*, 228 N. C. 740, 46 S. E. (2d) 840 (1948).

Cited in *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

**§ 15-83. Interpretation.**—The provisions of this article shall be so in-

terpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. (1937, c. 273, s. 27.)

§ 15-84. **Short title.**—This article may be cited as the Uniform Criminal Extradition Act. (1937, c. 273, s. 30.)

ARTICLE 9.

*Preliminary Examination.*

§ 15-85. **Waiver of examination.**—If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the Supreme or superior court. (1868-9, c. 178, subc. 3, ss. 7, 8; Code, ss. 1138, 1139; Rev., s. 3190; C. S., s. 4557.)

**Cross References.**—As to bail in criminal proceedings, see § 15-102 et seq. As to hearing by the coroner in lieu of other preliminary hearings, see § 152-10.

§ 15-86. **Procedure, when justice has not final jurisdiction.**—In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided. (1868-9, c. 178, subc. 4, s. 7; 1879, c. 302, s. 2; Code, s. 896; Rev., s. 3191; C. S., s. 4558.)

**Cross Reference.**—As to jurisdiction of a justice in criminal actions, see § 7-129 and notes. The justice has no jurisdiction of a case after he has bound the defendant to court and taken his recognizance. *State v. Lucas*, 139 N. C. 567, 51 S. E. 1021 (1905).

**When Jurisdiction of Justice Ends. —**

§ 15-87. **Duty of examining magistrate.**—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel. (1868-9, c. 178, subc. 3, s. 13; Code, ss. 1144, 1145; Rev., s. 3192; C. S., s. 4559.)

**Person Charged Must Be Present. —** There can be no examination in the absence of the person charged. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 40 S. E. 191 (1901).

**Rights of Accused. —** The present wise and beneficent policy of the law allows a prisoner under arrest time for deliberation and an opportunity to obtain correct legal advice, so that the statements which he may make on an examination are made of his own free will and with full knowledge of the nature and consequences of his confessions. *State v. Matthews*, 66 N. C. 106 (1872).

§ 15-88. **Testimony reduced to writing; right to counsel.**—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution. (1868-9, c. 178, subc. 3, ss. 14, 19; Code, ss. 1146, 1150; Rev., s. 3193; C. S., s. 4560.)

**Cross Reference.**—As to testimony being used as evidence, see § 15-100 and notes. **ten. —** The magistrate is not required to write down the very words of the witness as they are uttered. It is sufficient if he puts down fully and accurately the testi-

**Exact Words Not Required to Be Writ-**



mony of the witness as he intends it upon the subject matter of inquiry. *State v. Bridgers*, 87 N. C. 562 (1882).

**Notes Not Conclusive.**—The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined. *State v. Hooper*, 151 N. C. 646, 65 S. E. 613 (1909).

**Magistrate Can Give Parol Testimony.**—It is competent for a magistrate to state what a witness swore before him in regard to a homicide, although he afterwards

committed the statement to writing. *State v. Adair*, 66 N. C. 298 (1872).

**Use of Written Statement on Trial.**—The written statement can only be referred to, to refresh his memory, and is properly treated as a memorandum, *State v. Adair*, 66 N. C. 298 (1872), unless the witness is dead, or too ill to be present, or insane, or has removed from the State at the instigation or connivance of the defendant or prosecutor. *State v. King*, 86 N. C. 603 (1882).

**§ 15-89. Prisoner examined; advised of rights.**—The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings. (1868-9, c. 178, subc. 3, ss. 14, 15; Code, ss. 1145, 1146; Rev., s. 3194; C. S., s. 4561.)

**Cross Reference.**—As to the right of a prisoner to testify as a witness, see § 8-54.

**Purpose of Section.**—It was intended by this section to safeguard the rights of the prisoner as guaranteed by the law, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903). For the accused, without the caution, might, before the magistrate, feel compelled to answer questions put to him, and such answers as he might make, might not be voluntary. *State v. Conrad*, 95 N. C. 666 (1886).

**Application of Section.**—The provisions of this section are applicable only to preliminary judicial examinations. *State v. Grass*, 223 N. C. 31, 25 S. E. (2d) 193 (1943).

**Distinction between Examination under This Section and That under § 8-54.**—There is a distinction between the statement made by a prisoner on his preliminary examination before a magistrate under this section, and his testimony given under § 8-54, as a witness on the trial of the cause. On the former, he is to be advised of his rights, the examination is not under oath, and, should it be taken contrary to the statute, it may not be used against him at the trial. On the latter, accused at his own request, but not otherwise, is competent but not compellable to testify and his testimony thus given is under oath and may be used at any subsequent stage of the prosecution. *State v. Farrell*, 223 N. C.

804, 28 S. E. (2d) 560 (1944).

**Prisoner Must Not Be Sworn.**—It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903).

**Section Extends to Coroner's Inquest.**—The reason of the section extends to an inquisition by a coroner. In this respect he is an examining magistrate. *State v. Matthews*, 66 N. C. 106 (1872).

**Caution to Prisoner Is Essential.**—This caution is not a mere matter of form; it is a substantial right, necessary for the protection of prisoners who are too poor to employ counsel and too ignorant to conduct their own defense. *State v. Rorie*, 74 N. C. 148 (1876).

This caution is an essential part of the proceedings, and must be given to the prisoner under arrest to make his examination admissible in evidence. Thus where a confession is made before the cautions required by the section were given it is inadmissible as evidence. *State v. Matthews*, 66 N. C. 106 (1872).

**Caution Applies to Whole Examination.**—The purpose of the section is, that the prisoner shall be advised by the magistrate of his right to refuse to answer all questions that may be put to him as to the charge made against him, without prejudice, during the whole examination, and not simply so much of it as applies to him personally. *State v. Conrad*, 95 N. C. 666 (1886).

**When Caution to Be Given.**—The commencement of the examination is properly, when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally. It is then the caution to the accused is due, and ought to be given, because, then, the magistrate has taken official notice of the charge and the accused, and what he does and says, and then the latter must take notice of the magistrate and be under his jurisdiction and control; then he is before the court and his examination is begun. *State v. Conrad*, 95 N. C. 666 (1886).

**It is not necessary to competency of an extrajudicial confession to a police officer that defendant be warned he is not compelled to answer.** *State v. Grier*, 203 N. C. 586, 166 S. E. 595 (1932).

In a prosecution for murder, where defendant confessed shortly after the homicide to officers, one of whom was the coroner, such confession is not inadmissible because defendant was not advised of his rights under this section. *State v. Grass*, 223 N. C. 31, 25 S. E. (2d) 193 (1943).

**Exact Words of Section Not Required.**—It is not necessary that a committing magistrate at the commencement of the examination of a prisoner shall use the precise words of the section in giving the caution therein prescribed, but it is sufficient if there be a substantial compliance with the requirement of the section. *State v. Rogers*, 112 N. C. 874, 17 S. E. 297 (1893); *State v. DeGraff*, 113 N. C. 688, 18 S. E. 507 (1893); *State v. King*, 162 N. C. 580, 77 S. E. 301 (1913).

**Same—What Is Sufficient.** — Both the letter and spirit of the statute require that

the defendant should be advised of his rights by the justice, to the effect that he is not required to testify; that he is at liberty to refuse to answer any question put to him, and that his refusal to answer shall not be used to his prejudice. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903); *State v. Simpson*, 133 N. C. 676, 45 S. E. 567 (1903); *State v. Vaughan*, 156 N. C. 615, 71 S. E. 1089 (1911).

**Same—Insufficient Compliance.**—Where the prisoner was brought before the magistrate and he was told by that official that “he was charged with selling stolen corn, and that if he wanted to tell anything he could do so; but it was just as he chose.” This was not sufficient compliance. *State v. Rorie*, 74 N. C. 148 (1876).

**Trial Judge Must Find Proper Caution.**—Where the record of a committing magistrate merely states that the prisoner was cautioned and the trial court holds such admission competent, with no other evidence before him except this statement, it is error, as the trial judge should have found as a fact whether the proper caution was given to the prisoner. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830 (1903).

**Where Prisoner Examined as Witness at Own Request.**—Testimony given by a defendant when examined as a witness at his own request is admissible against him on another hearing or trial for the same or any other offense, for such admissions and declarations do not come within either the language or the reason of this section. *State v. Ellis*, 97 N. C. 447, 2 S. E. 525 (1887); *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623 (1894); *State v. Simpson*, 133 N. C. 676, 45 S. E. 567 (1903).

**Cited in** *State v. Dixon*, 215 N. C. 438, 2 S. E. (2d) 371 (1939).

**§ 15-90. Exclusion of witnesses at examination.**—The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined. (1868-9, c. 178, subc. 3, s. 18; Code, s. 1149; Rev., s. 3195; C. S., s. 4562.)

**Cross Reference.** — As to exclusion of bystanders in trials for rape, see § 15-166.

**Judge Has Discretion to Exclude.**—Exclusion is a matter of which the presiding judge must judge, and except in cases of abuse of his discretion, such order is not

reviewable. *State v. Hodge*, 142 N. C. 676, 55 S. E. 791 (1906); *State v. Lowry*, 170 N. C. 730, 87 S. E. 62 (1915); *Lee v. Thornton*, 174 N. C. 288, 93 S. E. 788 (1917); *State v. Davis*, 175 N. C. 723, 95 S. E. 48 (1918).

**§ 15-91. Answers in writing, read to prisoner, signed by magistrate.**—The answer of the prisoner to the several interrogatories shall be reduced to

writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate. (1868-9, c. 178, subc. 3, s. 16; Code, s. 1147; Rev., s. 3196; C. S., s. 4563.)

**Cross Reference.**—As to testimony being used as evidence, see § 15-100 and notes.

not require the examination of a committing magistrate to be certified under seal. *State v. Pressley*, 90 N. C. 730 (1884).

**Seal Not Necessary.**—This section does

§ 15-92. **Witnesses for defendant examined.**—After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. (1868-9, c. 178, subc. 3, s. 17; Code, s. 1148; Rev., s. 3197; C. S., s. 4564.)

§ 15-93. **Examination of prisoner not required in misdemeanors.**—Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner. (1868-9, c. 178, subc. 3, s. 22; Code, s. 1153; Rev., s. 3198; C. S., s. 4565.)

**Cross Reference.**—As to the right, of the prisoner to be examined as a witness, see § 8-54.

§ 15-94. **When prisoner discharged.**—If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner. (1868-9, c. 178, subc. 3, s. 20; Code, s. 1151; Rev., s. 3199; C. S., s. 4566.)

§ 15-95. **When prisoner held to answer charge.**—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison. (1868-9, c. 178, subc. 3, ss. 21, 25; Code, ss. 1152, 1156; Rev., s. 3202; C. S., s. 4567.)

**Cross References.**—As to bail generally, see § 15-102 et seq. As to commitment, see § 15-125 et seq.

reverse his decision the next day and fine the defendant was a nullity. *State v. Lucas*, 139 N. C. 567, 51 S. E. 1021 (1905).

**When Jurisdiction of Justice Ends.**—Where a justice of the peace heard a warrant charging the defendant with an assault, with serious damage, and adjudged that the accused give bond for his appearance, and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased and his attempt to

It was intended most surely that when the justice had fully performed the duties required of him, his jurisdiction as to the case should be at an end. If he makes a mistake, it must be corrected elsewhere—not in his court. *State v. Lucas*, 139 N. C. 567, 51 S. E. 1021 (1905).

§ 15-96. **Witnesses against prisoner recognized.**—The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed. (1868-9, c. 178, subc. 3, s. 21; Code, s. 1152; Rev., s. 3203; C. S., s. 4568.)

§ 15-97. **Witnesses required to give security for appearance.**—Whenever the magistrate is satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of the recognizance unless security be required, he may order the witness to enter into a recognizance

with such sureties as he shall deem meet for his appearance at such court. (1868-9, c. 178, subc. 3, s. 23; Code, s. 1154; Rev., s. 3204; C. S., s. 4569.)

**Bond for Appearance before Justice Not Permitted.** — There is no statute which authorizes a justice of the peace or magistrate to require of a witness to give bond for his appearance before such justice or magistrate. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 40 S. E. 191 (1901).

And a justice of the peace, together with those advising him, who orders a witness to give a bond to appear before a justice, thereby are guilty of falsely imprisoning the witness. *Lovick v. Atlantic Coast Line R. Co.*, 129 N. C. 427, 40 S. E. 191 (1901).

**§ 15-98. Investigation in case of lynching.**—Whenever the solicitor of any judicial district ascertains that the crime of lynching has been committed in any county in his judicial district, it is his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to be issued subpoenas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of the crime charged, it shall be the duty of the coroner, judge or justice before whom the case is heard to bind such person, with good security, for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safekeeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the State. (1893, c. 461, s. 2; Rev., s. 3200; C. S., s. 4570.)

**Cross References.**—As to venue in case of lynching, see § 15-128. As to cost of investigating lynchings, see § 6-43.

**Editor's Note.**—Venue in case of lynching is discussed in *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

**§ 15-99. Witnesses in lynching not privileged.**—In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by § 15-98 or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself; but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the State, be altogether pardoned of any and all participation in any crime arising under the provisions of § 15-98, or under existing law, concerning which he is required to testify. (1893, c. 461, s. 5; Rev., ss. 1638, 3201; C. S., s. 4571.)

**Editor's Note.**—See note under § 8-55, which provides for compelling witnesses to testify in certain criminal investigations and extends immunity to those thus testifying.

For a general discussion of the limits to self-incrimination, see 15 N. C. Law Rev. 229.

**Witness Pardoned Though Testimony Does Not Incriminate.** — Legislation in "abolition or oblivion of the offense" specified, applicable to all in a given class, is valid and therefore, when under this section, the defendant was summoned, sworn, and examined by and for the State touch-

ing an alleged lynching under investigation by the court, he shall be altogether pardoned of any and all participation therein under the statute or existing law, whether the evidence elicited from him tends to incriminate him or not. *State v. Bowman*, 145 N. C. 452, 59 S. E. 74 (1907).

**Plea of Pardon as Motion to Quash.**—It seems that for the purpose of an appeal, the plea of pardon may be considered and treated as a motion to quash, and so be brought within the direct provisions of § 15-179. *State v. Bowman*, 145 N. C. 452, 59 S. E. 74 (1907).

**§ 15-100. Proceedings certified to court; used as evidence.**—All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, within twenty days after the taking of such examinations and recognizances: Provided, that any criminal case tried within twenty days before the sitting of criminal court shall be returned on Saturdays before the court convenes. The examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the disposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the State, or is of unsound mind. (1868-9, c. 178, subc. 3, s. 26; Code, s. 1157; Rev., s. 3205; 1913, c. 24; C. S., s. 4572.)

**In General.**—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action do not affect the common-law rule, but they are extensions of its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. *State v. Maynard*, 184 N. C. 653, 113 S. E. 682 (1922).

The effect of this section and §§ 15-88 and 15-91 is to extend the common-law principle, and their purpose was to make these preliminary examinations, when properly taken, certified and filed, in the nature of an official record, to be read in evidence on mere identification, and they do not and were not intended to restrict or entrench upon the common-law principle that evidence of this kind, when repeated by a witness under proper oath, and who can and does swear that his statements contain the substance of the testimony as given by the dead or absent witness, shall be received in evidence on the second trial. And well considered authority is to the effect that stenographers' notes, when the stenographer who took them goes on the stand and swears that they are accurate and correctly portray the evidence as given by the witness, come well within the principle. *State v. Ham*, 224 N. C. 128, 29 S. E. (2d) 449 (1944).

**Examinations Must Accord with Pre-**

**§ 15-101. Penalty for failing to return.**—If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law. (1868-9, c. 178, subc. 3, s. 27; Code, s. 1158; Rev., s. 3206; C. S., s. 4573.)

**ceding Sections.**—Where the examinations are offered as substantive evidence bearing upon the criminal charge, they are only admissible under this section, when taken according to the requirements of the preceding section. *State v. Pierce*, 91 N. C. 606 (1884); *State v. Jordan*, 110 N. C. 491, 14 S. E. 752 (1892).

**Reason for Witness' Absence Must Appear.**—In order to use the examination as substantive evidence it must be shown that witness is absent because of one of reasons given in this section. *State v. Pierce*, 91 N. C. 606 (1884).

No foundation has been laid for the introduction of the evidence of a witness who merely does not respond to the obligations of the subpoena, and is simply proved to have "run away," and not that any effort has been made to secure his presence. *State v. King*, 86 N. C. 603 (1882).

**When Parol Evidence Admissible.**—On the trial in the superior court it is competent for purposes of contradiction, to offer parol evidence as to what a witness testified to upon such preliminary examination. *State v. Wright*, 75 N. C. 439 (1876); *State v. Lyon*, 81 N. C. 600 (1879); *State v. Roberts*, 81 N. C. 605 (1879); *State v. Hooper*, 151 N. C. 646, 65 S. E. 613 (1909).

To authorize the introduction of parol evidence as to the confession of a prisoner before an examining magistrate, it must appear affirmatively that there was no examination recorded as required by law. *State v. Parrish*, 44 N. C. 239 (1853); *State v. Matthews*, 66 N. C. 106 (1872).

## ARTICLE 10.

*Bail.*

§ 15-102. **Officers authorized to take bail, before imprisonment.**—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

1. Any justice of the Supreme Court, or a judge of a superior court, in all cases.

2. Any clerk of the superior court, any justice of the peace, or any chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital. (1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37; Code, s. 1160; Rev., s. 3209; C. S., s. 4574; 1951, c. 85.)

**Cross References.**—As to constitutional provisions against excessive bail, see N. C. Const., Art. I, § 14 and U. S. Const., Amend. VIII. As to authority of the arresting officer to allow bail, see § 15-47. As to arrest and bail in civil cases, see § 1-409 et seq. As to bail after habeas corpus proceeding, see §§ 17-35 and 17-36.

**Editor's Note.**—The 1951 amendatory act, which made subsection 2 applicable to superior court clerks, provided that "this act shall not apply to the counties of Guilford, Durham, Rowan, Lee and Alamance."

In *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890), the meaning and effect of this and the following section are discussed in the dissenting opinion.

**Accused May Deposit Cash in Lieu of Bond.**—The law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the Supreme Court has held that the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948), citing *State v. Mitchell*, 151 N. C.

716, 66 S. E. 202 (1909).

**Cash deposited by accused as security for his appearance remains his property** subject to the conditions of a recognizance, the justice of the peace becoming the custodian of the cash for the benefit of the State only in so far as the debt of accused to the State is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he perform the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

**And Is Liable to Attachment.**—A defendant in a criminal prosecution in a justice of the peace court of the State of North Carolina, who is a nonresident of the State, and who voluntarily deposits with the justice of the peace cash in lieu of bond for his appearance before the justice of the peace for a preliminary hearing, has such property right and interest in the deposit as is liable to attachment and garnishment at the instance of his creditor pending such preliminary hearing. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

§ 15-103. **Officers authorized to take bail, after imprisonment.**—Any justice of the Supreme Court or any judge of a superior court has power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town has the same power in all cases where the punishment is not capital. (1868-9, c. 178, subc. 3, s. 30; Code, s. 1161; Rev., s. 3210; C. S., s. 4575.)

§ 15-104. **Recognizance filed with the clerk.**—Whenever a prisoner is bailed by any officer under § 15-103, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized. (1868-9, c. 178, subc. 3, s. 31; Code, s. 1162; Rev., s. 3211; C. S., s. 4576.)

§ 15-105. **Bail allowed on preliminary examination.**—If the offense charged in the warrant be not punishable with death, the magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county

where the offense is alleged to have been committed. (1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1; Code, s. 1139; Rev., s. 3207; C. S., s. 4577.)

**Cross References.**—As to bail for persons arrested for extradition, see § 15-76. As to bail upon appeal from a superior to the Supreme Court, see §§ 15-182 and 15-183.

**Recognizance Explained.**—The taking of a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. *State v. Edney*, 60 N. C. 463 (1864); *State v. Houston*, 74 N. C. 549 (1876).

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. *State v. Smith*, 66 N. C. 620 (1872); *State v. White*, 164 N. C. 408, 79 S. E. 297 (1913).

A recognizance in a criminal proceeding is an acknowledgment by the defendant that he is indebted to the State in an amount fixed by the court, conditioned upon his personal appearance at a time and place specified by the court to answer the charge against him, to stand and abide the judgment of the court and not to depart without leave of the court. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

**§ 15-106. Duty of magistrate granting bail.**—Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which the prisoner has been recognized to appear. (1868-9, c. 178, subc. 3, s. 9; Code, s. 1140; Rev., s. 3212; C. S., s. 4578.)

**§ 15-107. Sheriff or deputy may take bail.**—When any sheriff or his deputy arrests the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias*; and the sheriff shall in no case become bail himself.

No sheriff, deputy sheriff, constable, jailer or assistant jailer or the wife of any sheriff, deputy sheriff, constable, jailer or assistant jailer shall in any case become bail for any prisoner for money or property; nor shall any sheriff, deputy sheriff, constable, jailer or assistant jailer, or their wives become bail as agents for any bonding company or professional bondsmen. Any violation of this paragraph shall constitute a misdemeanor punishable by a fine or by imprisonment in the discretion of the court, or by both such fine and imprisonment; provided that the provisions of this paragraph shall not apply to Caswell, Currituck, Dare, Granville, Greene, Hertford, Hyde, Lenoir, Martin, Moore, Nash, Pamlico, Perquimans, Person, Pitt, Rockingham, Stokes, Transylvania and Warren coun-

ties. (1797, c. 474, s. 4, P. R.; R. C., c. 35, s. 11; Code, s. 1180; Rev., s. 3208; C. S., s. 4579; 1939, c. 47.)

**Local Modification.**—Haywood: 1945, c. 875.

coming bail, see Appx. II, Part (2), Rule 2.

**Editor's Note.**—The 1939 amendment added the second paragraph.

**Cross Reference.**—As to attorney be-

§ 15-108. **Sheriff may take bail of prisoner in custody.**—If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R. C., c. 11, s. 8; Code, s. 1232; Rev., s. 3228; C. S., s. 4580.)

§ 15-109. **Bail on continuance before a justice.**—Upon the continuance of any criminal action returned before any justice of the peace for trial, in which the justice is authorized to take bail on a finding of probable cause or in which he has final jurisdiction, it is the duty of the justice of the peace to take bond for his appearance, payable to the State, on the same being tendered by the accused, with such surety as in his opinion will be sufficient to insure the appearance of the accused for trial at a time and place mentioned in the bond. (1889, c. 133; Rev., s. 3213; C. S., s. 4581.)

**Cross Reference.**—As to mortgage in lieu of security for appearance, see § 109-25.

**Section Gives a New Remedy.**—Before this section was passed a justice of the peace had no power to allow a party accused of an offense of which he had not final jurisdiction to give bail during the

postponement of the examination. If any delay in the examination was necessary, the accused was to be kept in the custody of the sheriff or other officer of the law until the examination was resumed. *State v. Jones*, 100 N. C. 438, 6 S. E. 655 (1888); *State v. Jenkins*, 121 N. C. 637, 28 S. E. 413 (1897).

## ARTICLE 11.

### *Forfeiture of Bail.*

§ 15-110. **In recognizance to keep the peace.**—Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given. (1868-9, c. 178, subc. 2, s. 10; Code, s. 1225; Rev., s. 3214; C. S., s. 4582.)

**Cross Reference.**—As to recognizance, see also notes under § 15-105.

**Recognizance Binds to Three Things.**—It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. *State v. Schenck*, 138 N. C. 560, 49 S. E. 917 (1905); *State v. Eure*, 172 N. C. 874, 89 S. E. 788 (1916).

**When Time and Place Specified.**—If the recognizance specify time and place the defendant cannot be held to be in default

for not appearing at some other time or place. *State v. Houston*, 74 N. C. 174 (1876).

Thus a recognizance, conditioned that the defendant appear at the courthouse in C, on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on 22 February. *State v. Houston*, 74 N. C. 174 (1876).

**Same—Effect of Subsequent Law.**—A recognizance conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day, to which the holding of the court was changed by a law passed after the taking of the recognizance, the law containing no provision that recognizances should be re-



turned and parties appear on that day. *State v. Melton*, 44 N. C. 426 (1853).

**When Appearance at Next Term Specified.**—A recognizance for the appearance of the defendant at the next term of the court to be held for a given county is valid and binds the defendant to appear at the next term and at the courthouse, although neither time nor place be specifically named; because every one knows, or is presumed to know, the time and place of holding the court. *State v. Houston*, 74 N. C. 174 (1876).

**Same—If Term Not Held.**—A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend at an intervening special term subsequently appointed and held. *State v. Horton*, 123 N. C. 695, 31 S. E. 218 (1898).

**Continuance Does Not Release.**—The continuance of a criminal case does not release the recognizance given for the appearance of the defendant. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604 (1904).

**Proceedings When Recognizance Broken.**—Where the condition of a recognizance is broken it is competent for the

justice to declare the same to be forfeited and order it to be prosecuted in the court having jurisdiction of the penal sum. *State v. Oates*, 88 N. C. 668 (1883).

**Defendant Must Appear until Discharged.**—An appearance bond by its terms, and under the uniform ruling of the court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court. *State v. Eure*, 172 N. C. 874, 89 S. E. 788 (1916).

**Agreement by Solicitor Will Not Relieve.**—An agreement by a solicitor for the State to discharge a defendant if he would become a State's witness against codefendant, will not relieve such defendant from a forfeited recognizance. *State v. Moody*, 69 N. C. 529 (1873).

**Failure to Sign Warrant.**—It is immaterial to the validity of an appearance bond given by defendant before the court and in custodia legis that the warrant for his arrest, in due form, was, inadvertently, not signed by the recorder. *State v. Mitchell*, 151 N. C. 716, 66 S. E. 202 (1909).

§ 15-111. **When recognizance deemed broken.**—No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance. (1868-9, c. 178, subc. 2, s. 12; Code, s. 1277; Rev., s. 3215; C. S., s. 4583.)

**Surety Not Relieved.**—The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. (See §§ 15-122, 15-123.) He is not released by the principal being drunk

and under arrest when his case was called in court and continued, and by the principal having since become a fugitive from justice under charge of a different offense. *State v. Holt*, 145 N. C. 450, 59 S. E. 64 (1907).

§ 15-112. **Recognizance prosecuted.**—Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken. (1868-9, c. 178, subc. 2, s. 13; Code, s. 1228; Rev., s. 3216; C. S., s. 4584.)

**Independent Proceeding Unnecessary.**—The judgment that the recognizance has been forfeited must be entered in the court, and in the cause, in which said recognizance was filed and it is not required that the prosecution for the forfeiture of such recognizance shall be taken by an independent proceeding. *State v. Sanders*, 153 N. C. 624, 69 S. E. 272 (1910).

**Proceedings When Forfeiture Is Moved for.**—When the forfeiture of a recognizance is moved for, if all the matters are

of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury. *State v. Sanders*, 153 N. C. 624, 69 S. E. 272 (1910), and cases cited.

**Entry of Forfeiture Not Traversed by Answer to Scire Facias.**—The entry of the forfeiture of a recognition in a criminal case cannot be contradicted or traversed by an answer or a plea to a scire

facias issued to enforce the forfeiture. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604 (1904).

**Effect of Answer to Scire Facias.** — Where the recognizance in a criminal case is entered on the records of the court as forfeited, and scire facias is is-

sued to enforce the forfeiture, an answer denying the truth of the record, though informal, is equivalent to a motion to set aside the entry, when that appears to have been the intention of the defendants. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604 (1904).

§ 15-113. **Notice of judgment nisi before execution.** — No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties. (1777, c. 115, s. 48, P. R.; R. C., c. 35, s. 43; Code, s. 1208; Rev., s. 3217; C. S., s. 4585.)

**Local Modification.**—Forsyth: 1935, c 83.

**Notice Must Be Given.**—This section has made it imperative, that before suing out execution on a forfeited recognizance, a scire facias shall issue, and judgment be had thereon. *State v. Mills*, 19 N. C. 552 (1837).

**Object of Notice.** — The object of a scire facias is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. *State v. Mills*, 19 N. C. 552 (1837).

**Judgment against Surety on Appearance Bond.**—An appearance bond is a debt of record conditioned to be void

upon the appearance of defendant, and while judgment absolute may not be entered upon a forfeited recognizance except upon a sci. fa., the object of the sci. fa. is merely to give notice of an opportunity to show cause why the cognizee should not have execution acknowledged, and the surety being a party to the recognizance and his liability being primary, direct and equal with that of the principal, judgment absolute may be had against the surety on the sci. fa. before service of the sci. fa. upon the principal. *Tar Heel Bond Co. v. Krider*, 218 N. C. 316, 11 S. E. (2d) 291 (1940), followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294 (1940).

§ 15-114. **What notice must contain.** — When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant. (1812, c. 836, s. 1, P. R.; R. C., c. 35, s. 44; Code, s. 1209; Rev., s. 3218; C. S., s. 4586.)

§ 15-115. **Service of notice.**—All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served. (1812, c. 836, s. 2, P. R.; R. C., c. 35, s. 45; Code, s. 1210; Rev., s. 3219; C. S., s. 4587.)

**Cited in** *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291 (1940).

§ 15-116. **Judges may remit forfeited recognizances.**—The judges of the superior courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded. (1788, c. 292, s. 1, P. R.; R. C., c. 35, s. 38; Code, s. 1205; Rev., s. 3220; C. S., s. 4588.)

**Trial Judge Has Discretion.**—The power given by this section is a matter of judicial discretion in the judges below, which cannot be reviewed except for some error in

a matter of law or legal inference. *State v. Moody*, 74 N. C. 73 (1876); *State v. Morgan*, 136 N. C. 593, 48 S. E. 604 (1904).

Whether a judgment nisi will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the superior court. *State v. Clarke*, 222 N. C. 744, 24 S. E. (2d) 619 (1943); *State v. Wiggins*, 228 N. C. 76, 44 S. E. (2d) 471 (1947).

**Court May Remit Penalty without Setting Aside Forfeiture.**—Where a motion is made to set aside the entry of forfeiture of a recognizance, its refusal does not prevent the court from reducing or remitting the penalty. *State v. Morgan*, 136 N. C. 593, 48 S. E. 604 (1904).

**Petition after Final Judgment.**—A surety on a bail bond may, under this section, present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349 (1925).

The superior courts have authority, under this section, to lessen or remit forfeited recognizances, upon the petition of the party aggrieved, either before or after final judgment. *State v. Moody*, 74 N. C. 73 (1876).

**Solicitor Has No Vested Right to Fee.**—Under this section the solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the court in the exercise of his discretionary power. *State v. King*, 143 N. C. 677, 57 S. E. 516 (1907).

**Injunction to Restrain Enforcement of Execution.**—A motion by the surety asking

that the forfeiture theretofore entered upon the appearance bond be stricken out for that defendant had been subsequently arrested under a *capias* is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, and does not serve to stay execution on the judgment entered against the surety upon the *sci. fa.*, and therefore the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. The remedy for a reduction or remission of the forfeiture is by application under this section. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291 (1940), followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294 (1940).

**Arrest Does Not Discharge Forfeiture of Appearance Bond.**—The arrest of defendant in a criminal proceeding upon a *capias* and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the *sci. fa.* after defendant has been arrested under the *capias*. Section 15-122 has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291 (1940), followed in *State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294 (1940).

§ 15-117. **Money refunded by clerk.**—The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted. (1795, c. 442, s. 1, P. R.; R. C., c. 35, s. 39; Code, s. 1206; Rev., s. 3221; C. S., s. 4589.)

§ 15-118. **Money refunded by treasurer.**—If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto. (1795, c. 442, s. 2, P. R.; R. C., c. 35, s. 40; Code, s. 1207; Rev., s. 3222; C. S., s. 4590.)

§ 15-119. **Forfeiture of bond before justice.**—On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, on his departing the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in

the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judgment nisi shall not be made final. (1889, c. 133, s. 2; Rev., s. 3223; C. S., s. 4591.)

**§ 15-120. Judgment final, rendered and enforced.**—If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the State. (1889, c. 133, s. 3; Rev., s. 3224; C. S., s. 4592.)

**§ 15-121. Forfeiture of bond over two hundred dollars before justice.**—If the bond shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the bond, and issue notice to the accused and his sureties to appear at the next term to show cause why the judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the State in such court. The entry on the bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety. (1889, c. 133, s. 4; Rev., s. 3225; C. S., s. 4593.)

**§ 15-122. Right of bail to surrender principal.** — The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance has been forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. (1777, c. 115, s. 20, P. R.; 1848, c. 7; R. C., c. 11, s. 5; Code, s. 1230; Rev., s. 3226; C. S., s. 4594.)

**In General.**—The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately, but be permitted to find security for the costs of his appeal and for his appearance at the next term, and if he fails afterwards to appear, when called during the term, and perfect his appeal and

give the necessary security for his appearance, or in default thereof to surrender himself in execution of the judgment, he may be called and his forfeiture entered. *State v. Schenck*, 138 N. C. 560, 49 S. E. 917 (1905).

**Compliance with Section Protects Surety.**—Where a defendant surrenders his principal in open court in discharge of himself as bail, he is acting in the clear exercise of an undoubted legal right. Under this section the entry of the fact made upon the records of the court was therefore proper, and the court could not by their

subsequent action, deprive the defendant of the benefit of it. *Underwood v. McLaurin*, 49 N. C. 17 (1856).

**When Condition of Bond Performed.**—The condition of a bail bond is not performed by the appearance, conviction and sentence of the defendant. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff, but to exonerate the surety the defendant must submit to such punishment as shall be adjudged. *State v. Schenck*, 138 N. C. 560, 49 S. E. 917 (1905).

**Discharge of Bail.**—The arrest of defendant in a criminal proceeding upon a capias and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the sci. fa. after defendant has been arrested under the capias. This section has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after recognizance is forfeited does not discharge the bail, but is merely addressed to the discretionary power of the court to reduce or remit the forfeiture. *Tar Heel Bond Co. v. Krider*, 218 N. C. 361, 11 S. E. (2d) 291 (1940), followed in

*State v. Brown*, 218 N. C. 368, 11 S. E. (2d) 294 (1940).

**Bail Not Exonerated During Defendant's Detention in Prison on Other Charges.**—Upon the failure of defendant to appear when his case was called, judgment nisi was entered and sci. fa. and capias issued. Upon the hearing of the sci. fa., the surety showed that at the time of the call of the case defendant was incarcerated in another county of this State on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured capias and filed same with the officials of the State's prison so that defendant would be surrendered to the court to stand trial upon the expiration of his sentence. Held: Notwithstanding that § 1-433 relates only to bonds executed in arrest and bail proceedings, the bail will not be exonerated during defendant's detention, since only the State and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the sci. fa. continued until the surety has had opportunity to produce defendant after his release from prison. *State v. Eller*, 218 N. C. 365, 11 S. E. (2d) 295 (1940).

§ 15-123. **New bail given upon surrender; liability of sheriff.**—Any person surrendered in the manner specified in § 15-122 shall have liberty, at any time before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken, the same term to which such bail bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the State the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Criminal Law. (1827 c. 40; R. C., c. 11, s. 6; Code, s. 1231; Rev., s. 3227; C. S., s. 4595.)

**Cross References.**—As to criminal liability for an escape, see § 14-239. As to recovery of the penalty, see § 162-14 and annotation thereto.

§ 15-124. **Defenses open to bail.**—Every matter which would entitle the principal to be discharged from arrest may be pleaded by the bail in exoneration of his liability. (R. C., c. 11, s. 9; Code, s. 1233; Rev., s. 3229; C. S., s. 4596.)

## ARTICLE 12.

### *Commitment to Prison.*

§ 15-125. **Order of commitment.**—Every commitment to prison of a person charged with crime shall state:

1. The name of the person charged.
2. The character of the offense with which he is charged.

3. The name and office of the magistrate committing him.

4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of the recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify.

5. The court before which the prisoner shall be sent for trial. (1868-9, c. 178, subc. 3, s. 32; Code, s. 1163; Rev., s. 3230; C. S., s. 4597.)

**Cross Reference.**—As to order of commitment after judgment by a justice, see § 15-159.

**Verbal Order Invalid.**—A verbal order of a justice of the peace sending a prisoner

to jail, whether made before or after the examination on the warrant, is not a sufficient authority for the officer to whom the order is given. *State v. James*, 78 N. C. 455 (1878).

§ 15-126. **Commitment to county jail.**—All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safekeeping as prescribed by law. (1868-9, c. 178, subc. 2, s. 33; Code, s. 1164; Rev., s. 3231; C. S., s. 4598.)

§ 15-127. **Commitment of witnesses.**—If any witness required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law. (1868-9, c. 178, subc. 3, s. 24; Code, s. 1155; Rev., s. 3232; C. S., s. 4599.)

**Cross Reference.**—As to when witnesses are required to give security for appearance, see § 15-97.

## ARTICLE 13.

### *Venue.*

§ 15-128. **In case of lynching.**—The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice. (1893, c. 461, s. 4; Rev., s. 3233; C. S., s. 4600.)

**Cross References.**—As to venue in civil cases, see § 1-76 et seq. As to removal for fair trial, see § 1-84 et seq.

**Section Constitutional.**—This section is a constitutional exercise of legislative power. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906); *State v. Rumble*, 178 N. C. 717, 100 S. E. 622 (1919).

**Purpose of Section.**—Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds

of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

**Bill Need Not Be Found in County Where Offense Committed.**—In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

§ 15-129. **In offenses on waters dividing counties.**—When any offense is committed on any water, or watercourse whether at high or low water, which water or watercourse, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed. (R. C., c. 35, s. 24; Code, s. 1193; Rev., s. 3234; C. S., s. 4601.)

**Cross Reference.**—As to venue of civil offenses committed on waters, see § 1-77.

§ 15-130. **Assault in one county, death in another.**—In all cases of felonious homicide when the assault has been made in one county within the State, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made. (1831, c. 22, s. 1; R. C., c. 35, s. 27; Code, s. 1196; Rev., s. 3235; C. S., s. 4602.)

**No New Offense Created by Section.**—This section received a judicial construction in *State v. Dunkley*, 25 N. C. 116 (1842), and it was held that it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. *State v. Hall*, 114 N. C. 909, 19

S. E. 602 (1894).

This section and the following were part of chapter 22 of the Public Laws 1831 and hence this construction applies equally to the following section.—Ed. Note.

**For meaning of "assault,"** see note under following section.

§ 15-131. **Assault in this State, death in another.**—In all cases of felonious homicide, when the assault has been made within this State, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this State. (1831, c. 22, s. 2; R. C., c. 35, s. 28; Code, s. 1197; Rev., s. 3236; C. S., s. 4603.)

**Section Is Valid.**—The validity of sections similar to this seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894).

**No New Offense Created by Section.**—See note to § 15-130.

**Meaning of "Assault."** — The assault mentioned in this section and the preceding section evidently means not a mere attempt, but such an injury inflicted in this

State as results in death in another state. *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894).

**Acts Causing Death Must Take Place in State.**—This section plainly contemplates that every part of the offense, except the death, must have occurred in this State. *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894).

**Shooting Person in Adjoining State.** — See § 15-132 and note thereto.

§ 15-132. **Person in this State injuring one in another.**—If any person, being in this State, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this State as he would be if the effect had taken place within this State. (1895, c. 169; Rev., s. 3237; C. S., s. 4604.)

**Editor's Note.**—This section was passed in 1895 as a result of the decision in *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894). In that case the defendants while in North Carolina shot across the State line and killed a person in Tennessee and being indicted for murder in North Carolina it was

held that they were not guilty of the crime charged in the absence of a statute like the present. Section 15-131 was discussed and held not applicable since the stroke producing death was given not in North Carolina but in Tennessee.

§ 15-133. **In county where death occurs.**—If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or

land, either within or without the limits of this State, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens. (1891, c. 68; Rev., s. 3238; C. S., s. 4605.)

**Section Constitutional.**—This section is inflicted mortal wounds elsewhere. State constitutional and applies to foreigners as v. Caldwell, 115 N. C. 794, 20 S. E. 523 well as to citizens of this State who have (1894).

**§ 15-134. Improper venue met by plea in abatement; procedure.**—Because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the State, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the State, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the State, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty. (R. C., c. 35, s. 25; Code, s. 1194; Rev., s. 3239; C. S., s. 4606.)

**Cross References.**—As to venue in indictment for stealing rides on trains, see § 60-104. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in case of discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in case of bribery of baseball player, see § 14-378. As to venue in trial of an accessory, see §§ 14-5 and 14-7. As to venue in cases of bigamy, see § 14-183. As to sale and delivery of intoxicating liquors, see § 18-9. As to offenses by officers of State institutions, see § 143-116. As to venue in cases of bastardy, see § 49-5.

**Purpose of Section.**—This section was evidently intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed, and should not be construed to modify the common law beyond the reasonable scope of its manifest purpose. State v. Mitchell, 202 N. C. 439, 163 S. E. 581 (1932).

**Power of Legislature.**—Venue is under the control of the legislature. State v. Woodward, 123 N. C. 710, 31 S. E. 219 (1898).

**Broad Terms.**— This section is very broad in its terms. State v. Outerbridge,

82 N. C. 618 (1880).

**Old Rule Reversed.**— It reverses the rule which seems to have obtained on the trial of criminal cases before its enactment. State v. Lytle, 117 N. C. 799, 23 S. E. 476 (1895).

**Applies to All Crimes.**—In felonies, as in misdemeanors, the objection can only be taken by plea in abatement. State v. Outerbridge, 82 N. C. 618 (1880).

**Same—Committed within State.**— The offenses referred to in this section are those committed within the borders of the State, in violation of the laws of the State, for our courts cannot take cognizance of the violation of the criminal laws of other states; and would have no right to recognize offenders to appear before their judicial tribunals. State v. Mitchell, 83 N. C. 674 (1880).

**Laws Regulating Jurisdiction Not a Part of Offense.**—Laws conferring, withdrawing or limiting jurisdiction over pre-existing common-law offenses do not become a constituent part of the offenses to which they apply. State v. Williamson, 81 N. C. 546 (1879); State v. Lewis, 142 N. C. 626, 55 S. E. 600 (1906).

**Crime Deemed to Have Taken Place Where Alleged.**— Under this section, a



criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by the plea in abatement. *State v. Allen*, 107 N. C. 805, 11 S. E. 1016 (1890); *State v. Oliver*, 186 N. C. 329, 119 S. E. 370 (1923).

Where there is no challenge to the indictment prior to a plea of guilty, under this section the offense is deemed to have been committed in the county alleged in the indictment. *State v. McKeon*, 223 N. C. 404, 26 S. E. (2d) 914 (1943).

**Averment of Venue in Indictment.**—In an indictment for murder, the offence must be charged in the body of the bill, to have been committed within the district, over which the court has jurisdiction; it is not sufficient that the caption names the district. *State v. Adams*, 1 N. C. 56 (1793).

But the want of an averment of a proper and perfect venue is not fatal to a bill of indictment. *State v. Williamson*, 81 N. C. 540 (1879).

**The crime of offering a bribe to a juror is committed in the county where the offer is communicated to the juror,** and the proper venue is the county in which the juror was serving and in which the defendant's offer was communicated to him by his wife, although defendant communicated with the juror's kinsmen and wife in the county of their residence. *State v. Noiland*, 204 N. C. 329, 168 S. E. 412 (1933).

**Objection to Venue Waived.**—Objection to venue is waived unless objection is taken in apt time by plea in abatement. *State v. Lytle*, 117 N. C. 799, 23 S. E. 476 (1895); *State v. Woodward*, 123 N. C. 710, 31 S. E. 219 (1898); *State v. Holder*, 133 N. C. 709, 45 S. E. 862 (1903).

Thus where a prisoner is charged with killing the deceased in the county in which the indictment is found, the State need not prove that the offense was committed in that county. Such allegation is to be taken as true unless the prisoner denies the same by plea in abatement. *State v. Outerbridge*, 82 N. C. 618 (1880).

**Demurrer to Evidence Improper Remedy.**—Under this section, an objection to

venue must be taken by plea in abatement, and a demurrer to the evidence on this ground was properly overruled. *State v. Burton*, 138 N. C. 575, 50 S. E. 214 (1905).

**Plea in Abatement.**—An indictment charging that defendant did feloniously embezzle certain certificates of deposit in the county in which the prosecution is instituted, held not subject to defendant's plea in abatement on the ground that the certificates of deposit were issued by a bank in another county and that such other county was the proper venue of the prosecution, since the indictment charges the embezzlement of the certificates of deposit and not the proceeds of the certificates. *State v. Shore*, 206 N. C. 743, 175 S. E. 116 (1934).

**What Must Be Stated in Plea in Abatement.**—In pleas in abatement the facts upon which the plea rests must be stated, and present matters which will defeat the further prosecution of the present action, if proven or admitted. *Emry v. Chappell*, 148 N. C. 327, 62 S. E. 411 (1908).

**Jurisdiction of Person Acquired by Consent.**—While the court's jurisdiction of the subject matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late. *State v. Oliver*, 186 N. C. 329, 119 S. E. 370 (1923).

**Where Motion to Quash Indictment Was Correctly Denied.**—Defendant moved to quash the indictment for receiving stolen goods on the ground that the evidence showed that the property, if stolen, was stolen in another county, and, if received by defendant, was received by him in a third county. It was held that the motion to quash was correctly denied since, under this section, the crime is presumed to have been committed in the county laid in the bill of indictment unless defendant aptly enters a plea in abatement. *State v. Ray*, 209 N. C. 772, 184 S. E. 836 (1936).

**Cited in** *State v. Ritter*, 199 N. C. 116, 154 S. E. 62 (1930).

**§ 15-135. Removal of indictment with consent of defendant; pleas.**—Whenever an indictment, charging the commission of a capital or other felony, is returned a true bill, the judge holding the court in which such indictment is found shall have the power, with the written consent of the defendant or defendants charged in said bill, to remove such indictment for trial to some adjacent county prior to the arraignment or plea of the defendant or defendants in such indictment, without the presence in person of the defendant or defendants, and upon such removal the pleas of the defendant or defendants may be entered in such adjacent county. (1921, c. 12, s. 1; C. S., s. 4606(a).)

§ 15-136. **Jurisdiction of grand jury.**—Upon the removal of any indictment under § 15-135, if it shall be found that there is any defect in such indictment, the grand jury of the county to which the same is removed for trial shall have as full and ample jurisdiction and power to find another indictment for the same offense as would the grand jury of the county from which the indictment was removed. (1921, c. 12, s. 2; C. S., s. 4606(b).)

#### ARTICLE 14.

##### *Presentment.*

§ 15-137. **No arrest or trial on presentment.**—No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law. (1797, c. 474, s. 3, P. R.; R. C., c. 35, s. 6; 1879, c. 12; Code, s. 1175; Rev., s. 3240; C. S., s. 4607.)

**Cross References.**—As to exception to grand jurors, see § 9-26 and notes. As to the indictment, see § 15-140 et seq. As to constitutional provisions, see N. C. Const., Art. I, § 12 and U. S. Const., Amend. V.

**Original and Derivative Jurisdiction Distinguished.**—On appeal from the superior court of Craven County, from conviction of the unlawful possession of intoxicants, where the record showed that defendant was bound over to the county court of Craven County with no record of his having been tried in that court or that there was any appeal therefrom, the superior court was without jurisdiction, and upon motion of the Attorney General, the appeal was properly dismissed. *State v. Patterson*, 222 N. C. 179, 22 S. E. (2d) 267 (1942).

**Objections to Grand Jury.**—In *State v. Sharp*, 110 N. C. 604, 14 S. E. 504 (1892), where there is a full discussion of objections to the competency of a grand jury, it is held that the fact that a son of the prosecutor was a member of the grand jury did not vitiate the indictment, though

he had actively participated in finding the bill. *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

**Where Foreman Interested in Prosecution.**—A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution will be denied when it appears that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

**Remedy When Grand Jury Defective.**—If there be a defect in the accusing body, it is the right of the party indicted, by plea of abatement or by motion to quash, to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer. *State v. Haywood*, 73 N. C. 437 (1875); *State v. Griffee*, 74 N. C. 316 (1876); *State v. Baldwin*, 80 N. C. 390 (1879).

§ 15-138. **Names of witnesses indorsed on presentment.**—When a presentment shall be made of any offense by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon. (1797, c. 474, s. 2, P. R.; R. C., c. 35, s. 7; Code, s. 1176; Rev., s. 3241; C. S., s. 4608.)

**Failure to Mark Names of Witnesses on Bill.**—Section 9-27 providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury is

directory merely, and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. *State v. Fines*, 84 N. C. 810 (1881).

§ 15-139. **Subpœna for witnesses on presentment.**—In issuing subpœnas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall name therein the first Tuesday of the term of court as the time for such witnesses to appear and give evidence. And no clerk shall issue a subpœna for any such witness to appear on Monday, except upon written order of the solicitor of the district. (1913, c. 168; C. S., s. 4609.)

ARTICLE 15.

*Indictment.*

§ 15-140. **Waiver of indictment in misdemeanor cases.**—In any criminal action in the superior courts where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court. The provisions of this section shall not apply to any case heard in the superior court on an appeal from an inferior court. (1907, c. 71; C. S., s. 4610; 1951, c. 726, s. 1.)

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

**Section Constitutional.** — This section, authorizing the waiver of an indictment in the superior court by the defendant bound over from an inferior court, is con-

stitutional and valid. Constitution, Art. IV, § 13. *State v. Jones*, 181 N. C. 543, 106 S. E. 827 (1921).

**Cited in** *State v. Finch*, 218 N. C. 511, 11 S. E. (2d) 547 (1940).

§ 15-140.1. **Waiver of indictment in noncapital felony cases.**—In any criminal action in the superior courts where the offense charged is a felony, but not one for which the punishment may be death, the defendant may waive the finding and return into court of a bill of indictment when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment. Where the finding and return into court of a bill of indictment charging the commission of a felony is waived by the defendant, the prosecution shall be on an information signed by the solicitor. The information shall contain as full and complete a statement of the accusation as would be required in an indictment. The written waiver by the defendant and his counsel shall appear on the face of the information. Such counsel shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court. (1951, c. 726, s. 2.)

§ 15-140.2. **Withdrawal of waiver of indictment.** — Waiver of indictment may not be withdrawn except with the approval of the presiding judge. (1951, c. 726, s. 3.)

§ 15-141. **Bills returned by foreman except in capital cases.**—Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body. (1889, c. 29; Rev., s. 3242; C. S., s. 4611.)

**Indictment to Be Returned in Open Court.**—It is the returning of the bill or indictment, publicly, in open court and its being there recorded, that makes it effectual. *State v. Cox*, 28 N. C. 440 (1846).

**Indictment Need Not Be Signed.** — It has been often held that an indictment need not necessarily be signed by any one. *State v. Cox*, 28 N. C. 440 (1846); *State v.*

*Mace*, 86 N. C. 668 (1882); *State v. Pitt*, 166 N. C. 268, 80 S. E. 1060 (1914).

No endorsement by the foreman or otherwise is essential to the validity of an indictment, which has been duly returned into court by the grand jury under this section, and entered upon its records. *State v. Avant*, 202 N. C. 680, 163 S. E. 806 (1932).

§ 15-142. **Substance of judicial proceedings set forth.**—In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the

peace, it is sufficient to set forth the substance only of the proceedings, or the substance of such part thereof as makes, or helps to make, the offense prosecuted. R. C., c. 35, s. 15; Code, s. 1184; Rev., s. 3243; C. S., s. 4612.)

**Power of Legislature.**—The legislature has the undoubted right to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. *State v. Harris*, 145 N. C. 456, 59 S. E. 115 (1907).

**Purpose of Section.**—The purpose of this section and § 15-153 is to render unnecessary merely useless refinements and technicalities in pleading that once prevailed. *State v. Murphy*, 101 N. C. 697, 8 S. E. 142 (1888).

**Office of Indictment.**—The office of an indictment is to inform the defendant with sufficient certainty of the charge against him to enable him to prepare his defense. *State v. Gates*, 107 N. C. 832, 12 S. E. 319 (1890).

**Refinements Abolished.**—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 (1923). See also *State v. Morrison*, 202 N. C. 60, 161 S. E. 725 (1932).

**Statement Required.**—In every indictment, the facts and circumstances must be stated with such certainty that the defendant may judge whether they constitute an indictable offense or not. *State v.*

**§ 15-143. Bill of particulars.**—In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters. (Rev., s. 3244; C. S., s. 4613.)

**In General.**—This provision as to a bill of particulars had prevailed previously as to civil proceedings, § 1-150, and was by this section made expressly applicable to criminal cases, to which the court had applied it in *State v. Brady*, 107 N. C. 822, 12 S. E. 325 (1890); *State v. Stephens*, 170 N. C. 745, 87 S. E. 131 (1915).

**Purpose of Section.**—This section intended to make all indictments alike in regard to dispensing with the insertion of the means and methods by which any offense was committed. *State v. Stephens*, 170 N. C. 745, 87 S. E. 131 (1915).

**Object of Bill of Particulars.**—The whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and suffi-

*Lewis*, 93 N. C. 581 (1885). And thus where an indictment sets forth the substance of the offense charged "in a plain, intelligible and explicit manner," with such fullness as that the court could see that it was charged, and it gave the defendant such information as was necessary to enable him to make defence on the trial and in case of a subsequent prosecution, it is sufficient under this section and § 15-153. *State v. Murphy*, 101 N. C. 697, 8 S. E. 142 (1888).

**Omission of Caption Does Not Vitiare.**—While every indictment properly should have a caption, it is no part of the indictment, and its omission is no ground for arresting judgment. *State v. Wasden*, 4 N. C. 596 (1817); *State v. Brickell*, 8 N. C. 354 (1821); *State v. Lane*, 26 N. C. 113 (1843); *State v. Dula*, 61 N. C. 437 (1868); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

**Mistake in Caption.**—A misrecital of the county in the caption is not ground for arrest of judgment. *State v. Sprinkle*, 65 N. C. 463 (1871); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

**Signature of Solicitor Not Requisite.**—It is regular and orderly for the bill to be signed by the solicitor, but such signing is not essential to its validity. *State v. Cox*, 28 N. C. 440 (1846); *State v. Mace*, 86 N. C. 668 (1882); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

cient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements, as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 62 S. E. 1088 (1908).

**State Confined to Particulars Stated.**—The granting of a bill of particulars on an indictment for a criminal offense is primarily to inform the accused of the charges against him, and secondarily to inform the court, and while this is not strictly a part of the indictment, its effect is to confine the State in its evidence to the particulars stated, and it is reversible error to the prejudice of the defendant's

rights for the court to admit, over his objection, evidence as to other criminal offenses not included in the bill to show the scienter or quo animo in relation to the particulars enumerated and coming within the scope of those generally charged in the indictment. *State v. Wadford*, 194 N. C. 336, 139 S. E. 608 (1927).

**Former Details Not Now Charged in Indictment.** — It is no longer charged whether a murder was committed with a knife or a pistol, nor the length and breadth and depth of a wound, and the same is true as to all other offenses. In lieu of this, we have adopted this section which provides for a bill of particulars. *State v. Stephens*, 170 N. C. 745, 87 S. E. 131 (1915).

**What Bill Will Not Supply.**—A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense. *State v. Long*, 143 N. C. 670, 57 S. E. 349 (1907). See also, *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358 (1942) (dis. op.).

The provisions of this section cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense. *State v. Cole*, 202 N. C. 592, 163 S. E. 594 (1932). See also, *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941).

**Granting Order Is within Court's Discretion.**—The granting of an order for a bill of particulars is in the discretion of the court, and the question of sufficient compliance is likewise in the sound legal discretion of the trial judge. *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 62 S. E. 1088 (1908).

The granting or denial of motions for bills of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *State v. Lippard*, 223 N. C. 167, 25 S. E. (2d) 594 (1943).

**Same—Amendment of Bill.**—A bill of particulars, being no part of the indictment, is not subject to demurrer, and may be amended at any time, with permission of the court, on such terms or under such conditions as are just. *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461 (1895); *State v. Wadford*, 194 N. C. 336, 139 S. E. 608 (1927).

A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court

and the accused of specific occurrences for investigation. *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930).

**Meaning of "Discretion."** — The term "discretion," as used and contemplated in the statute, should be construed to mean the sound legal discretion of the trial court; it is well understood that the action of the lower court will not be reviewed or disturbed on appeal, unless there has been manifest abuse in the respect to defendant's prejudice. *State v. Dewey*, 139 N. C. 556, 51 S. E. 937 (1905); *State v. Seaboard Air Line R. Co.*, 149 N. C. 508, 62 S. E. 1088 (1908).

**When Applied for.**—Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *State v. Shade*, 115 N. C. 757, 20 S. E. 537 (1894); *State v. Corbin*, 157 N. C. 619, 72 S. E. 1071 (1911).

**Indictment for Perjury.**—Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars under this section if the indictment is in the form prescribed by § 15-145. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 (1923).

**Indictment for Malfeasance of Bank Officer.**—It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of § 14-254, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143 (1924).

**What Constitutes Waiver of Right.** — Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47 (1923).

**Motion to Quash Not Proper Remedy.**

—Where the criminal indictment sufficiently charges all the elements of the offense but is not as definite as the defendant may desire, the defendant's remedy is by motion for a bill of particulars, and not by a motion to quash. *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738 (1932).

**Where Motion in Arrest of Judgment Properly Denied.**—An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed

in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if he desires more specific information is by motion for a bill of particulars under this section, but a motion in arrest of judgment after a verdict of guilty of murder in the first degree, is properly denied. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

**Cited in** *State v. Suncrest Lumber Co.*, 199 N. C. 199, 154 S. E. 72 (1930).

§ 15-144. **Essentials of bill for homicide.**—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be. (1887, c. 58; Rev., s. 3245; C. S., s. 4614.)

**Cross Reference.**—As to homicide generally, see §§ 14-17, 14-18 and notes there-to.

**Section Constitutional.**—The power of the legislature to prescribe the form of indictment for murder is upheld in *State v. Moore*, 104 N. C. 743, 10 S. E. 183 (1889); *State v. Brown*, 106 N. C. 645, 10 S. E. 870 (1890); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

**This section is an abbreviated form for a bill of indictment for murder.** *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

**Willfully Not Necessary in Indictment for Murder.**—The word "willfully" is not essential to the validity of an indictment for murder, neither at common law nor under this section. *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312 (1889); *State v. Harris*, 106 N. C. 682, 11 S. E. 377 (1890); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

**What Is Sufficient under Section.**—This section declares an indictment containing certain words "sufficient," but it does not make those words essential, nor by any reasonable construction can it be held to make technical and "sacramental" words which were not theretofore necessary in indictments for murder. *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890).

**Same—Form of Indictment Set Out.**—The following is full and sufficient in the body of an indictment for murder: "The

jurors for the State on their oaths present that A. B., in the county of E., did feloniously, and of malice aforethought, kill and murder C. D." And it is sufficient in an indictment for manslaughter to follow the same form, omitting the words "and with malice aforethought" and substituting "slay" in the stead of the word "murder." These forms contain, in the words of the statute, "every averment necessary to be proved." *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890). This form also approved in *State v. Sou. Ry. Co.*, 125 N. C. 666, 34 S. E. 527 (1899).

**An indictment charging the essential facts of murder** as required by this section, is sufficient to sustain the court's charge based upon the evidence in the case relative to murder committed in the perpetration of robbery or other felony. *State v. Fogleman*, 204 N. C. 401, 168 S. E. 536 (1933).

**Statements Not Necessary.**—An indictment is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. *State v. Pate*, 121 N. C. 659, 28 S. E. 354 (1897).

It is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary

in indictments prior to the adoption of the section. *State v. Covington*, 117 N. C. 834, 23 S. E. 337 (1895).

The omission of the word "wound" in an indictment for murder was held not fatal, long before the adoption of the present short form of indictment for murder under this section. *State v. Rinehart*, 75 N. C. 58 (1876); *State v. Ratliff*, 170 N. C. 707, 86 S. E. 997 (1915).

An indictment of murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by this section being sufficient. *State v. Kirksey*, 227 N. C. 445, 42 S. E. (2d) 613 (1947).

A bill of indictment, drawn in the statutory form as required by this section, includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. *State v. Smith*, 223 N. C. 457, 27 S. E. (2d) 114 (1943).

**Variance between Allegata and Probata.**—Where indictment charged capital felony of murder in the language of this section and contained every necessary averment, proof that murder was committed in the perpetration of felony constituted no variance between *allegata* and *probata*. *State v. Mays*, 225 N. C. 486, 35 S. E. (2d) 494 (1945).

**§ 15-145. Form of bill for perjury.**—In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed. In indictments for perjury the following form shall be sufficient, to wit:

The jurors for the State, on their oath, present, that A. B., of ..... County, did unlawfully commit perjury upon the trial of an action in ..... court, in ..... County, wherein ..... was plaintiff and ..... was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true. (1842, c. 49, s. 1; R. C., c. 35, s. 16; Code, s. 1185; 1889, c. 83; Rev., ss. 3246, 3247; C. S., s. 4615.)

**Cross Reference.**—As to perjury generally, see § 14-209 et seq.

**In General.**—A person charged with perjury must be indicted by the grand jury as the offense is a felony. A trial without an indictment is contrary to the Constitution, Art. 1, § 12. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913).

But a defendant certainly can derive no

**Variance in Time Not Fatal.**—Where an indictment for murder charged the killing to have taken place December fifth and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found. Held, that the variance was not fatal. *State v. Pate*, 121 N. C. 659, 28 S. E. 354 (1897).

**Indictment under Section Held to Give Full Information of Crime.**—Where an indictment was drawn according to this section the defendant was given full information of the crime on which he was being tried. There was nothing indefinite or uncertain about the bill of indictment. It was in the alternative, but this was merely two counts in one bill of indictment. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

**Applied in** *State v. Kirkman*, 208 N. C. 719, 182 S. E. 498 (1935); *State v. Dills*, 210 N. C. 178, 185 S. E. 677 (1936); *State v. Hudson*, 218 N. C. 219, 10 S. E. (2d) 730 (1940).

**Cited in** *State v. Thornton*, 211 N. C. 413, 190 S. E. 758 (1937); *State v. Godwin*, 211 N. C. 419, 190 S. E. 761 (1937); *State v. Smith*, 221 N. C. 278, 20 S. E. (2d) 313 (1942).

just benefit from the insertion in the charge of the minutiae of what would constitute perjury. The use of such phraseology was indeed always illogical, and the experience of ages has been that it served not so much to enlighten the defendant as to the charge he was to meet, as to present a network of technicalities which hindered the trial of the cause upon its merits and very often

caused a miscarriage of justice. *State v. Gates*, 107 N. C. 832, 12 S. E. 319 (1890).

And thus the purpose of this section is to render unnecessary useless details and niceties, in charging the offense of perjury, that one time prevailed to the prejudice of the administration of criminal justice. *State v. Robertson*, 98 N. C. 751, 4 S. E. 511 (1887).

This section dispenses with the necessity of setting forth the record of the indictment, on the trial of which the false oath is alleged to have been taken, and only requires that the substance would be set forth, but it did not dispense with the necessity of making all the averments in an indictment for perjury which were all necessary to be proved, and it is necessary to prove in what court, or before whom, the oath was taken. *State v. Lewis*, 93 N. C. 581 (1885).

**Section Constitutional.**—The form of indictment for perjury prescribed by this section is sufficient and legal. *State v. Gates*, 107 N. C. 832, 12 S. E. 319 (1890); *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890); *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 (1923), overruling *State v. Cline*, 150 N. C. 854, 64 S. E. 591 (1909).

**Word "Feloniously" Not Necessary.**—In the cases of *State v. Shaw*, 117 N. C. 764, 23 S. E. 246 (1895) and *State v. Bunting*, 118 N. C. 1200, 24 S. E. 118 (1896), which were indictments for perjury, it was expressly held that the term "feloniously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the adoption of this section which established the form for indictment for perjury. The court, however, in rendering these decisions, was evidently not advertent to the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not called to its attention; the statute having been enacted at a subsequent session and being Chapter 83, Laws of 1889. *State v. Harris*, 145 N. C. 456, 59 S. E. 115 (1907).

But this section does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. *State v. Harris*, 145 N. C. 456, 59 S. E. 115 (1907); *State v. Holder*, 153 N. C. 606, 69 S. E. 66 (1910).

**Sufficient Averment of Jurisdiction.**—The jurisdiction of the justice of the peace of the complaint upon the examination whereof the alleged perjury was committed is sufficiently averred where it is averred, that the justice had power to administer

the oath. *State v. Davis*, 69 N. C. 495 (1873).

**Style of the Court.**—The style of the court before which the perjury is alleged to have been committed must be legally set forth. *State v. Street*, 5 N. C. 156, 3 Am. Dec. 682 (1807).

**Proceedings Not Set Out.**—Where an indictment for perjury alleges that the false oath was taken before a justice of the peace upon the trial of a warrant, etc., it is not necessary to set forth the proceedings in which the false oath was alleged to have been made. *State v. Roberson*, 98 N. C. 751, 4 S. E. 511 (1887).

**Indictment Need Not Charge Materiality of False Testimony.**—Prior to the adoption of this section it was settled that in indictments for perjury the indictment must charge that the alleged false testimony was material to the issue. See *State v. Mumford*, 12 N. C. 519 (1828); *State v. Davis*, 69 N. C. 495 (1873). Since this section was passed, however, it has been repeatedly held that this need not appear in the indictment. See *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 (1923) and cases cited. The case of *State v. Cline*, 150 N. C. 854, 64 S. E. 591 (1909), evidently overlooked the provisions of this section as well as the cases previously construing it and held in accordance with the former view that the materiality of the false testimony must be charged in the indictment. This case was expressly overruled by the court in *State v. Hawley*, supra.

But the averment in a bill that defendant committed perjury includes the necessity for proving that the false testimony was material to the issue. *State v. Cline*, 146 N. C. 640, 61 S. E. 522 (1908).

**Variance Held Fatal.**—Where an indictment for perjury charged that the false oath was taken at one term of a court in a trial between A and B and the records of that court showed that at that term there was no trial between these parties, but the record showed that at a term other than the one alleged in the indictment there was such a trial, and the judge allowed this record to be introduced: Held, error, and that the variance was fatal. *State v. Lewis*, 93 N. C. 581 (1885).

**Not Quashed for Omissions.**—Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it; but the defendant should be held until a proper indictment is had. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718 (1891).



**Surplusage.**—Where perjury was alleged to have been committed in the trial of a “suit, controversy, or investigation,” without a definite statement of the nature of the proceeding, the words, “suit, controversy, or investigation,” under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888 (1923).

An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not de-

fective because it sets out the name of the justice before whom the case was tried. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718 (1891).

**No Change in Proof Required.**—This section has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the crime. *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890); *State v. Cline*, 146 N. C. 640, 61 S. E. 522 (1908).

**Applied in** *State v. Rhinehart*, 209 N. C. 150, 183 S. E. 388 (1936).

§ 15-146. **Bill for subornation of perjury.**—In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed. (1842, c. 49, s. 2; R. C., c. 35, s. 17; Code, s. 1186; Rev., s. 3248; C. S., s. 4616.)

§ 15-147. **Former conviction alleged in bill for second offense.**—In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. (R. C., c. 35, s. 18; Code, s. 1187; Rev., s. 3249; C. S., s. 4617.)

**In General.**—When a second conviction is punished with other or greater punishment than for a first conviction, the first conviction shall be charged as required by this section. *State v. Davidson*, 124 N. C. 839, 32 S. E. 957 (1899).

**No Presumption of Second Conviction.**—The first conviction of manufacturing or

aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641 (1922).

§ 15-148. **Manner of alleging joint ownership of property.**—In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint stock companies and trustees. (R. C., c. 35, s. 19; Code, s. 1188; Rev., s. 3250; C. S., s. 4618.)

**Apparent Variance Cured.**—Where property is charged in an indictment for larceny as belonging to A and another, and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by

this section. *State v. Capps*, 71 N. C. 93 (1874).

Where A makes a crop of cotton on the plantation of B, under a verbal agreement that B is to have half of it, it was held, that in an indictment for larceny the cotton

was properly charged to be the property of A and another. *State v. Patterson*, 68 N. C. 292 (1873).

**Variance Not Cured.**—Upon the trial of an indictment for injury to livestock, it was held to be a variance where the property was laid in “L. S. and others,” and the proof was that L. S. was the exclusive

owner. *State v. Hill*, 79 N. C. 657 (1878).

**Words “And Another or Others” Invalidates.**—An indictment for larceny, which charges the thing taken to be the property of J. R. D. “and another or others” is fatally defective under this section. *State v. Harper*, 64 N. C. 129 (1870).

§ 15-149. **Description in bill for larceny of money.**—In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven. (1876-7, c. 68; Code, s. 1190; Rev., s. 3251; C. S., s. 4619.)

**Purpose of Section.**—An indictment, before 1877, for stealing “money” without further description could not have been sustained, and the legislature, to remedy the difficulty of describing and identifying bank bills, treasury notes, etc., which may be stolen, passed this section. *State v. Reese*, 83 N. C. 637 (1880).

**Amount Should Be Charged.**—The term “money,” without anything added to make it more definite, is too loose in indictments, and it should be described at least by the amount, as to how many dollars and cents. *State v. Reese*, 83 N. C. 637 (1880).

**Charge Sufficient.**—The charge of the theft of “\$5 in money of the value of \$5” is good under this section and is sustained by

the proof of the theft of any kind of coin or treasury or bank notes without proof of the particular kind of coin or treasury or bank note. *State v. Carter*, 113 N. C. 639, 18 S. E. 517 (1893).

Inasmuch as money is the measure of values a charge in an indictment of taking “ten dollars in money” is an allegation of taking “the value of ten dollars.” *State v. Brown*, 113 N. C. 645, 18 S. E. 51 (1893).

**Variance Allowed.**—Where an indictment charged the larceny of “thirty dollars in money,” and the proof was that defendant stole “three ten dollar bills” it was held, no variance. *State v. Freeman*, 89 N. C. 469 (1883).

§ 15-150. **Description in bill for embezzlement.**—In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved. (1871-2, c. 145, s. 2; Code, s. 1020; Rev., s. 3252; C. S., s. 4620.)

**Cross Reference.**—As to embezzlement in general, see § 14-90 et seq.

**Sufficient Description of Property.**—The description of the property embezzled, as “one note for five dollars in money of the value of five dollars,” is sufficiently specific. *State v. Fain*, 106 N. C. 760, 11 S. E. 593 (1890).

**Surplusage Which Does Not Vitiates.**—An allegation in an indictment for embezzlement that the defendant “did steal, take, carry away” the property alleged to have been embezzled, is surplusage, and

will not vitiate an indictment otherwise sufficient. *State v. Fain*, 106 N. C. 760, 11 S. E. 593 (1890).

**Variance.**—In a prosecution for embezzlement the failure of proof of embezzlement of the whole sum charged in the bill of indictment does not constitute a fatal variance between allegation and proof where there is proof of embezzlement of a sum less than that charged in the indictment. *State v. Dula*, 206 N. C. 745, 175 S. E. 80 (1934).

§ 15-151. **Intent to defraud; larceny and receiving.**—In any case where an intent to defraud is required to constitute the offense of forgery, or any

other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny. (1852, c. 87, s. 2; R. C., c. 35, ss. 21, 23; 1874-5, c. 62; Code, s. 1191; Rev., s. 3253; C. S., s. 4621.)

**Cross Reference.**—As to larceny and receiving stolen goods generally, see § 14-70 et seq., and § 53-129.

**In General.**—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank in which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47 (1923).

**§ 15-152. Separate counts; consolidation.** — When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses. (1917, c. 168; C. S., s. 4622; 1921, c. 100.)

**Cross References.**—As to the amount of solicitors' fees, see § 6-12. As to writing separate counts in violation of laws regulating intoxicating liquors, see § 18-10.

**Editor's Note.**—By the 1921 amendment the first proviso to this section, regarding the fees of the solicitor, was amended. The former wording provided that the defendant should be taxed half fees for each subsequent count upon which conviction was had. The amendment in addition to allowing the half fee on but one subsequent count added at the end of the proviso the words "or plea of guilty entered."

**General Verdict Covers Several Counts.**—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to

**Solicitor Need Not Elect Count.**—On trial of an indictment for larceny and receiving, etc., the two counts relating to the same transaction and varied to meet the probable proofs, the court will not order the solicitor to elect upon which count he will proceed. *State v. Morrison*, 85 N. C. 561 (1881).

**General Verdict Correct.**—A general verdict of guilty upon an indictment of two counts—one for stealing and the other for receiving stolen goods of a value less than five dollars—is correct and if one count is defective the verdict will be taken upon the good count, and there may be judgment. *State v. Bailey*, 73 N. C. 70 (1875); *State v. Leak*, 80 N. C. 403 (1879).

each count will be sustained for the separate offenses. *State v. Mills*, 181 N. C. 530, 106 S. E. 677 (1921).

**Offenses of Same Class.**—An indictment charging the defendant with "receiving stolen goods," etc., with evidence tending to show the receiving on several occasions, does not require the solicitor to select the count on which he would proceed, on defendant's motion, each offense being of the same class of crime. *State v. Charles*, 195 N. C. 868, 142 S. E. 486 (1928).

**Entering Judgment on Each Offense upon General Verdict of Guilty.**—Where the trial of two separate criminal indictments are consolidated by the judge and tried together as authorized by this section and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of

them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and held further, the sentences being concurrent, the defendant was not prejudiced. *State v. Harvell*, 199 N. C. 599, 155 S. E. 257 (1930).

Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial, as authorized by this section, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. *State v. Braxton*, 230 N. C. 312, 52 S. E. (2d) 895 (1949).

**When Order of Consolidation Made in Capital Cases.**—An order of consolidation in capital cases will be made when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might be threatened by the consolidation. *State v. Harris*, 223 N. C. 697, 28 S. E. (2d) 232 (1943).

**Obstructing Highway and Injury to Property.**—It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248 (1925).

**Delivering Liquor and Keeping for Sale.**—Under this section consolidation of charges of delivering and keeping for sale under the Turlington Act is proper. *State v. Jarrett*, 189 N. C. 516, 127 S. E. 590 (1925).

**Arson and House Burning.**—Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. *State v. Brown*, 182 N. C. 761, 108 S. E. 349 (1921).

**Housebreaking and Larceny.**—When not subject to legal objection, a motion by the solicitor to consolidate two criminal actions for trial is addressed to the discretion of the trial judge, and where prosecutions for housebreaking and larceny on two occasions during the same night against two defendants are consolidated without objection, and the charges are so connected in time and place that evidence of guilt in one action is competent in the other, the order of the trial judge consolidating the

actions will not be held for error on appeal. *State v. Combs*, 200 N. C. 671, 158 S. E. 252 (1931).

**Murder of One Person and Assault upon Another.**—Upon the trial under an indictment charging the prisoner with murder of M., it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D., the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge. *State v. Rice*, 202 N. C. 411, 163 S. E. 112 (1932).

**Separate Acts of Rape.**—Where the evidence tended to show that defendant, a negro, was walking through woods with a negro girl and forced her to have sexual intercourse with him against her will, that on the same night, while defendant was still in company with the colored girl, he met a white girl in the company of two white boys, and that after an altercation with the white boys, they and the colored girl left the white girl with defendant and that he forced her to have sexual intercourse with him against her will, the consolidation of the prosecutions for the purpose of trial was not error. *State v. Chapman*, 221 N. C. 157, 19 S. E. (2d) 250 (1942).

**Rape and Carnal Knowledge of Female.**—A charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under § 14-26, were properly joined in separate counts in one indictment under this section, since they are related in character and grow out of the same transaction. *State v. Hall*, 214 N. C. 639, 200 S. E. 375 (1939).

**Burglary and Rape.**—A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the two offenses being of the same class, which under this section may be joined in one indictment in separate counts, and it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. *State v. Smith*, 201 N. C. 494, 160 S. E. 577 (1931).

**Offenses Related to Operation of Automobile.**—A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating

liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, and separate judgments may be entered upon the jury's verdict of guilty of reckless driving and assault. *State v. Fields*, 221 N. C. 182, 19 S. E. (2d) 486 (1942).

**Reckless Driving and Passing Standing School Bus.**—Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial as provided in this section. *State v. Webb*, 210 N. C. 350, 186 S. E. 241 (1936).

It is permissible to join counts charging conspiracy and successive steps thereafter taken by the respective conspirators in executing the common design. *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935).

It is not error, under this section, for the trial court to refuse a separate trial on each two counts in an indictment charging defendants with conspiracy to rob and with murder committed in the attempt to perpetrate the robbery. *State v. Green*, 207 N. C. 369, 177 S. E. 120 (1934).

**Consolidation Is within Discretionary Power of Trial Court.**—The defendant was tried separately in municipal court on two warrants, each charging assault with a deadly weapon, but upon different persons on separate occasions about fifteen days apart. On appeal to the superior court, the court, upon motion of the solicitor, consolidated the cases for trial. Under the provisions of this section, the order of consolidation was within the discretionary power of the trial court. *State v. Waters*, 208 N. C. 769, 182 S. E. 483 (1935). See also, *State v. McLean*, 209 N. C. 38, 182 S.

E. 700 (1935), wherein indictments charging embezzlement were consolidated.

The court is authorized by this section to order the consolidation for trial of two or more indictments, in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. *State v. Norton*, 222 N. C. 418, 23 S. E. (2d) 301 (1942).

Upon the consolidation and trial together over defendants' objection of two indictments the first against all three of defendants for abduction of a fourteen-year-old girl, and the second against two of the three defendants for an assault with intent to commit rape upon the abducted child during the abduction, while a verdict of guilty on the first charge and a verdict of not guilty on the second would seem to render the exception to the consolidation reckless, the right to consolidate was in the sound discretion of the trial court. *State v. Truelove*, 224 N. C. 147, 29 S. E. (2d) 460 (1944).

**Motion to Consolidate Is Not an Assent to a Mistrial.**—A motion to consolidate three capital cases in *medias res* pending the taking of testimony on the trial of one of them, is not an assent to a mistrial in order to effect a consolidation. *State v. Harris*, 223 N. C. 697, 28 S. E. (2d) 232 (1943).

Applied in *State v. Lancaster*, 210 N. C. 584, 187 S. E. 802 (1936).

Cited in *State v. Alridge*, 206 N. C. 850, 175 S. E. 191 (1934); *State v. Wells*, 219 N. C. 354, 13 S. E. (2d) 613 (1941); *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.).

§ 15-153. **Bill or warrant not quashed for informality.**—Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment. (37 Hen. VIII, c. 8; 1784, c. 210, s. 2, P. R.; 1811, c. 809, P. R.; R. C., c. 35, s. 14; Code, s. 1183; Rev., s. 3254; C. S., s. 4623.)

- I. Nature and Purpose.
- II. General Effect.
- III. Defects Cured.

- A. In General.
- B. Omissions and Mistakes.
- C. Allegations Differing from Proof.

#### Cross References.

As to particular defects which do not vitiate, see § 15-155. For examples of

sufficient indictments, see the notes under the various sections dealing with particular crimes.

#### I. NATURE AND PURPOSE.

**Purpose of Section.**—As far back as *State v. Moses*, 13 N. C. 452 (1830), the court, speaking of this section, says: "This law was certainly designed to uphold the execution of public justice, by freeing the

courts from those fetters of form, technicality, and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. \* \* \* We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the court to proceed to judgment, without regard to two things—one of the form, the other refinement." *State v. Hester*, 122 N. C. 1047, 29 S. E. 380 (1898). See *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381 (1898), which uses the same language. See also, *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47 (1923); *State v. Switzer*, 187 N. C. 88, 121 S. E. 43 (1924); *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (1941) (dis. op.).

This section and § 15-155 were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. *State v. Leeper*, 146 N. C. 655, 61 S. E. 585 (1908).

The whole purpose of the law is to administer justice and that law and order and orderly government may at all times be maintained. *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

**Quashing Indictments Not Favored.**—Quashing indictments is not favored. It releases recognizances and sets the defendant at large where, it may be, he ought to be held to answer upon a better indictment, though allowable, where it will put an end to the prosecution altogether, and advisable where it appears that the court has not jurisdiction, or where the matter charged is not indictable in any form.

It is, therefore, a general rule that no indictment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. *State v. Flowers*, 109 N. C. 841, 13 S. E. 718 (1891). See *State v. Colbert*, 75 N. C. 368 (1876).

**Approved Forms Should Be Followed.**—This section was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments

with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations. *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381 (1898); *State v. Marsh*, 132 N. C. 1000, 43 S. E. 828 (1903).

## II. GENERAL EFFECT.

**Liberal Construction.**—This section has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as in form of indictment. *State v. Smith*, 63 N. C. 234 (1869); *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373 (1917).

Under this section bills and warrants are no longer subject to quashal "by reason of any informality or refinement." *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935); *State v. Dale*, 218 N. C. 625, 12 S. E. (2d) 556 (1940).

This section provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for nonessential or minor defects. *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686 (1947).

**Plain, Intelligible and Explicit Charge Sufficient.**—The current is all one way, sweeping away by degrees "informalities and refinements," until a plain, intelligible and explicit charge is all that is now required in any criminal proceeding. *State v. Smith*, 63 N. C. 234 (1869); *State v. Caylor*, 178 N. C. 807, 101 S. E. 627 (1919). See also *State v. Everhardt*, 203 N. C. 610, 166 S. E. 738 (1932); *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941).

If a warrant is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment, it meets the requirements of this section. *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84 (1950).

A joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. Held: The use of the word "his" instead of "their" is insufficient ground for arresting the judgment, informalities and refinements being disregarded if the indictment is sufficient to inform defendants of the charge against them and to enable them to prepare their defense, and to protect them

from another prosecution. *State v. Linney*, 212 N. C. 739, 194 S. E. 470 (1938).

A charge of the receipt by defendant of official ballots, knowing that he had no legal right to them, amounts to a charge of interference with the duty of the county board of elections to safely keep the ballots until time for delivery to the registrars, within the provisions of this section, and the bill of indictment should not have been quashed because it failed to charge the manner in which the election officials were interfered with. *State v. Abernethy*, 220 N. C. 226, 17 S. E. (2d) 25 (1941).

**Same—Describing Property.**—The description in an indictment must be in the common and ordinary acceptance of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant in any subsequent prosecution for the same offense. *State v. Campbell*, 76 N. C. 261 (1877); *State v. Martin*, 82 N. C. 672 (1880); *State v. Caylor*, 178 N. C. 807, 101 S. E. 627 (1919).

**Following Words of Statute.**—Where an indictment follows the words of a statute it is sufficient under this section. *State v. Harrison*, 145 N. C. 408, 59 S. E. 867 (1907); *State v. Leeper*, 146 N. C. 655, 61 S. E. 585 (1908). See also *State v. Davis*, 203 N. C. 47, 164 S. E. 732 (1932).

**Rule Also Applied in Defendant's Favor.**—Although the rule prohibiting reliance upon technicalities applies only against defendants, it is in accordance with the spirit of the section that it should be invoked in their favor also, for example as to the form of defendant's objection to the indictment. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050 (1918).

**Motion in Arrest of Judgment.**—A motion in arrest of judgment after conviction, on the ground that the bill of indictment is defective, will not be granted unless it appears that the bill is so defective that judgment cannot be pronounced upon it. *State v. Francis*, 157 N. C. 612, 72 S. E. 1041 (1911); *State v. Ratliff*, 170 N. C. 707, 86 S. E. 997 (1915); *State v. Sauls*, 190 N. C. 810, 130 S. E. 848 (1925).

And where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by this section. *State v. Darden*, 117 N. C. 697, 23 S. E. 106 (1895).

**Indictment under Private Law.**—Upon an indictment under a private statute, it is sufficient if the same is set forth by chapter

and date and its material provisions incorporated in the indictment. *State v. Heaton*, 77 N. C. 505 (1877).

**Does Not Supply Essential Averments.**—By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *State v. Cole*, 202 N. C. 592, 163 S. E. 594 (1932). See *State v. Tarlton*, 208 N. C. 734, 182 S. E. 481 (1935); *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 355 (1942) (dis. op.).

**Where the indictment contains sufficient matter to enable the court to proceed to judgment** a motion to quash for duplicity or indefiniteness is properly refused, and a motion to quash for redundancy or artificiality is addressed to the sound discretion of the trial court. *State v. Davis*, 203 N. C. 13, 164 S. E. 737 (1932); *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686 (1947).

**Prisoner Is Held Although Indictment Is Defective.**—Where the indictment should have been quashed because it was defective in form, the prisoner could still be held for a proper bill under this section. *State v. Callett*, 211 N. C. 563, 191 S. E. 27 (1937).

**Applied in** *State v. Blanton*, 227 N. C. 517, 42 S. E. (2d) 663 (1947).

**Quoted in** *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941).

**Cited in** *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937); *State v. Miller*, 231 N. C. 419, 57 S. E. (2d) 392 (1950).

### III. DEFECTS CURED.

#### A. In General.

**Superfluous Words Disregarded.**—The use of superfluous words in a bill of indictment will be disregarded. *State v. Guest*, 100 N. C. 410, 6 S. E. 253 (1888); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890); *State v. Darden*, 117 N. C. 697, 23 S. E. 106 (1895); *State v. Piner*, 141 N. C. 760, 53 S. E. 305 (1906); *State v. Wynne*, 151 N. C. 644, 65 S. E. 459 (1909).

**Variance Must Be Material to Vitiare.**—A variance now, since this section was passed, to be fatal must be substantial and material. *State v. Ridge*, 125 N. C. 655, 34 S. E. 439 (1899).

**Immaterial Words May Be Omitted.**—The inadvertent omission of words not affecting the substances of the charge or prejudicing the defendant is not fatal.

State v. Burke, 108 N. C. 750, 12 S. E. 1000 (1891), and cases there cited. State v. Ratliff, 170 N. C. 707, 86 S. E. 997 (1915).

**Stripping Nonessential Words from Warrant.**—A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of non-tax-paid whiskey, is sufficient to survive a motion to quash. State v. Camel, 230 N. C. 426, 53 S. E. (2d) 313 (1949).

**Endorsement by Grand Jury Unnecessary.**—No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. State v. McBroom, 127 N. C. 528, 37 S. E. 193 (1900), overruled. State v. Sultan, 142 N. C. 369, 54 S. E. 841 (1906); State v. Long, 143 N. C. 670, 57 S. E. 349 (1907).

#### B. Omissions and Mistakes.

**In the Complaint.**—The omission of the name of the party in the complaint, against whom a criminal offense is charged, will not of itself invalidate the indictment, when the warrant of arrest thereto attached and referred to contains his name and clearly indicates him as the person charged, the complaint and warrant being read together, and in this way they are sufficient in form to proceed to judgment upon conviction. State v. Poythress, 174 N. C. 809, 93 S. E. 919 (1917).

**In Describing a Lease.**—In describing a lease the omission of the word "year" after the word "one", is one of the informalities cured by this section. State v. Walker, 87 N. C. 541 (1882).

**Incorrect Spelling.**—Charging that one committed a crime in the "count aforesaid" instead of county aforesaid is an informality which is cured by this section. State v. Smith, 63 N. C. 234 (1869); State v. Evans, 69 N. C. 40 (1873).

**Wrong County in Caption.**—A misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment, and it seems that such an indictment would have been sufficient even before this section was adopted. State v. Sprinkle, 65 N. C. 463 (1871); State v. Davis, 225 N. C. 117, 33 S. E. (2d) 623 (1945).

**Omission of Caption.**—The omission of the caption of a bill of indictment does not constitute ground for arrest of judgment. State v. Davis, 225 N. C. 117, 33 S. E. (2d) 623 (1945).

**Name of Court Incorrect.**—Describing the court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a justice of the peace, in and for

said county," instead of as "a court of a justice of the peace for township A, of Chowan County," is not a substantial variance from the true description and is cured by this section. State v. Davis, 69 N. C. 495 (1873).

**Failure to Repeat Names in Charging Scienter.**—Where defendants contended that a count in the indictment charging receiving stolen goods was fatally defective in that the names of defendants were not repeated in charging scienter, it was held that the defect was merely an informality or refinement not sufficient to support a quashal of the indictment, the charge being plain, explicit and sufficient to enable the court to proceed to judgment. State v. Whitley, 208 N. C. 661, 182 S. E. 338 (1935).

**Ownership of Property in Arson.**—In a prosecution under §§ 14-5, 14-65, an indictment stating that the defendant procured another to burn a certain house owned by the defendant and another as tenants in common is sufficient, and the fact that the same parties owned other houses in like capacity is not ground for demurrer or quashal. State v. McKeithan, 203 N. C. 494, 166 S. E. 336 (1932).

#### C. Allegations Differing from Proof.

**Names of Parties.**—Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, the variance is immaterial. State v. Drakeford, 162 N. C. 667, 78 S. E. 308 (1913).

Where indictment alleged that Thomas R. Robertson was defendant, and the proof was that "Thomas Robertson" was the defendant in said action and there was evidence of the identity of Thomas Robertson and Thomas R. Robertson, this is an informality cured by the section. State v. Hester, 122 N. C. 1047, 29 S. E. 380 (1898).

In an indictment for murder, the assault is charged to have been made on one "N. S. Jarrett," and in subsequent parts of the indictment he is described as "Nimrod S. Jarrett," Held, to be no variance. State v. Henderson, 68 N. C. 348 (1873).

**Name of Article Stolen.**—In an indictment for larceny, when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin: Held, no variance between the allegation and the proof. State v. Campbell, 76 N. C. 261 (1877).

**Object Used in Commission of Assault.**—Evidence that defendant committed the assault with a "brick or a rock or what" was not fatal variance with a warrant



charging that the assault was committed with a brick, the evidence being sufficient to justify the jury in inferring that the assault was committed with a brick as charged, and there being no element of

surprise in the evidence, especially since defendant's defense was that of an alibi. *State v. Hobbs*, 216 N. C. 14, 3 S. E. (2d) 431 (1939).

**§ 15-154. No quashal for grand juror's failure to pay taxes or being party to suit.**—No indictment shall be quashed nor shall judgment thereon be arrested by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue. (1907, c. 36; C. S., s. 4624.)

**Cross Reference.**—As to when exceptions for disqualification of grand jurors should be made, see § 9-26.

**§ 15-155. Defects which do not vitiate.**—No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense. (7 Hen. VIII, c. 8; R. C., c. 35, s. 20; Code, s. 1189; Rev., s. 3255; C. S., s. 4625.)

**Cross Reference.** — As to other defects which do not vitiate an indictment, see the notes under § 15-153 and under the various sections dealing with the particular crimes.

**In General.**—The refined technicalities of the procedure at common law, in both civil and criminal cases, have almost entirely, if not quite, been abolished by our statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47 (1923).

The modern tendency is against technical objections which do not affect the merits of the case. Hence judgments are not to be stayed or reversed for nonessential or minor defects. *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935).

**Section Cures Formal Defects.** — This section is intended to cure only formal defects in the indictment after judgment, and not omissions of averments necessary to enable the court to give judgment intelligently. *State v. Wise*, 66 N. C. 120 (1872).

**Locality May Be Omitted.** — Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions, but this has been wisely reversed by this section. *State v. Long*, 143 N. C. 670, 57 S. E. 349 (1907).

**Other Expressions Omitted.**—Omitting the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State," are not fatal defects. *State v. Howard*, 92 N. C. 772 (1885).

**When Time Need Not Be Charged.** — Where time is not of the essence of a crime, "the omission to charge any date" is immaterial by this section, though the allegation of time can do no harm. *State v. Taylor*, 83 N. C. 602 (1880); *State v. Arnold*, 107 N. C. 861, 11 S. E. 990 (1890); *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890); *State v. Williams*, 117 N. C. 753, 23 S. E. 250 (1895).

Thus time is not of the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803 (1923).

While an appeal from conviction in a recorder's court upon a warrant, charging unlawful possession on a certain date of intoxicating liquors for the purpose of sale, was pending in the superior court, that court had jurisdiction to try defendant on

a bill of indictment of a later date charging the same offense, where the record contains nothing to show that the offenses are identical. Time is not of the essence and need not be specified in the indictment. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

**Failure to specify a particular day in an indictment for abandonment** is not fatal especially in view of an instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after a particular date. *State v. Jones*, 201 N. C. 424, 160 S. E. 468 (1931).

**Time of Birth in Bastardy Proceeding.**—Indictment, in a bastardy proceeding, which states that the child was born on August 13, 1941, whereas the evidence was that the birth occurred on November 13, 1940, is not fatally defective. *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31 (1942).

**Conclusion Simplified.**—The formal conclusion, “against the peace and dignity of the State,” and “against the form of the statute,” etc., are not necessary in an indictment for any offense whatever, but are mere surplusage. *State v. Kirkman*, 104 N. C. 911, 10 S. E. 312 (1889), overruling *State v. Joyner*, 81 N. C. 534 (1879); *State v. Sykes*, 104 N. C. 694, 10 S. E. 191 (1889); *State v. Peters*, 107 N. C. 876, 12 S. E. 74 (1890); *State v. Dudley*, 182 N. C. 822, 109 S. E. 63 (1921).

That an indictment concludes against the form of the statute instead of statute, is no ground for an arrest of judgment. *State v. Smith*, 63 N. C. 234 (1869).

An indictment concluding against the “force” instead of the “form” of the statute is sufficient under this section. *State v. Davis*, 80 N. C. 385 (1879).

**Variance.**—In a prosecution of defendant for being an accessory before the fact of murder, variance of a few days between the indictment and proof as to the day the murder was committed is not fatal under this section. *State v. Gore*, 207 N. C. 618, 178 S. E. 209 (1935).

It is to the girl’s first act of intercourse with a man when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. *State v. Trippe*, 222 N. C. 600, 24 S. E. (2d) 340 (1943).

**Jurisdiction.**—Where the jurisdiction of the court is not ousted on the face of the indictment the position that the court does not have jurisdiction is not available on a plea in abatement. *State v. Davis*, 203 N. C. 13, 164 S. E. 737 (1932).

**A charge in a murder prosecution in the alternative was not a vitiating defect**, and the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

**Cited in** *State v. Dale*, 218 N. C. 625, 12 S. E. (2d) 556 (1940); *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941); *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (1942) (dis. op.).

## ARTICLE 16.

### *Trial before Justice.*

§ 15-156. **In cases of final jurisdiction.**—When the justice is satisfied that he has jurisdiction, if no jury is asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars or imprisonment in the county jail for thirty days. (1868-9, c. 178, subc. 4, s. 8; Code, s. 897; Rev., s. 3256; C. S., s. 4626.)

**Cross References.**—As to jurisdiction of justice in criminal actions, see § 7-129 and notes. As to divesting inferior courts of exclusive original jurisdiction in certain criminal actions, see § 7-64.

**An Adversary Proceeding Intended.**—It was contemplated there should be an adversary proceeding in all trials of criminal cases before a justice of the peace, especially when the justice assumes final juris-

diction. It was never intended that the accused should be also the accuser and the sole witness against himself. Such a proceeding would not conduce to the discovery of truth, and the detection and punishment of crime, which is the real object to be obtained, and would oftener than otherwise defeat the very ends of justice. *State v. Moore*, 136 N. C. 581, 48 S. E. 573 (1904).

§ 15-157. **Trial by jury, if demanded.**—If either the complainant or the

accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace. (1868-9, c. 178, subc. 4, s. 9; Code, s. 898; Rev., s. 3257; C. S., s. 4627.)

**Cross References.**—As to constitutional provisions, see N. C. Constitution, Art. I, § 13, and U. S. Constitution, Art. III, § 2, cl. 3. As to trial by jury before a justice, see § 7-150 et seq. See annotations under § 15-177.

**§ 15-158. What submitted to jury.**—In case a trial by jury is had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offense charged, and shall enter the verdict on his docket, and adjudge accordingly. (1868-9, c. 178, subc. 4, s. 10; Code, s. 899; Rev., s. 3258; C. S., s. 4628.)

**§ 15-159. Commitment after judgment.**—The commitment to the county prison shall set forth—

1. The name of the guilty person.
2. The nature of the offense of which he is convicted and the date of the trial.
3. The period of his imprisonment.
4. It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law.
5. The name of the constable or other officer required to execute it.
6. It shall be signed by the justice and be dated. (1868-9, c. 178, subc. 4, s. 17; Code, s. 1238; Rev., s. 3259; C. S., s. 4629.)

**Cross Reference.**—As to commitment of person charged with a crime, see § 15-125, § 72 (1890).

**Legality of Custody.**—When a prisoner, legally sentenced, is placed in charge of a special officer to convey to jail, the legality of his custody by the officer depends upon the validity of the special deputation of the officer, and not upon the sufficiency of the mittimus, which is to terminate his duties. *State v. Armistead*, 106 N. C. 639, 10 S. E. 872 (1890).

**Same — Where Prisoner Taken from Officer.** — It is a criminal offense to take, by force, from the custody of an officer a prisoner legally committed to his charge to convey to jail, and it is no defense that the mittimus does not comply, in all respects, with the requirements of this section. *State v. Armistead*, 106 N. C. 639, 10 S. E. 872 (1890).

**§ 15-160. Parties entitled to copy of papers; bar to indictment.**—The justice shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense. (1868-9, c. 178, subc. 4, ss. 13, 14; Code, ss. 902, 903; Rev., s. 3260; C. S., s. 4630.)

**Collusive Conviction Not a Bar.** — The conviction of a person before a justice of the peace which is collusive and not adversary is not sufficient to sustain a plea of former conviction. *State v. Moore*, 136 N. C. 581, 48 S. E. 573 (1904).

**§ 15-161. Justice to make return of cases to superior court.**—It is the duty of each justice of the peace on or before Monday of every term of the superior court of his county, to furnish the clerk of the court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law. (1869-70, c. 110; Code, s. 906; Rev., s. 3261; C. S., s. 4631.)

**Cross Reference.**—As to liability for failure to make return of cases to superior court, see § 14-231.

**When Report Unnecessary.**—A justice

of the peace is not guilty of a violation of this section by failing to make report to the clerk of the superior court when there have been no criminal cases disposed of

by him within the time therein prescribed. *State v. Latham*, 110 N. C. 490, 14 S. E. 390 (1892).

## ARTICLE 17.

### *Trial in Superior Court.*

§ 15-162. **Prisoner standing mute, plea of "not guilty" entered.**—If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same. (R. S., c. 35, s. 16; R. C., c. 35, s. 29; Code, s. 1198; Rev., s. 3262; C. S., s. 4632.)

**Deaf Mutes.**—Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf mute, and was incapable of understanding the nature of a trial, and its incidents and his rights under it, it was held proper for a jury to be empanelled to try the truth of these suggestions, for the court to decline putting the prisoner on his trial. *State v. Harris*, 53 N. C. 136 (1860).

In *State v. Early*, 211 N. C. 189, 189 S. E. 668 (1937), the court, upon finding that defendant was a deaf mute, subpoenaed an interpreter, who after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's question of whether defendant

was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. It was held that there was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty.

**Changing Plea.**—Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or vice versa, is a matter for the sound legal discretion of the trial court. *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908).

**Entry after Verdict.**—It is no error in the court below, on a trial of a defendant for larceny, "as upon a plea of not guilty," and after a verdict of guilty, to amend the record by inserting the plea of "not guilty." *State v. McMillan*, 68 N. C. 440 (1873).

§ 15-163. **Peremptory challenges of jurors by defendant.**—Every person on joint or several trial for his life may make a peremptory challenge of fourteen jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, six jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors. (22 Hen. VIII, c. 14, s. 6; 1777, c. 115, s. 85, P. R.; 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; R. S., c. 35, ss. 19, 21; R. C., c. 35, s. 32; 1871-2, c. 39; Code, s. 1199; 1887, c. 53; Rev., s. 3263; 1913, c. 31, s. 3; C. S., s. 4633; 1935, c. 475, s. 2.)

**Cross References.**—As to challenge for cause, see § 9-14 and notes, et seq. As to peremptory challenges in civil cases, see § 9-22.

**Editor's Note.**—The number of jurors that may be challenged was increased from twelve and four to fourteen and six, respectively, by the 1935 amendment.

**In General.**—Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors,

without assigning any cause, and as many more as he can assign a good cause for. *State v. Patrick*, 48 N. C. 443 (1856).

**A Right to Exclude.**—The right of peremptory challenge is not a right to select but to exclude. *State v. Smith*, 24 N. C. 402 (1842); *State v. Banner*, 149 N. C. 519, 63 S. E. 84 (1908).

**Purpose.**—The legislative intent in the enactment of this section is to secure a reasonable and impartial verdict. *State v.*

Ashburn, 187 N. C. 717, 122 S. E. 833 (1924). See note of this case under § 15-164.

**When Challenge Should Be Made.**—The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced. *State v. Patrick*, 48 N. C. 443 (1856).

**Peremptory Challenges Limited to Four.**—A defendant, in an indictment for an offense other than capital, having only four peremptory challenges to jurors, cannot challenge a fifth juror peremptorily although he had first challenged one of the four for cause, which was properly disallowed. *State v. Hargrave*, 100 N. C. 484, 6 S. E. 185 (1888). This case was decided prior to the 1935 amendment. A defendant is now allowed six peremptory challenges.—Ed. Note.

**Same—When Verdict of Manslaughter Asked.**—Where, upon the trial of an indictment for murder, the solicitor states that he should ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four peremptory challenges. *State v. Hunt*, 128 N. C. 584, 38 S. E. 473 (1901); *State v. Caldwell*, 129 N. C. 682, 40 S. E. 85 (1901). See Ed. Note in preceding paragraph.

**Judge Determines Competency.**—Triers are now dispensed with, and the judge de-

§ 15-164. **Peremptory challenges by the State.**—In all capital cases the prosecuting officer on behalf of the State shall have the right to challenge peremptorily six jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than six jurors, he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of four jurors shall be allowed in behalf of the State for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court. (33 Edw. I, c. 4; 1827, c. 10; R. C., c. 35, s. 33; Code, s. 1200; 1887, c. 53; Rev., s. 3264; 1907, c. 415; 1913, c. 31, s. 4; C. S., s. 4634; 1935, c. 475, s. 3.)

**Cross Reference.**—See notes under § 15-164.

**Editor's Note.**—The number of challenges was increased in capital cases from four to six, and in other cases from two to four, by the 1935 amendment.

**Construed with § 9-15.**—The effect of § 9-15, to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and this section, abolish-

termines the facts as well as the legal sufficiency of the challenge based upon them. *State v. Kilgore*, 93 N. C. 533 (1885).

**Waiver of Objection by Not Using Challenges.**—If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign it for error, if a jury is obtained before he has exhausted his peremptory challenges. *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1888); *State v. Sultan*, 142 N. C. 569, 54 S. E. 841 (1906).

**Where several defendants are tried together** for a crime other than a capital felony each is entitled to four (now six) peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four (now six) peremptory challenges for all the defendants, a new trial will be granted upon appeal. *State v. Burleson*, 203 N. C. 779, 166 S. E. 905 (1932).

**Challenges Where Bills of Indictment Are Consolidated.**—Where several bills of indictment against a defendant are consolidated for trial, the defendant is entitled to but four (now six) peremptory challenges to the jury as provided by this section and not to four (now six) peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. *State v. Aldridge*, 206 N. C. 850, 175 S. E. 191 (1934).

ing the established practice permitting the solicitor to place jurors, upon the trial of capital felony, at the foot of the panel, does not affect the application of § 9-15, to the trial of such felonies. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833 (1924).

**Judge Cannot Extend Time.**—The discretionary power of the trial judge in respect to challenges is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by this section than he has to allow more than four (now six) of such challenges. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797 (1894).

§ 15-165. **Challenge to special venire same as to tales jurors.**—In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors. (1887, c. 53; Rev., s. 3265; C. S., s. 4635.)

**Cross References.**—As to grounds for challenging tales jurors, see § 9-11. As to special venire in general, see § 9-29 et seq.

**Editor's Note.**—See 11 N. C. Law Rev.

219.

**Cited in** *State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205 (1945); *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

§ 15-166. **Exclusion of bystanders in trials for rape.**—In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case; and upon the preliminary hearing before a justice of the peace of the offenses above named, that officer may adopt a like course. (1907, c. 21; C. S., s. 4636.)

§ 15-167. **Term expiring during trial extended.**—In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week. (1830, c. 22; R. C., c. 31, s. 16; C. C. P., s. 397; Code, s. 1229; 1893, c. 226; Rev., s. 3266; C. S., s. 4637.)

**Section Constitutional.**—This section is constitutional. *State v. Adair*, 66 N. C. 298 (1872); *State v. Jefferson*, 66 N. C. 309 (1872); *State v. Taylor*, 76 N. C. 64 (1877); *State v. Monroe*, 80 N. C. 373 (1879). See also, *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2 (1895).

**Expiration of Term No Ground for Discharging Jury.**—The expiration of a term of court is no ground for discharging a jury before verdict, for the term may be continued for the purposes of the trial. *State v. McGimsey*, 80 N. C. 377 (1879).

**Special Term Extended.**—Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was

not improper for the trial judge to open and conduct the regular term on Monday following and to continue the special term into that week for the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby. *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2 (1895).

**Daily entries on the journal** during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 a. m. tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, constitutes a sufficient compliance with this section. *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921).

§ 15-168. **Justification as defense to libel.**—Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge. (R. C., c. 35, s. 26; Code, s. 1195; Rev., s. 3267; C. S., s. 4638.)

**Cross Reference.**—As to effect of publication in good faith and retraction by a newspaper, see § 99-2.

**Truth of Entire Charge Must Be Proved.**—Where the matter set out in the indictment is libellous, in order for the defendant to justify he must show that the entire charge imputed to the prosecutor is true. *State v. Lyon*, 89 N. C. 568 (1883).

**General Report Insufficient.**—In an indictment for a libel, it is not competent for the defendant to justify by proving that

there was, and long had been, a general report in the neighborhood, of the truth of his charge. *State v. White*, 29 N. C. 180 (1847).

**Proof of Specific Charge Necessary.**—Proof of the general bad character of an officer in other matters of which he had taken cognizance, will not be received to establish the truth of libellous charge in reference to a particular matter. *State v. Lyon*, 89 N. C. 568 (1883).

**§ 15-169. Conviction of assault, when included in charge.**—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (1885, c. 68; Rev., s. 3268; C. S., s. 4639.)

**Cross Reference.**—As to arbitrary right of jury to convict defendant of lesser degree of the crime charged, see § 15-170 and note thereto.

**Section Refers to Assault Generally.**—This section does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. *State v. Smith*, 157 N. C. 578, 72 S. E. 853 (1911).

**When Section Applicable.**—This section and § 15-170 are applicable only where there is evidence tending to show that defendant is guilty of a crime of lesser degree than that charged in the indictment. *State v. Jackson*, 199 N. C. 321, 154 S. E. 402 (1930); *State v. Sawyer*, 224 N. C. 61, 29 S. E. (2d) 34 (1944).

**What Indictment Includes.**—An indictment for any offense against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both. *State v. Williams*, 185 N. C. 685, 116 S. E. 736 (1923).

**Same—Murder.**—Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault, “if the evidence shall warrant such finding” when he is not acquitted entirely. *State v. Williams*, 185 N. C. 685, 116 S. E. 736 (1923).

**Same—Assault with Intent to Rape.**—Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury’s finding, the court may determine the grade of the punishment. *State v. Smith*, 157 N. C. 578, 72 S. E. 853 (1911).

Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under § 15-173 was properly refused where there was sufficient evidence to convict of an assault. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812 (1942).

Upon an indictment for an assault with

intent to commit rape, even though the evidence is insufficient to support a verdict, motion for judgment of dismissal or nonsuit cannot be granted, as defendant may be convicted of an assault. *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944).

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove the intent necessary for a conviction of this offense, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. *State v. Moore*, 227 N. C. 326, 42 S. E. (2d) 84 (1947).

**Duty of Judge.**—Upon the trial under an indictment for murder it is the duty of the trial judge, under supporting evidence, to declare and explain the law upon the less offense of manslaughter, with the burden of proof on defendant, and a statement of the contentions of the parties, etc., with a mere announcement of the principle is insufficient. *State v. Hardee*, 192 N. C. 533, 135 S. E. 345 (1926).

**Same—Failure to Charge upon Lesser Degree.**—The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. *State v. Williams*, 185 N. C. 685, 116 S. E. 736 (1923).

Where the indictment is sufficient and the evidence is conflicting as to whether the defendant committed highway robbery or an assault with a deadly weapon, the jury may find for the lesser offense, and it is the duty of the trial judge to so instruct the jury, though a special request therefor has not been aptly tendered in writing. *State v. Holt*, 192 N. C. 490, 135 S. E. 324 (1926).

Where all the evidence points to a graver crime and the jury’s verdict is for an offense of a lesser degree, although illogical and incongruous, it will not be disturbed,

since it is favorable to accused. *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943).

**Effect of Simple Verdict of Guilty.**—While this section permits a verdict for an assault when it is embraced in the charge of a greater offense, as rape or other felony, a verdict simply of “guilty,” and not specifying a lower offense, is a verdict of guilty of the offense charged in the indictment. *State v. Barnes*, 122 N. C. 1031, 29 S. E. 381 (1898); *State v. Lee*, 192 N. C. 225, 134 S. E. 458 (1926).

**Applied in** *State v. Johnson*, 227 N. C.

**§ 15-170. Conviction for a less degree or an attempt.**—Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. (1891, c. 205, s. 2; Rev., s. 3269; C. S., s. 4640.)

**Application of Section.**—Where there are several counts in a bill, if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty as to them. This principle should not be confused with the practice, authorized by this section, which permits the conviction of a “lesser degree of the same crime” when included in a single count. *State v. Hampton*, 210 N. C. 283, 186 S. E. 251 (1936).

The State’s evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. *State v. Feyd*, 213 N. C. 617, 197 S. E. 171 (1938).

**Crime of Accessory Included.**—The crime of accessory before the fact is included in the charge of the principal crime within the meaning of this section. *State*

587, 42 S. E. (2d) 685 (1947); *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410 (1948), treated in note under § 15-170; *State v. Matthews*, 231 N. C. 617, 58 S. E. (2d) 625 (1950).

**Cited in** *State v. Hairston*, 222 N. C. 455, 23 S. E. (2d) 885 (1943); *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943); *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944); *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834 (1948), treated under § 15-170; *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835 (1950).

*v. Bryson*, 173 N. C. 803, 92 S. E. 698 (1917), discussing and, it seems, overruling *State v. Green*, 119 N. C. 899, 26 S. E. 112 (1896); *State v. Simons*, 179 N. C. 700, 103 S. E. 5 (1920).

**Joinder Mere Surplusage.**—Since this section was adopted the joinder in an indictment of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage. *State v. Brown*, 113 N. C. 645, 18 S. E. 51 (1893).

**Indictment for Attempt or Complete Offense.**—An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. *State v. Addor*, 183 N. C. 687, 110 S. E. 650 (1922); *State v. Parker*, 224 N. C. 524, 31 S. E. (2d) 531 (1944).

**Intent Alone Not Sufficient.**—The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connected with some overt act or acts toward the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. *State v. Addor*, 183 N. C. 687, 110 S. E. 650 (1922).

**Defendant Entitled to Complete Charge.**—Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, and he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a ver-



dict of conviction upon one of a greater degree. *State v. Robinson*, 188 N. C. 784, 125 S. E. 617 (1924). See also *State v. Keaton*, 206 N. C. 682, 175 S. E. 296 (1934).

When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court. *State v. Burnette*, 213 N. C. 153, 195 S. E. 356 (1938); *State v. DeGraffenreid*, 223 N. C. 461, 27 S. E. (2d) 130 (1943). See also, *State v. Chambers*, 218 N. C. 442, 11 S. E. (2d) 280 (1940).

**And Conviction of Offense Charged Does Not Cure Error.**—A verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733 (1948).

The general rule of practice is, that when it is permissible under the indictment to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. *State v. Childress*, 228 N. C. 208, 45 S. E. (2d) 42 (1947).

**Evidence Must Justify Conviction in Lesser Degree.**—The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and the evidence does not support the charge of second degree burglary, the defendant cannot be convicted of the lesser offense. *State v. Spain*, 201 N. C. 571, 160 S. E. 825 (1931).

The provisions of this section in regard to conviction of a less degree of the crime charged in a bill of indictment applies only

where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error. *State v. Smith*, 201 N. C. 494, 160 S. E. 577 (1931).

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. *State v. Cox*, 201 N. C. 357, 160 S. E. 358 (1931); *State v. Manning*, 221 N. C. 70, 18 S. E. (2d) 821 (1942); *State v. Sawyer*, 224 N. C. 61, 29 S. E. (2d) 34 (1944).

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111 (1946); *State v. Locklear*, 226 N. C. 416, 38 S. E. (2d) 162 (1946).

Where the evidence was sufficient to carry the case to the jury upon the charge of assault with intent to commit rape but the jury returned a verdict of guilty of an assault upon a female, the defendant being a male person over 18 years of age, such verdict was authorized by this section. *State v. Morgan*, 225 N. C. 549, 35 S. E. (2d) 621 (1945).

Where the evidence justified such action, the court properly charged the jury that defendant might be acquitted of felonious assault and battery with intent to kill charged in the indictment, and convicted of an assault of lower degree, namely, an assault with a deadly weapon. *State v. Anderson*, 230 N. C. 54, 51 S. E. (2d) 895 (1949).

**Uncontradicted Evidence Showing Defendant Guilty of More Serious Offense.**—This and the preceding section were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment. *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402 (1947).

Where all the evidence tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, there being no evidence warranting court in submitting the question of defendants' guilt of less degrees of the crime. *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834 (1948).

**It would be without precedent to try defendant for one offense and to convict him of another and greater offense**, even though the conviction be of a higher degree of the same offense for which he is being tried. *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111 (1946).

**Error Not Prejudicial.**—Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. *State v. Chase*, 231 N. C. 589, 58 S. E. (2d) 364 (1950).

**Instruction Limiting Verdict to Less Degree.**—Where, in an indictment charging an assault with intent to commit rape, the evidence shows an assault but fails to show an intent to commit rape, at all events and notwithstanding any resistance on the part of the intended victim, the court would err in refusing to give an instruction to limit the verdict to a less degree of the same crime. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812 (1942); *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944).

**In a prosecution for murder**, where the evidence raises a question as to whether or not the killing was intentional, this section requires that the question of the defendant's guilt of manslaughter be submitted to the jury with proper instructions. *State v. McNeill*, 229 N. C. 377, 49 S. E. (2d) 733 (1948).

Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter, this section requires that the "less degree of the same crime" be submitted to the jury with proper instructions. *State v. Childress*, 228 N. C. 208, 45 S. E. (2d) 42 (1947).

**Charge as to Assault Unnecessary Where Homicide Admitted.**—While under the provisions of this section the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and

the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of human being. *State v. Luterloh*, 188 N. C. 412, 124 S. E. 752 (1924).

**Instructions as to Second Degree Murder Where Evidence Shows First Degree.**—Where upon the trial for murder all the evidence tends to show that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error under this section. *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186 (1934).

**Same—Assault.**—Where the evidence tended to show a simple assault by defendant on prosecuting witness and a later encounter between the parties in which defendant was armed with a deadly weapon, it was error, under this section, for the court to charge the jury that they could convict defendant of assault with the intent to kill, or assault with a deadly weapon or not guilty, and refuse to charge the jury that they might convict defendant of simple assault. *State v. Lee*, 206 N. C. 472, 174 S. E. 288 (1934).

**In prosecution for assault with a deadly weapon with intent to kill**, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt, is held without error. *State v. Elmore*, 212 N. C. 531, 193 S. E. 713 (1937).

**In a prosecution for burglary** in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. *State v. Surles*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

**In Prosecution for Robbery.**—Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410 (1948).

**Rape and carnally knowing a female** between the age of twelve and sixteen years are of such a nature as to come within the provisions of this section, permitting the

jury to find the defendants guilty of the lesser crime, if they do not deem the evidence sufficient to warrant a conviction on the first. *State v. Hall*, 214 N. C. 639, 200 S. E. 375 (1939).

**An attempt to commit barratry** is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common-law offense of barratry. *State v. Batson*, 220 N. C. 411, 17 S. E. (2d) 511, 139 A. L. R. 614 (1941).

**New Trial Must Be on Full Charge.**—Upon an appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342 (1906).

**Applied** in *State v. Jones*, 227 N. C. 402, 42 S. E. (2d) 465 (1947); *State v. Jones*, 229 N. C. 276, 49 S. E. (2d) 463 (1948); *State v. Matthews*, 231 N. C. 617, 58 S. E.

(2d) 625 (1950); *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

**Quoted** in *State v. Hairston*, 222 N. C. 455, 23 S. E. (2d) 885 (1943).

**Stated** in *State v. Beard*, 207 N. C. 673, 178 S. E. 242 (1935) (dis. op.).

**Cited** in *State v. Colson*, 194 N. C. 206, 139 S. E. 230 (1927); *State v. Ratcliff*, 199 N. C. 9, 153 S. E. 605 (1930); *State v. Palmer*, 212 N. C. 10, 192 S. E. 896 (1937); *State v. Hobbs*, 216 N. C. 14, 3 S. E. (2d) 431 (1939); *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940); *State v. Gregory*, 223 N. C. 415, 27 S. E. (2d) 140 (1943); *State v. Bentley*, 223 N. C. 563, 27 S. E. (2d) 738 (1943) (con. op.); *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944); *State v. Grimes*, 226 N. C. 523, 39 S. E. (2d) 394 (1946); *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410 (1948); *State v. Fowler*, 230 N. C. 470, 53 S. E. (2d) 853 (1949).

§ 15-171. **Burglary in the first degree charged, verdict for second degree.**—When the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do. The judge in his charge shall so instruct the jury. (1889, c. 434, s. 3; Rev., s. 3270; C. S., s. 4641; 1941, c. 7, s. 1.)

**Editor's Note.**—For comment on the 1941 amendment to this section, see 19 N. C. Law Rev. 476.

This section relates to indictments for burglary in the first degree only, and has no bearing on an appeal from a verdict of guilty of rape. *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402 (1947).

**Instruction as to Second Degree Burglary Mandatory.**—This section gives the jury the right to render a verdict of guilty of burglary in the second degree, not only where the evidence tends to show certain facts, but, "upon the findings of facts sufficient to constitute burglary in the first degree as defined by the statute—if they deem it proper so to do." This instruction is mandatory. *State v. Brown*, 227 N. C. 383, 42 S. E. (2d) 402 (1947); *State v. Hooper*, 227 N. C. 633, 44 S. E. (2d) 42 (1947).

Thus, the right of the jury under this section is not dependent upon the finding of certain facts as set forth in a charge on burglary in the second degree. *State v. Hooper*, 227 N. C. 633, 44 S. E. (2d) 42 (1947).

**Conviction in Second Degree Authorized.**—Under this section as amended a defendant is entitled, as a matter of right, to have the jury instructed that they may elect to render a verdict of guilty of burglary in the

second degree if they deem it proper so to do. *State v. McLean*, 224 N. C. 704, 32 S. E. (2d) 227 (1944).

**Conviction of Attempt to Commit Burglary in Second Degree.**—In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. *State v. Surlis*, 230 N. C. 272, 52 S. E. (2d) 880 (1949).

**Permissible Verdicts When Jury Finds Facts Constituting Burglary in First Degree.**—Taking § 14-52 and this section together, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

**Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set**

**Aside.**—See this catchline in note to § 14-51.

**Conviction in Second Degree Unauthorized under Former Law.**—Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree was not authorized by this section as it stood prior to the 1941 amendment, since a felonious entry under such

circumstances is by § 14-51 made burglary in the first degree. *State v. Johnston*, 119 N. C. 883, 26 S. E. 163 (1896). See also, *State v. Morris*, 215 N. C. 552, 2 S. E. (2d) 554 (1939); *State v. Fain*, 216 N. C. 157, 4 S. E. (2d) 319 (1939); *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940).

**Cited in** *State v. Ratcliff*, 199 N. C. 9, 153 S. E. 605 (1930); *State v. Jordan*, 226 N. C. 155, 37 S. E. (2d) 111 (1946).

**§ 15-172. Verdict for murder in first or second degree.**—Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. (1893, c. 85, s. 3; Rev., s. 3271; C. S., s. 4642.)

**Object of Section.**—The object of this section is, of course, to place it beyond doubt in what degree of murder the prisoner was convicted. *State v. Wiggins*, 171 N. C. 813, 89 S. E. 58 (1916).

**Applies to All Indictments for Murder.**—This section applies to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture, or otherwise. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342 (1906).

**Sufficiency of Indictment.**—For a brief history of this section in connection with sufficiency of indictment for first degree murder, see *State v. Kirksey*, 227 N. C. 445, 42 S. E. (2d) 613 (1947).

**Jury Must Determine Degree.**—For a conviction of murder in the first degree under this section and § 14-17, the jury must find specially under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, Const., Art. I, §§ 13, 17, which right may not be waived. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927).

By this section it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree. *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477 (1895); *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075 (1911); *State v. Bagley*, 158 N. C. 608, 73 S. E. 995 (1912). And the record must show that they have so done, in order that there may be a proper judgment. *State v. Lucas*, 124 N. C. 825, 32 S. E. 962 (1899); *State v. Truesdale*, 125 N. C. 696, 34 S. E. 646 (1899).

**Failure to Determine Degree.**—Where the degree of murder is not expressed in the verdict, the judge should tell the jury

to reconsider their finding, for the purpose of specifying the crime, and upon response being made by them of murder in the first degree, the verdict is properly recorded accordingly. *State v. Bagley*, 158 N. C. 608, 73 S. E. 995 (1912).

**Judge May Exclude Second Degree in Charge.**—When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. *State v. Spevey*, 151 N. C. 676, 65 S. E. 995 (1909); *State v. Wiggins*, 171 N. C. 813, 89 S. E. 58 (1916).

**In prosecution for murder, defendant's premeditation and deliberation are questions of fact**, to be determined by jury under this section and § 14-17, and not questions of law for judge, and must be proved beyond a reasonable doubt. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928).

**Verdict Construed According to Charge.**—The verdict must be construed according to the charge and the evidence and when these make it certain beyond question, the law has been complied with. *State v. Gilchrist*, 113 N. C. 673, 18 S. E. 319 (1893); *State v. Wiggins*, 171 N. C. 813, 89 S. E. 58 (1916).

**Mere Killing Presumes Second Degree Murder.**—Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. *State v. Hicks*, 125 N. C. 636, 43 S. E. 247 (1899).

In all indictments for homicide, when the intentional killing is established or ad-

mitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree) unless he can satisfy the jury of the truth of facts which justify or excuse his act, or mitigate it to manslaughter. *State v. Lane*, 166 N. C. 333, 81 S. E. 620 (1914).

But a conviction of murder in the first degree may be had upon sufficient circumstantial evidence. *State v. Matthews*, 66 N. C. 106 (1872); *State v. Melton*, 187 N. C. 481, 122 S. E. 17 (1924); *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927).

**When First Degree Presumed.** — A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. *State v. Lane*, 166 N. C. 333, 81 S. E. 620 (1914).

In an indictment for murder, when the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torture, the law raises the presumption of murder in the first degree, but none the less if the jury convict of a less offense, it is within their power so to do under the statute, and the prisoner has no cause to complain that he was not convicted of the higher offense. *State v. Matthews*, 142 N. C. 621, 55 S. E. 342 (1906).

A defendant will not be permitted to plead guilty to murder in the first degree under this section, and this rule applies to all indictments for murder, including

murder perpetrated by means of poison, lying in wait, imprisonment, starvation, torture or otherwise. *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635 (1941).

**Evidence.**—Where all the evidence at a trial for murder tends to show murder in the first degree in that the murder was committed by poisoning, starvation, lying in wait, imprisonment, torture, or in the perpetration or attempt to perpetrate a felony, the trial court may instruct the jury that they may render only one of two verdicts, murder in the first degree, or not guilty. But where the evidence tends to show that the killing was with a deadly weapon, and the State in one phase of its case relies on premeditation and deliberation, the presumption is that the murder was in the second degree, with the burden of proving premeditation beyond a reasonable doubt on the State, in order to constitute it murder in the first degree, and under these circumstances it is error for the trial court to fail to charge the jury that they might find the prisoner guilty of murder in the second degree. *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928); *State v. Gause*, 227 N. C. 26, 40 S. E. (2d) 463 (1946).

**Quoted** in *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

**Cited** in *State v. Gooding*, 196 N. C. 710, 146 S. E. 806 (1929); *State v. Thornton*, 211 N. C. 413, 190 S. E. 758 (1937); *State v. Goodwin*, 211 N. C. 419, 190 S. E. 761 (1937).

§ 15-173. **Demurrer to the evidence.**—When on the trial of any criminal action in the superior court or in any criminal court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of “not guilty” as to such defendant. If the motion is refused and the defendant does not choose to introduce evidence, the case shall be submitted to the jury as in other cases, and the defendant may on appeal urge as ground for reversal, the trial court’s denial of his motion without the necessity of the defendant’s having taken exception to such denial.

If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. The defendant, however, may make such motion at the conclusion of all the evidence in the case, irrespective of whether or not he made a motion for dismissal or judgment as in case of nonsuit theretofore. If the motion is allowed, or shall be sustained on appeal, it shall in all cases have the force and effect of a verdict of “not guilty”. If the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court’s denial of his motion made at the close of all the evidence without the necessity of

the defendant's having taken exception to such denial. (1913, c. 73; Ex. Sess. 1913, c. 32; C. S., s. 4643; 1951, c. 1086, s. 1.)

**Cross References.**—As to demurrer to the evidence in civil cases, see § 1-183. As to motions in civil actions heard at criminal term, see § 7-72.

**Editor's Note.**—The 1951 amendment rewrote this section. The principal changes made were to do away with the necessity for taking an exception to the denial of the motion, and to provide that the motion may be made at the close of all the evidence irrespective of whether or not such a motion was made theretofore.

It should be noted that all of the cases in the following annotation were decided before the amendment.

**Compared with § 1-183.**—This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by § 1-183, in civil actions. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769 (1922); *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925); *State v. Norris*, 206 N. C. 191, 173 S. E. 14 (1934); *State v. Ormond*, 211 N. C. 437, 191 S. E. 22 (1937); *State v. Hill*, 225 N. C. 74, 33 S. E. (2d) 470 (1945).

**On motion to nonsuit, the court is required merely to ascertain whether there is any competent evidence** to sustain the allegations of the indictment. *State v. Landin*, 209 N. C. 20, 182 S. E. 689 (1935). See also, *State v. Lefevers*, 216 N. C. 494, 5 S. E. (2d) 552 (1939).

When the court is to rule upon a demurrer to the evidence in a criminal case, it is required merely to ascertain whether there is any competent evidence to sustain the allegations of the indictment, the evidence being construed in the light most favorable to the State. *State v. Murdock*, 225 N. C. 224, 34 S. E. (2d) 69 (1945).

A trial judge, in passing upon a motion for a judgment as of nonsuit, under the provisions of this section is not bound by the measure or quantum of proof by which the State must prove a defendant's guilt before the jury can convict him. *State v. Davenport*, 227 N. C. 475, 42 S. E. (2d) 686 (1947).

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819 (1940).

**Sufficiency of Evidence May Be Chal-**

**lenged if Motion Timely Made.**—Before the 1951 amendment to this section, if the defendant, on trial for murder, wished to challenge the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt, motion to nonsuit under this section, on the capital charge should be lodged at the close of the State's case, exception noted, if overruled, and the motion renewed at the close of all the evidence, and exception again noted, if overruled. *State v. Bittings*, 206 N. C. 798, 175 S. E. 299 (1934).

A motion for judgment of nonsuit, under this section as it stood before the 1951 amendment, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered. *State v. Ormond*, 211 N. C. 437, 191 S. E. 22 (1937).

A motion for judgment as of nonsuit, in a criminal case under this section before the 1951 amendment must be made at the close of the State's evidence and, if denied, renewed at the close of all the evidence, otherwise the benefit of the exception to the court's refusal to grant the motion would be lost. *State v. Hill*, 225 N. C. 74, 33 S. E. (2d) 470 (1945).

To present the question of the sufficiency of the evidence upon appeal, under this section before the 1951 amendment, a motion to nonsuit had to be made at the close of the State's evidence, and exception noted upon its denial, and if defendant introduced evidence the motion must be renewed at the close of all the evidence, and if again overruled another exception must be noted, in which event the assignment of error must be based upon the second exception. *State v. Perry*, 226 N. C. 530, 39 S. E. (2d) 460 (1946); *State v. Weaver*, 228 N. C. 39, 44 S. E. (2d) 360 (1947).

**Motion Must Be Renewed.**—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence as this section requires. *State v. Helms*, 181 N. C. 566, 107 S. E. 228 (1921). See also, *State v. Kiziah*, 217 N. C. 399, 8 S. E. (2d) 474 (1940).

**Same—Waiver.**—Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first motion,

and it is not subject to review in the Supreme Court on appeal. *State v. Hayes*, 187 N. C. 490, 122 S. E. 13 (1924).

See also, *State v. Hargett*, 196 N. C. 692, 146 S. E. 801 (1929); *State v. Chapman*, 221 N. C. 157, 19 S. E. (2d) 250 (1942); *State v. Epps*, 223 N. C. 740, 28 S. E. (2d) 219 (1943); *State v. Jackson*, 226 N. C. 760, 40 S. E. (2d) 417 (1946).

**Only incriminating evidence need be considered upon defendant's motion as of nonsuit** under this section, and contradictions in the inculpatory testimony and equivocations of some of the State's witnesses, which affects the weight or credibility of the evidence but not its competency, need not be taken into account in determining whether there is any competent evidence to sustain the allegations of the indictment. *State v. Satterfield*, 207 N. C. 118, 176 S. E. 466 (1934). See also, *State v. Moses*, 207 N. C. 139, 176 S. E. 267 (1934).

On a demurrer to the evidence only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear that offered by the State. *State v. Oldham*, 224 N. C. 415, 30 S. E. (2d) 318 (1944).

**When Motion Denied.**—A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if the evidence is sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

Where evidence is conflicting in a criminal case and where, considering the evidence in the light most favorable to the State, the jury might find the defendant guilty, a motion as of nonsuit is properly denied. *State v. Carr*, 195 N. C. 129, 141 S. E. 698 (1928).

Where the evidence for the prosecution is sufficient to make out a case, nonsuit on the ground that the defendant's evidence tended to establish a defense is properly denied. *State v. Werst*, 232 N. C. 330, 59 S. E. (2d) 835 (1950).

A motion for judgment of nonsuit must be denied, if there be any substantial evidence—more than a scintilla—to prove the allegations of the indictment. *State v. Weinstein*, 224 N. C. 645, 31 S. E. (2d) 920 (1944).

**Consideration of Entire Evidence on Appeal.**—Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under this section, at the close of the

State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception to the Supreme Court on appeal upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755 (1923).

In *State v. Pasour*, 183 N. C. 793, 111 S. E. 799 (1922), the court said: "Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence."

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. *State v. Brinkley*, 183 N. C. 720, 110 S. E. 783 (1922).

Upon appeal from the denial of a motion as of nonsuit in a criminal action, review of the evidence is not confined to the State's evidence alone, but all the evidence in the State's favor, taken in the light most favorable to the State and giving it every reasonable intendment therefrom, will be considered, and where there is sufficient evidence of the defendant's guilt upon the whole record, the action of the trial judge in denying the motion of nonsuit will be upheld. *State v. Lawrence*, 196 N. C. 562, 146 S. E. 395 (1929).

A motion as of nonsuit in a criminal case at the close of the State's evidence, renewed after all the evidence has been introduced, does not confine its sufficiency to the time of the first motion, and will be denied if there is sufficient evidence in the State's behalf viewing all the evidence in its entirety. *State v. Earp*, 196 N. C. 164, 145 S. E. 23 (1928).

When upon the trial of a criminal action, the State produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the State, but of all the evidence; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion.

State v. Norton, 222 N. C. 418, 23 S. E. (2d) 301 (1942).

**Same—Supreme Court Not to Weigh Evidence.**—This section provides that if on the motion the judgment of nonsuit is allowed on appeal, "it shall, in all cases, have the force and effect of a verdict of not guilty." This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that the Supreme Court should weigh the evidence and render a verdict. State v. Cooke, 176 N. C. 731, 97 S. E. 171 (1918).

**Where the evidence was substantially similar to that introduced at a former trial,** decision of the Supreme Court on the former appeal that evidence was sufficient to be submitted to the jury is *res judicata* on question of nonsuit or sufficiency of evidence. State v. Stone, 226 N. C. 97, 36 S. E. (2d) 704 (1946).

**Where the indictments contain two separate charges and the State takes a voluntary nonsuit upon the first count,** defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, under this section, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. State v. Baldwin, 226 N. C. 295, 37 S. E. (2d) 898 (1946).

**Where a complete defense is established by the State's case,** on a criminal indictment, the defendant should be allowed to avail himself of a motion for nonsuit under this section. State v. Boyd, 223 N. C. 79, 25 S. E. (2d) 456 (1943); State v. Watts, 224 N. C. 771, 32 S. E. (2d) 348 (1944).

**Sufficiency of Evidence.**—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the court will not pass upon its weight or the credibility of the witnesses. State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921); State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412 (1936); State v. Johnson, 226 N. C. 671, 40 S. E. (2d) 113 (1946). See State v. Eubanks, 209 N. C. 758, 184 S. E. 839 (1936). See also, State v. Mann, 219 N. C. 212, 13 S. E. (2d) 247 (1941).

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the

weight and credibility of the evidence being for the jury and not the court. State v. Johnson, 220 N. C. 773, 18 S. E. (2d) 358 (1942); State v. Smith, 221 N. C. 400, 20 S. E. (2d) 360 (1942).

Nonsuit may not be granted on the ground that the testimony of the State's witnesses was incredible and unworthy of belief, the credibility of the witnesses being for the jury and not the court. State v. Bowman, 232 N. C. 374, 61 S. E. (2d) 107 (1950).

On appeal in criminal cases the Supreme Court cannot pass upon the weight of evidence but only whether there is sufficient evidence to support conviction. State v. Shoup, 226 N. C. 69, 36 S. E. (2d) 697 (1925).

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge. State v. Sigmon, 190 N. C. 684, 130 S. E. 854 (1925).

On a motion for nonsuit in a criminal action, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. State v. Fleming, 194 N. C. 42, 138 S. E. 342 (1927). See also State v. Lawrence, 196 N. C. 562, 146 S. E. 395 (1929); State v. Durham, 201 N. C. 724, 161 S. E. 398 (1931); State v. Smoak, 213 N. C. 79, 195 S. E. 72 (1938); State v. Adams, 213 N. C. 243, 195 S. E. 822 (1938); State v. Hammonds, 216 N. C. 67, 3 S. E. (2d) 439 (1939); State v. Brown, 218 N. C. 415, 11 S. E. (2d) 321 (1940).

On a motion for judgment as of nonsuit in a criminal case the evidence must be considered in the light most favorable to the State. State v. Herndon, 223 N. C. 208, 25 S. E. (2d) 611 (1943). See State v. McMahan, 224 N. C. 476, 31 S. E. (2d) 357 (1944); State v. Fulk, 232 N. C. 118, 59 S. E. (2d) 617 (1950); State v. Hendric, 232 N. C. 447, 61 S. E. (2d) 349 (1950).

On a motion for judgment of nonsuit the evidence must be considered in the light most favorable for the State, and if there be any competent evidence to support the charge contained in the bill of indictment the case is one for the jury. State v. Scoggins, 225 N. C. 71, 33 S. E. (2d) 473 (1945).

"In considering a motion to dismiss the action under the statute, we are merely to



ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. *State v. Carlson*, 171 N. C. 818, 89 S. E. 30 (1916); *State v. Rountree*, 181 N. C. 535, 106 S. E. 669 (1921)." *State v. Carr*, 195 N. C. 129, 144 S. E. 698 (1928).

Upon motion to dismiss under this section, it is required that the court ascertain merely whether there is any sufficient evidence to sustain the allegations of the indictment and not whether it be true nor whether the jury should believe it. *State v. McLeod*, 196 N. C. 542, 146 S. E. 409 (1929).

Where the evidence for the State where the defendants are charged with fornication and adultery, shows no more than that the defendants had opportunities to commit the crime, on motion of the defendants, the action should be dismissed, and a verdict of not guilty, entered under this section. *State v. Woodell*, 211 N. C. 635, 191 S. E. 334 (1937).

Evidence that the defendants had assisted a prisoner to escape is held insufficient in *State v. Pace*, 192 N. C. 780, 136 S. E. 11 (1926) and the motion for judgment of nonsuit as provided in this section should have been granted.

The court said in *State v. Woodell*, 211 N. C. 635, 191 S. E. 334 (1937), citing *State v. Prince*, 182 N. C. 788, 108 S. E. 330 (1921), that when it is said that there is no evidence to go to the jury, it does not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established.

On a trial for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing has been shown, it is required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, is insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. *State v. Swinson*, 196 N. C. 100, 144 S. E. 555 (1928).

Upon a motion as of nonsuit in a criminal action, made at the close of the State's evidence and renewed at the close of all

of the evidence, all the evidence, whether offered by the State or elicited from defendant's witnesses, will be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only evidence favorable to the State will be considered, the weight and credibility of the evidence being for the jury. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657 (1932); *State v. Ammons*, 204 N. C. 753, 169 S. E. 631 (1933); *State v. Mann*, 219 N. C. 212, 13 S. E. (2d) 247, 132 A. L. R. 1309 (1941).

Upon motion as of nonsuit in a criminal action, under this section, the evidence is to be considered in the light most favorable to the State, and if there is any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. *State v. Marion*, 200 N. C. 715, 158 S. E. 406 (1931).

**Same—Prosecution for Homicide.** — When an intentional killing with a deadly weapon has been established, the law implies malice, and the State cannot be nonsuited. *State v. Brooks*, 228 N. C. 68, 44 S. E. (2d) 482 (1947).

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide. *State v. Robinson*, 226 N. C. 95, 36 S. E. (2d) 655 (1946).

Where defendant, in a prosecution for murder, admitted that he intentionally and without provocation fired the gun which resulted in the death of deceased, a police officer, to prevent deceased from arresting him, and offered no excuse or explanation in mitigation for his act, except that he did not make up his mind and determine to kill deceased, there is evidence of premeditation and deliberation and evidence sufficient to sustain a verdict of murder in the first degree, and motion for nonsuit was properly overruled. *State v. Matheson*, 225 N. C. 109, 33 S. E. (2d) 590 (1945).

In a prosecution of two persons for murder, where the State's evidence tended to show that deceased was standing near another person on a city sidewalk, when the first defendant called upon deceased to stop bothering his cousin and the deceased said he was not bothering anyone, where-

upon the first defendant shot a pistol at deceased twice, and then the second defendant took the gun from the first defendant and shot at deceased twice, deceased falling to the ground at the second shot and dying on the way to the hospital, there being only one wound on deceased, a shot through the heart, there is ample evidence for the jury and the first defendant's motion for judgment as of nonsuit was properly denied. *State v. Williams*, 225 N. C. 182, 33 S. E. (2d) 880 (1945).

In a prosecution for felonious slaying evidence held sufficient to go to the jury. *State v. Stone*, 224 N. C. 848, 32 S. E. (2d) 651 (1945).

**Same—Accident Rather than Homicide.**—Evidence tending only to show, upon a trial for wife murder, that the prisoner unintentionally in his sleep, as a result of a bad dream, inflicted upon his wife a wound too slight to have caused her death, except that from its neglect of treatment it may have been possible for blood poisoning to have set in therefrom that caused her death, is insufficient in law to sustain a conviction of manslaughter, and defendant's motion as of nonsuit, should have been sustained, under this section. *State v. Everett*, 194 N. C. 442, 140 S. E. 22 (1927). See also, *State v. Tankersley*, 172 N. C. 955, 90 S. E. 781 (1916).

**Same—Murder in Perpetration of Robbery.**—Where two witnesses saw two of defendants enter a store, both witnesses being present, hold up the proprietor with pistols and shoot and kill him and flee, and two other witnesses saw both of these defendants run out of the store and enter and drive away in a car with third defendant, all four of these witnesses picking out defendants from a number of prisoners in a city jail about 30 days after the homicide and positively identifying them and their car, without denial on the part of the prisoners, and other persons identifying same defendants as the perpetrators of another hold-up just before their arrest, there was sufficient identification and evidence of murder for the jury and motion for nonsuit was properly denied. *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352 (1944).

**Same—Rape.**—Evidence tending to show that the deceased was ravished by a person suffering from gonorrhoea, and that she died from the assault and choking, with further evidence that the defendant had the disease and that his shoes fitted the tracks made at the time of the crime around the house of the deceased and at the place of the crime, is sufficient, taken with other evidence of guilt, to be sub-

mitted to the jury and to sustain their verdict thereon of murder in the first degree. *State v. McLeod*, 196 N. C. 542, 146 S. E. 409 (1929).

Positive testimony of rape by prosecutrix is sufficient to carry the case to the jury, even when her evidence is denied by defendant and nonsuit under this section was held properly denied. *State v. Vicks*, 223 N. C. 384, 26 S. E. (2d) 873 (1943).

Evidence of defendant's guilt of rape held sufficient to overrule his motion to nonsuit. *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294 (1949).

**Same—Tending Only to Exculpate.**—Where the State's evidence and that of the defendant are substantially to the same effect, in an action for an assault, and tend only to exculpate the defendant, his motion as of nonsuit after all the evidence has been introduced, considering it as a whole, should be sustained. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769 (1922).

**Same—Father Shielding Child.**—The father may shield his child from assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769 (1922).

**Same—Personal Presence of Defendant.**—In a criminal prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one of them of larceny only, a motion for nonsuit under this section, was properly denied, where the State's evidence tended to show that this defendant and one of the other defendants planned the theft and this defendant advised, aided and abetted his codefendant therein, though not personally present when the theft occurred. *State v. King*, 222 N. C. 239, 22 S. E. (2d) 445 (1942).

**Same—Flight of Defendant from Scene of Crime.**—In a prosecution for breaking and entering an industrial plant with intent to steal, evidence tended to show that upon the arrival of police officers at the scene of a break-in in response to a telephone call, they saw the three defendants running up the street, that defendants got into a car and drove quickly away and were not stopped by the officers until after a ten mile chase, and that appealing defendant denied any knowledge of the break-in. It was held that the evidence was insufficient to be submitted to the jury, and judgment of nonsuit was allowed

in the Supreme Court on appeal. *State v. Cranford*, 231 N. C. 211, 56 S. E. (2d) 423 (1949).

**Same — Recent Possession of Stolen Goods.**—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of § 14-54, and defendant's demurrer to the State's evidence or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13 (1924).

Evidence from which the jury might infer that stolen goods were thereafter in the constructive possession of defendant will not justify an inference that at such time defendant knew the goods to have been stolen, and where the evidence is sufficient to support only the first inference the defendant's motion as of nonsuit should be allowed under this section. *State v. Anthony*, 206 N. C. 120, 173 S. E. 47 (1934).

In a criminal prosecution for larceny and receiving a bicycle, where the evidence tended to show that the bicycle was taken in the night from a parked truck, and was found near the same place about eight months thereafter in the possession of defendants, who made contradictory and false statements about how they came by it, there is not sufficient evidence to convict and a motion for nonsuit should have been granted. *State v. Cameron*, 223 N. C. 449, 27 S. E. (2d) 81 (1943).

**Same — Knowledge That Goods Were Stolen.** — In a prosecution for larceny and receiving, where the State's evidence tended to show that strangers to defendants stole a barrel of molasses, hid it among some trees in a pasture, offered to sell it to defendants, who agreed to buy at a price considerably below the market and went in the nighttime to inspect and remove their purchase and were in the act of having it rolled out to their truck when the officer arrived, there is sufficient evidence to convict of an attempt to feloniously receive stolen property, knowing it to have been stolen, and motion of nonsuit was properly refused. *State v. Parker*, 224 N. C. 524, 31 S. E. (2d) 531 (1944).

Where three defendants bought goods, paying full value, about 2 a. m. from two strangers, who represented that they must dispose promptly of the merchandise from their business because both had been called to the armed forces, and one defendant promptly admitted all the facts to the officers while the other two first denied

and then admitted the purchase, the State's witness who accompanied the thieves saying on cross-examination that the accused persons had no knowledge of the theft, the element of scienter is wanting and demurrer should have been sustained. *State v. Oxendine*, 223 N. C. 659, 27 S. E. (2d) 814 (1943).

**Same — Evidence Raising Suspicion Only.**—Evidence that does no more than raise a suspicion, somewhat strong perhaps, of a homicide and the defendant's guilt, is not enough on a prosecution for murder and demurrer to the evidence will be sustained. *State v. Carter*, 204 N. C. 304, 168 S. E. 204 (1933).

Upon a motion for nonsuit under this section, if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, the case should be submitted to the jury. But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment, the motion should be allowed. *State v. Boyd*, 223 N. C. 79, 25 S. E. (2d) 456 (1943); *State v. Kirkman*, 224 N. C. 778, 32 S. E. (2d) 328 (1944); *State v. Murphy*, 225 N. C. 115, 33 S. E. (2d) 588 (1945).

Where the evidence, taken in the light most favorable to the State, on motion by defendants for judgment as of nonsuit in a criminal prosecution, raises no more than a suspicion as to the guilt of defendants, the same is insufficient to support a verdict of guilty and the motion must be allowed. *State v. Hegler*, 225 N. C. 220, 34 S. E. (2d) 76 (1945).

On the trial of several defendants, upon an indictment for robbery, where the evidence against one of the defendants raises no more than a suspicion of his guilt, a motion to dismiss as to such defendant should be allowed. *State v. Ham*, 224 N. C. 128, 29 S. E. (2d) 449 (1944).

**Same—Evidence of Accomplice.** — The evidence of accomplices is sufficient to carry the case to the jury and to justify a refusal of motion to nonsuit. *State v. Rising*, 223 N. C. 747, 28 S. E. (2d) 221 (1943).

**Same—Malicious Castration.** — The direct evidence of the guilt of one of the defendants in a prosecution for malicious castration, and the circumstantial evidence as to the other's participation and guilt is held sufficient to overrule their motions as of nonsuit. *State v. Ammons*, 204 N. C. 753, 169 S. E. 631 (1933).

**Same—Identity.**—In a prosecution for homicide the evidence of the defendant's identity as the perpetrator of the crime is

sufficient to be submitted to the jury, the weight and credibility of the wife's identification of the defendant being for their determination, and defendant's motion as of nonsuit on the ground that her testimony was based upon imagination and auto-suggestion was properly refused. *State v. Fogleman*, 204 N. C. 401, 168 S. E. 536 (1933).

**Same—Conspiracy.** — Where the direct circumstantial evidence in this case tends to show that defendant had quarreled with deceased and had entered into a conspiracy to kill him, that deceased was murdered and that all the conspirators, including the appealing defendant, were present, aiding and abetting in the commission of the crime, the evidence is sufficient to be submitted to the jury and motion for nonsuit was properly overruled. *State v. Brown*, 204 N. C. 392, 168 S. E. 532 (1933).

**Same—Assault with Intent to Kill.**—In a prosecution, for a secret assault and battery with a deadly weapon with malice and intent to kill, evidence that there had been ill-feeling between the prosecuting witness and the defendant, that the prosecuting witness had seen and recognized the defendant standing outside a window in the witness's home, that the defendant appeared there suddenly at night and shot the prosecuting witness before he could do anything, and seriously wounded him, is sufficient to overrule defendant's motion as of nonsuit, and to show that the assault was done in a secret manner. *State v. McLamb*, 203 N. C. 442, 166 S. E. 507 (1932).

In a prosecution for assault with a deadly weapon with intent to kill, resulting in injury, it was held that there was ample evidence to sustain conviction and motion to dismiss under this section was properly denied. *State v. Cody*, 225 N. C. 28, 33 S. E. (2d) 71 (1945).

In a criminal prosecution for a felonious assault with intent to kill, where the State's evidence tended to show that defendant, while the prosecuting witness was having a row in her place of business with one of her servants, left the room and returned almost immediately with a shotgun and shot the prosecuting witness at close range, inflicting serious injury, there was sufficient evidence for the jury, and motion for judgment as of nonsuit was properly denied. *State v. Murdock*, 225 N. C. 224, 34 S. E. (2d) 69 (1945).

On trial upon an indictment for assault with a deadly weapon with intent to kill, motion for judgment of nonsuit was properly denied. *State v. Oxendine*, 224 N. C. 825, 32 S. E. (2d) 648 (1945).

**Same—Assault with Intent to Rape.** — Upon an indictment charging an assault with intent to commit rape, defendant may be convicted of an assault upon a female as though separately charged, and motion to dismiss under this section was properly refused where there was sufficient evidence to convict of an assault. *State v. Jones*, 222 N. C. 37, 21 S. E. (2d) 812 (1942); *State v. Gay*, 224 N. C. 141, 29 S. E. (2d) 458 (1944); *State v. Johnson*, 227 N. C. 557, 42 S. E. (2d) 685 (1947).

**Same — Operation of Prohibited Mechanical Device.** — Evidence tending to show that defendant was the owner of an automobile, and had been seen in same prior to its capture, and that when the automobile was subsequently captured it was being driven by others and had attached thereto a mechanical device for the emission of excessive smoke or gas, is insufficient to resist defendant's motion as of nonsuit under this section, in a prosecution under § 4506(b) [now G. S. § 20-136]. *State v. Yates*, 208 N. C. 194, 179 S. E. 756 (1935).

**Same—Gaming.**—In a criminal prosecution, under §§ 14-290, 14-291, and 14-291.1, the court erred in the refusal of defendants' motion of nonsuit. *State v. Heglar*, 225 N. C. 220, 34 S. E. (2d) 76 (1945).

**Same—Seduction.**—In a prosecution for seduction it was held that where facts and circumstances tended to support prosecutrix's statements a motion for nonsuit should be denied. *State v. Smith*, 223 N. C. 199, 25 S. E. (2d) 619 (1943).

**Same—Refusal to Support Child.** — In proceeding on indictment instituted more than 13 years after the birth of an illegitimate child, charging defendant with willful neglect and refusal to support the child, whose paternity had been established in bastardy proceeding instituted under C. S., 265-279, the action was held barred under § 49-4 and motion for judgment of nonsuit was sustained. *State v. Dill*, 224 N. C. 57, 29 S. E. (2d) 145 (1944).

**Same — Unlawful Sale of Intoxicating Liquors.**—In a criminal prosecution for the unlawful possession of intoxicating liquors for the purpose of sale, where all the evidence tended to show that accused had concealed in the apartment occupied as a residence by himself and family, above a store operated by him, five pints of tax-paid liquor the seals on which had not been broken, and a sixth pint was found by officers at the back door of the store, where an unknown person was seen to "set something down," and some empty bottles, apparently wine bottles, were also

found in the store, motion of defendant for judgment of nonsuit should have been sustained. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

In a prosecution for possession of intoxicating liquor for purpose of sale, where the evidence tended to show only that there was found in the yard of defendant's house an automobile containing 42 gallons of liquor, upon which no tax had been paid, defendant testifying that the car was not his, but was driven by a stranger, got out of order and defendant helped push it onto his premises, where it remained several days while he was away from home, and it was subsequently driven away by someone unknown to him, the refusal of defendant's motion for judgment of nonsuit was error. *State v. Kirkman*, 224 N. C. 778, 32 S. E. (2d) 328 (1944).

Where defendant at time of arrest said illicit whiskey belonged to him but at trial denied any knowledge of the liquor or its ownership, an issue of fact was presented for jury and motion to dismiss under this section was properly overruled. *State v. Stutts*, 225 N. C. 647, 35 S. E. (2d) 881 (1945).

**Same—Operation of Motor Vehicle after License Suspended.**—In a criminal prosecution for the operation of a motor vehicle after the operator's license had been revoked, where the State's evidence tended to show that defendant was tried and convicted in recorder's court, for operating a motor vehicle while under the influence of intoxicants, as James Stewart had his license revoked for one year, that the records show no license issued to James Stewart but show one to James Tyree Stewart of the same county as defendant, who admitted that his name was James Tyree Stewart when the highway patrolman went to take up his license, and that defendant was seen operating a motor vehicle upon the public highway within one year of such conviction and there had been no reinstatement of the revocation, there is sufficient evidence to sustain a conviction and motion for nonsuit was properly refused. *State v. Stewart*, 224 N. C. 528, 31 S. E. (2d) 534 (1944).

**Same—Violation of Hit and Run Drivers' Law.**—In a prosecution under G. S., § 20-166, the State introduced testimony of a statement by defendant that he had just driven on the road in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence.

The statement was held binding upon the State, and defendant's motion for judgment of nonsuit was sustained in the Supreme Court for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person. *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494 (1948).

**Conflicting Evidence.**—Where the prosecutor's goods have been stolen two days before and they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the case can only be determined by the jury, and the defendant's motion under this section to dismiss must be denied. *State v. Jenkins*, 182 N. C. 818, 108 S. E. 767 (1921).

When the defendant is on trial under a criminal indictment for recklessly driving his car and colliding with another car in which deceased was riding, on a public highway, causing her death, and there is both direct and circumstantial evidence that the defendant was driving the car at the time, which his own testimony and evidence of his witnesses contradicts, his motion for judgment as in case of nonsuit, made at the close of the State's evidence and renewed after all the evidence, is properly denied. *State v. Leonard*, 195 N. C. 242, 141 S. E. 736 (1928).

**Testimony by State witness that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit**, since such self-serving declaration does not rebut any proof by the State. *State v. Baldwin*, 226 N. C. 295, 37 S. E. (2d) 898 (1946).

**Variance.**—The defendant in a criminal action may raise the question of a variance between the indictment and the proof by a motion to dismiss the prosecution as in case of nonsuit. This is clearly set forth in *State v. Gibson*, 170 N. C. 697, 86 S. E. 774 (1915); *State v. Harbert*, 185 N. C. 760, 118 S. E. 6 (1923); *State v. Harris*, 195 N. C. 306, 141 S. E. 883 (1928); *State v. Grace*, 196 N. C. 280, 145 S. E. 399 (1928).

Where there is a fatal variance between the indictment and the proof, it is proper to sustain the demurrer to the evidence, or to dismiss the action as in case of nonsuit. *State v. Franklin*, 204 N. C. 157, 167 S. E. 569 (1933). See also, *State v. Martin*, 199 N. C. 636, 155 S. E. 447 (1930).

Where it was alleged that defendant committed larceny of money and valuable papers, and the evidence tended to show, at most, an attempt to commit larceny of two suitcases or baggage, it was held that

there was a fatal variance between the allegata and the probata, of which defect defendant could take advantage under his exception to the disallowance of his motion for judgment as of nonsuit. *State v. Nunley*, 224 N. C. 96, 29 S. E. (2d) 17 (1944).

**Effect of Reversal of Judgment of Guilty.**—Under the provisions of this section the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty." *State v. Corey*, 199 N. C. 209, 153 S. E. 923 (1930).

**Motion will not lie for failure of the State to offer evidence of a nonessential averment in the indictment**, when each essential element of the offense is supported by competent evidence. *State v. Atkinson*, 210 N. C. 661, 188 S. E. 73 (1936).

**Demurrer to the Evidence Properly Sustained.**—See *State v. Sims*, 208 N. C. 459, 181 S. E. 269 (1935), and *State v. White*, 208 N. C. 537, 181 S. E. 558 (1935), wherein defendant's identity was not established; *State v. Landin*, 209 N. C. 20, 182 S. E. 689 (1935), wherein defendant's negligence was held harmless; *State v. Creech*, 210 N. C. 700, 188 S. E. 316 (1936), wherein owner of car did not know driver was intoxicated; *State v. Harvey*, 228 N. C. 62, 44 S. E. (2d) 472 (1947), wherein the identity of the accused was not established; *State v. Coffey*, 228 N. C. 119, 44 S. E. (2d) 886 (1947), wherein it was held that taking all the State's evidence to be true did not exclude a reasonable hypothesis of defendant's innocence.

**Demurrer to the Evidence Properly Denied.**—See *State v. Webber*, 210 N. C. 137, 185 S. E. 659 (1936), wherein evidence showed defendant was driving at fifty miles an hour before collision; *State v. Smith*, 211 N. C. 93, 189 S. E. 175 (1937), wherein evidence showed felonious intent to commit rape; *State v. Vincent*, 222 N. C. 543, 23 S. E. (2d) 832 (1943), evidence showing identity in rape; *State v. Reynolds*, 222 N. C. 40, 21 S. E. (2d) 813 (1942), evidence showing felonious breaking and entry and showing identity; *State v. Dilliard*, 223 N. C. 446, 27 S. E. (2d) 85 (1943), evidence showing guilt in abortion; *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944), wherein evidence showed possession of liquor with intent to sell same unlawfully; *State v. King*, 224 N. C. 329, 30 S. E. (2d) 230 (1944), wherein evidence sustained conviction of operating a lottery; *State v. Rivers*, 224 N. C. 419, 30 S. E. (2d) 322 (1944), wherein evidence tended to show that prisoner killed de-

ceased, while the two were quarreling over some trivial matters, defendant admitting the killing but alleging that he shot deceased to repel an assault; *State v. Peterson*, 225 N. C. 540, 35 S. E. (2d) 645 (1945), wherein evidence offered held sufficient to repel the motion to dismiss under this section.

**An instruction that the court grants a nonsuit on the offense charged in the indictment**, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment. *State v. Matthews*, 231 N. C. 617, 58 S. E. (2d) 625 (1950).

**Applied in** *State v. Callett*, 211 N. C. 563, 191 S. E. 27 (1937); *State v. McDonald*, 211 N. C. 672, 191 S. E. 733 (1937); *State v. Brewington*, 212 N. C. 244, 193 S. E. 24 (1937); *State v. Delk*, 212 N. C. 631, 194 S. E. 94 (1937); *State v. Lockey*, 214 N. C. 525, 199 S. E. 715 (1938); *State v. Myers*, 214 N. C. 652, 200 S. E. 443 (1939); *State v. Goodman*, 220 N. C. 250, 17 S. E. (2d) 8 (1941); *State v. Johnson*, 220 N. C. 252, 17 S. E. (2d) 7 (1941); *State v. Todd*, 222 N. C. 346, 23 S. E. (2d) 47 (1942); *State v. Forte*, 222 N. C. 537, 23 S. E. (2d) 842 (1943); *State v. Edwards*, 224 N. C. 577, 31 S. E. (2d) 762 (1944); *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591 (1946); *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156 (1946); *State v. Little*, 228 N. C. 417, 45 S. E. (2d) 542 (1947); *State v. Minton*, 228 N. C. 518, 46 S. E. (2d) 296 (1948); *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868 (1948); as to motion for nonsuit sustained on appeal, in *State v. Palmer*, 230 N. C. 205, 52 S. E. (2d) 908 (1949); *State v. Baker*, 231 N. C. 136, 56 S. E. (2d) 424 (1949); *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532 (1950).

**Cited in** *State v. Eubanks*, 194 N. C. 319, 139 S. E. 451 (1927); *State v. Pridgen*, 194 N. C. 795, 139 S. E. 601 (1927); *State v. Mickle*, 194 N. C. 808, 140 S. E. 150 (1927); *State v. Dowell*, 195 N. C. 523, 143 S. E. 13 (1928); *State v. Golden*, 196 N. C. 246, 145 S. E. 236 (1928); *State v. Weston*, 197 N. C. 25, 147 S. E. 618 (1929); *State v. McKinnon*, 197 N. C. 576, 150 S. E. 25 (1929); *State v. Hickey*, 198 N. C. 45, 150 S. E. 615 (1929); *State v. Burluson*, 198 N. C. 61, 150 S. E. 628 (1929); *State v. Wrenn*, 198 N. C. 260, 151 S. E. 261 (1930); *State v. McLeod*, 198 N. C. 649, 152 S. E. 895 (1930); *State v. Spivey*, 198 N. C. 655, 153 S. E. 255 (1930); *State v. Ritter*, 199 N. C. 116, 154 S. E. 62 (1930); *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Johnson*, 199 N. C. 429,

154 S. E. 730 (1930); *State v. Baker*, 199 N. C. 578, 155 S. E. 249 (1930); *State v. Sizemore*, 199 N. C. 687, 155 S. E. 724 (1930); *State v. Fletcher*, 199 N. C. 815, 155 S. E. 927 (1930); *State v. Wilson*, 205 N. C. 376, 171 S. E. 338 (1933); *State v. Davidson*, 205 N. C. 735, 172 S. E. 489 (1934); *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934); *State v. Mazingo*, 207 N. C. 247, 176 S. E. 582 (1934); *State v. Newton*, 207 N. C. 323, 177 S. E. 184 (1934); *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935); *State v. Jones*, 209 N. C. 49, 182 S. E. 699 (1935); *State v. Camby*, 209 N. C. 50, 182 S. E. 715 (1935); *State v. Langley*, 209 N. C. 178, 183 S. E. 526 (1936); *State v. Hinson*, 209 N. C. 187, 183 S. E. 397 (1936); *State v. Lewis*, 209 N. C. 191, 183 S. E. 357 (1936); *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936); *State v. Gallman*, 210 N. C. 288, 186 S. E. 236 (1936); *State v. Evans*, 211 N. C. 458, 190 S. E. 724 (1937); *State v. Caldwell*, 212 N. C. 484, 193 S. E. 716 (1937); *State v. Perry*,

212 N. C. 533, 193 S. E. 727 (1937); *State v. Hanford*, 212 N. C. 746, 194 S. E. 481 (1938); *State v. Libby*, 213 N. C. 662, 197 S. E. 154 (1938); *State v. Epps*, 213 N. C. 799, 197 S. E. 580 (1938); *State v. Stiers*, 214 N. C. 126, 198 S. E. 601 (1938); *State v. Bowser*, 214 N. C. 249, 199 S. E. 31 (1938); *State v. Hawkins*, 214 N. C. 326, 199 S. E. 284 (1938); *State v. Jones*, 215 N. C. 660, 2 S. E. (2d) 867 (1939); *State v. Hudson*, 218 N. C. 219, 10 S. E. (2d) 730 (1940); *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941); *State v. Hunt*, 223 N. C. 173, 25 S. E. (2d) 598 (1943); *State v. Graham*, 224 N. C. 351, 30 S. E. (2d) 154 (1944); *State v. Ogle*, 224 N. C. 468, 31 S. E. (2d) 444 (1944); *State v. Curling*, 225 N. C. 769, 35 S. E. (2d) 179 (1945); *State v. Williams*, 229 N. C. 348, 49 S. E. (2d) 617 (1948); *State v. Tilley*, 231 N. C. 734, 58 S. E. (2d) 720 (1950); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950); *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

§ 15-174. **New trial to defendant.**—The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases. (1815, c. 895, P. R.; R. C., c. 35, s. 35; Code, s. 1202; Rev., s. 3272; C. S., s. 4644.)

**Cross Reference.** — As to new trial in civil cases, see § 1-207 and notes thereto.

**Rule Similar at Common Law.** — Independent of this section, the rule of the common law was the same and in Wharton's Criminal Law, § 3391, it is laid down that "at common law the court trying the case, is the sole tribunal by whom a new trial can be granted, and its refusal so to do being matter of discretion is no ground for a writ of error." *State v. Bennett*, 93 N. C. 503 (1885).

**New Trial Not Granted After Acquittal.** —After a verdict of acquittal on a State prosecution, a new trial is not allowed by this section. *State v. Taylor*, 8 N. C. 462 (1821).

**Newly Discovered Evidence.**—A motion for new trial for newly discovered evidence will not be granted even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving. *State v. Lilliston*, 141 N.

C. 857, 54 S. E. 427 (1906).

Motions for new trials for newly discovered evidence cannot be entertained in the Supreme Court in criminal cases. *State v. Lilliston*, 141 N. C. 857, 54 S. E. 427 (1906).

**Disqualification of Jurors and Newly Discovered Evidence.**—Where a judgment of the Supreme Court in a criminal case has been certified to the clerk of the superior court, the case is in the latter court for execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence. *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931).

**When Judgment Set Aside.** — A judgment regularly entered at one term of the court, cannot be set aside at a subsequent term, except in cases of surprise, mistake or excusable neglect. *State v. Bennett*, 93 N. C. 503 (1885).

§ 15-175. **Nol. pros. after two terms; when capias and subpoenas to issue.**—A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application

of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the State indorsed on the indictment. (1905, c. 360, ss. 1, 3, 4; Rev., s. 3273; C. S., s. 4645.)

**Cross Reference.**—As to clerk's record of nolle prosequi with leave cases, see § 2-42, paragraph 34.

**In General.**—A nolle prosequi is merely a declaration on the part of the solicitor that he will not then prosecute the suit further, and is not an acquittal, although its effect is to discharge the defendant without delay. *Wilkinson v. Wilkinson*, 159 N. C. 265, 74 S. E. 740 (1912).

**Effect of Nol. Pros.** — A nol. pros. in criminal proceedings does not amount to an acquittal, and the defendant may be arrested again upon the same bill and put to trial. *State v. Thornton*, 35 N. C. 256 (1852); *State v. Smith*, 129 N. C. 546, 40 S. E. 1 (1901); *State v. Faggart*, 170 N. C. 737, 87 S. E. 31 (1915).

**Discretion of Attorney General.** — The

Attorney General has a discretionary power to enter a nolle prosequi, and the court will not interfere, unless the power be oppressively used. *State v. Thompson*, 10 N. C. 613 (1825); *State v. Buchanan*, 23 N. C. 59 (1840).

**Permission of Court for New Capias.**—

Where a nolle prosequi has been entered in a criminal case a capias will not issue as a matter of course upon the will of the prosecuting officer, but only upon permission of the court first obtained. *State v. Thornton*, 35 N. C. 256 (1852).

**Same—When Unnecessary.** — Where a "nolle prosequi with leave," is entered, it authorizes the clerk, at the request of the solicitor, to issue another capias. *State v. Smith*, 129 N. C. 546, 40 S. E. 1 (1901).

**§ 15-176. Prisoner not to be tried in prison uniform.**—It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor. (1915, c. 124; C. S., s. 4646.)

## ARTICLE 18.

### *Appeal.*

**§ 15-177. Appeal from justice, trial de novo.**—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings. (1868-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10; Code, s. 900; Rev., s. 3274; C. S., s. 4647.)

**Cross References.**—As to appeal in civil cases, see § 1-299 and notes thereto. As to appeal by State, see § 15-179. As to recordari as substitute for appeal, see § 1-269.

**In General.**—These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed. They refer to the

conviction and sentence of defendants. *State v. Lyon*, 93 N. C. 575 (1885).

**Right of Appeal Has Been Modified.**—The right of appeal to the superior court from conviction in a justice's court of a misdemeanor within the justice's jurisdiction, as provided by this section, has been modified by the statutes establishing and expanding the uniform system of recorders' courts, and under the general provisions of § 7-243, an appeal from a conviction of simple assault in a justice's court must



first be taken to the recorder's court and not the superior court in the counties affected by the act. *State v. Baldwin*, 205 N. C. 174, 170 S. E. 645 (1933).

**Judgment Must Be Final in Nature.**—The appeal must be from a final judgment. *State v. Bailey*, 65 N. C. 426 (1871); *State v. Pollard*, 83 N. C. 598 (1880); *State v. Seaboard Air Line R. R.*, 169 N. C. 295, 84 S. E. 283 (1915).

**Appeal as Matter of Right.**—Under this section, a defendant found guilty of an offense of which the justice of the peace has final jurisdiction and an order is made without defendant's consent that judgment be suspended upon payment of costs, need not resort to the circuitous remedy of a recordari but is entitled to an appeal to the superior court as a matter of right. *State v. Griffin*, 117 N. C. 709, 23 S. E. 164 (1895).

**Right of Appeal Personal to Accused.**—The right of appeal provided for by this section is for the benefit only of the person accused; but so much of the judgment as is personal to the prosecutor and taxes him with the costs, may be appealed from. *State v. Powell*, 86 N. C. 640 (1882).

**Appeal under Section Presents Trial De Novo.**—Where the defendant after trial and conviction before a justice of the peace, moved in arrest of judgment, which motion was refused, and he appealed to the superior court, it was held, that the appeal brought up the whole case, and the defendant under this section was entitled to a trial de novo. *State v. Koonce*, 108 N. C. 752, 12 S. E. 1032 (1891). But where the defendant restricts himself by a plea of guilty then there can be no acts left open for consideration by a jury and the case on appeal does not concern the whole case. *State v. Warren*, 113 N. C. 683, 18 S. E. 498 (1893).

**After an appeal from a recorder's court to a superior court has been effected and appeal bond given, the recorder's court has no further jurisdiction over the case, the procedure being the same as under this sec-**

tion, and defendant appellant may not thereafter withdraw the appeal by notice given in the recorder's court. *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

**Bill of Indictment Unnecessary.**—Upon an appeal from an inferior court to the superior court from a conviction of a petty misdemeanor, the necessity of a bill of indictment in the latter court is dispensed with. *State v. Quick*, 72 N. C. 241 (1875); *State v. Jones*, 181 N. C. 543, 106 S. E. 827 (1921); but where the case is beyond the jurisdiction of the inferior court then an indictment is necessary. *State v. McAden*, 162 N. C. 575, 77 S. E. 298 (1913).

**Amendment to Complaint.**—Where the defendant has been separately tried before a justice of the peace for several indictable offenses, it is permissible for the superior court, on appeal, to allow an amendment to the complaint or warrant so as to make one complaint include the several offenses under different counts. *State v. Mills*, 181 N. C. 530, 106 S. E. 677 (1921).

**Excessive Punishment by Police Justice.**—A defendant is not entitled to a new trial because the punishment imposed by a police justice was excessive; the case should be remanded for resentencing in conformity to law. *State v. Black*, 150 N. C. 866, 64 S. E. 778 (1909).

**Due Process Where Justice Paid by Fee upon Conviction.**—Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial as provided in § 15-157, and the right to appeal to the superior court and have the whole matter heard therein de novo, under this section, the fact that a justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. *In re Steele*, 220 N. C. 685, 18 S. E. (2d) 132 (1942).

Cited in *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937); *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861 (1945).

**§ 15-177.1. Appeal from justice of the peace or inferior court; trial anew or de novo.**—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. (1947, c. 482.)

**§ 15-178. Justice to return papers and findings to superior court.**—In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all

the facts found by him, as well as his finding of those which were alleged in the complaint and which were found by him not to be proved. (1868-9, c. 178, subc. 4, s. 12; Code, s. 901; Rev., s. 3275; C. S., s. 4648.)

**Cited in** *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934); *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

§ 15-179. **When State may appeal.**—An appeal to the Supreme Court or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
  2. Upon a demurrer.
  3. Upon a motion to quash.
  4. Upon arrest of judgment.
  5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
  6. Upon declaring a statute unconstitutional.
- (Code, s. 1237; Rev., s. 3276; C. S., s. 4649; 1945, c. 701.)

**Cross Reference.**—As to distinction between general and special verdicts, see § 1-201 et seq.

**Editor's Note.**—The 1945 amendment inserted the words "or superior" in the introductory paragraph and added subdivisions 5 and 6.

For note on "Special Verdicts," see 13 N. C. Law Rev. 321. As to appeals by the State, see 23 N. C. Law Rev. 338.

**Judgments Rendered in Superior Court.**—The right of the State to appeal upon a special verdict, a demurrer, a motion to quash, or a motion in arrest of judgment, as provided by this section, applies only to judgments rendered in the superior court. *State v. Nichols*, 215 N. C. 80, 200 S. E. 926 (1939).

**Right Is Statutory.**—The right of the State to appeal is statutory, which right may not be enlarged by the superior court, and when the superior court remands a cause to the county court with provision that the State may appeal from any judgment thereafter rendered by the county court, the provision giving the State the right to appeal is void. *State v. Cox*, 216 N. C. 424, 5 S. E. (2d) 125 (1939).

**Bond Not Essential.**—A bond, in the case of an appeal on the part of the State, is not necessary, a recognizance being sufficient. *State v. M'Lelland*, 1 N. C. 632 (1804). As to necessity of bond on appeal by defendant, see *State v. Patrick*, 72 N. C. 217 (1875).

**The word "demurrer"** is used in this section in its usual and ordinary significance, as understood and defined in criminal pleading, and is not used in the sense of embracing "demurrer to evidence." *State v. Moody*, 150 N. C. 847, 64 S. E. 431 (1909).

**Upon a demurrer to an indictment** the State is allowed to appeal because it has

the effect, in criminal cases, of opening the whole record to the court and, under it, the jurisdiction of the court may be challenged, as well as the sufficiency of the subject matter of the indictment itself. *State v. McDowell*, 84 N. C. 799 (1881); *State v. Moody*, 150 N. C. 847, 64 S. E. 431 (1909).

**No Right of Appeal from Procedural Error.**—The State has no right of appeal from the action of the trial judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging the prisoner, upon a trial for an indictable offense. *State v. Branner*, 149 N. C. 559, 63 S. E. 169 (1908).

**Overruling Motion to Amend Record.**—No appeal lies by the State from an order overruling a motion to amend the record. *State v. Swepson*, 82 N. C. 541 (1880).

**Taxing Prosecutor with Costs.**—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. *State v. Morgan*, 120 N. C. 564, 26 S. E. 634 (1897). See also note of *State v. Powell*, 86 N. C. 640 (1882), under § 15-177.

**The refusal of the court to mark one as prosecutor of record** is not one of the cases enumerated in this section in which the State may appeal. *State v. Moore*, 84 N. C. 724 (1881).

**General Verdict of Not Guilty.**—In a criminal prosecution where there is a plea and general verdict of not guilty, the State has no right of appeal; such verdict ends the case, *State v. Savery*, 126 N. C. 1083, 36 S. E. 22 (1900) and cases cited; but under this section the State may appeal from a judgment for defendant on a special verdict. *State v. Lane*, 78 N. C. 547 (1878); *State v. Monger*, 107 N. C. 771, 12 S. E.

250 (1890); *State v. Winston*, 194 N. C. 243, 139 S. E. 240 (1927).

**Judgment Non Obstante Veredicto.**—Where there is a verdict convicting a defendant of a misdemeanor under the provisions of a statute prohibiting the drawing of a worthless check on a bank under certain conditions, and a judgment has been rendered in favor of the defendant non obstante veredicto, the State may appeal under the provisions of this section. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927).

**Acquittal in Consequence of Erroneous Charge.**—When a defendant has once been tried and acquitted upon an indictment good in form, no appeal lies even though the acquittal is in consequence of the erroneous charge of the presiding judge. *State v. West*, 71 N. C. 263 (1874).

**Arrest of Judgment.**—In a prosecution for manslaughter, judgment was entered providing that prayer for judgment and sentence be continued and that the defendant be placed on probation for a period of five years, with further order that as a special condition of probation the defendant should pay a designated sum weekly into the office of the clerk for a period of five years for the use of the mother of the deceased. Upon defendant's petition filed after the death of the mother within the five-year period, the court adjudged that the requirement for the payment of the sum had terminated and abated on her death. Held: The State may not appeal from the order, as the ruling is not equivalent to the allowance of a motion in arrest of judgment. *State v. McCollum*, 216 N. C. 737, 6 S. E. (2d) 503 (1940).

**Arrest of Judgment as to One of Two Defendants.**—Where in a prosecution for murder two defendants were convicted of manslaughter, the State under subdivision 4 of this section, has a right to appeal from an arrest of judgment as to one of them. *State v. Hall*, 183 N. C. 806, 112 S. E. 431 (1922).

**Remanding Case for Lighter Sentence.**—This section does not include a ruling of the superior court remanding a case for

the imposition of a lesser sentence. *State v. Davidson*, 124 N. C. 839, 32 S. E. 957 (1899).

**If a warrant charges simple assault, the State has no right of appeal** from a judgment of a justice of the peace acquitting the defendant, the justice having, in such cases, exclusive original jurisdiction. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803 (1932).

**The State may appeal from acquittal of defendant upon a special verdict**, although the verdict is fatally defective in that it fails to find facts essential to an adjudication of defendant's guilt or innocence. *State v. Gullede*, 207 N. C. 374, 177 S. E. 123 (1934).

**Judgment Based on Unconstitutionality of Statute.**—Where the court enters judgment of not guilty, after a purported special verdict, on the conclusion that the statute on which the criminal prosecution was based is unconstitutional, the State has no right of appeal under this section. *State v. Mitchell*, 225 N. C. 42, 33 S. E. (2d) 134 (1945).

**An appeal by the State from a judgment granting a new trial** on the ground of newly discovered evidence falls within the expression "and no other," as used in this section, albeit the State seeks to present only a question of law. *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313 (1944).

**Applied in** *State v. Lancaster*, 169 N. C. 284, 84 S. E. 529 (1915) (order quashing bill of indictment); *State v. Parker*, 209 N. C. 32, 182 S. E. 723 (1935); *State v. Lovelace*, 228 N. C. 186, 45 S. E. (2d) 48 (1947); *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860 (1948).

**Stated in** *State v. Hinson*, 123 N. C. 765, 31 S. E. 854 (1898); *State v. Davidson*, 124 N. C. 839, 32 S. E. 957 (1899); *State v. Bowan*, 145 N. C. 452, 59 S. E. 74 (1907); *State v. Morris*, 208 N. C. 44, 179 S. E. 19 (1935).

**Cited in** *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938); *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939); *State v. Thomas*, 215 N. C. 181, 1 S. E. (2d) 533 (1939).

**§ 15-180. Appeal by defendant to Supreme Court.**—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the Supreme Court; and the appeal shall be perfected and the case for the Supreme Court settled, as provided in civil actions. (1818, c. 962, s. 4, P. R.; R. C., c. 4, s. 21; Code, s. 1234; Rev., s. 3277; C. S., s. 4650.)

**Cross References.**—As to perfection of appeal, see § 1-282 and notes. As to essentials of transcript, see § 1-284 and notes. As to undertaking on appeal in civil cases, see

§ 1-285 and notes.

**Editor's Note.**—The manner of perfecting appeals in criminal cases is precisely the same as that in civil cases.

**Appeals in criminal cases are controlled by this section,** and a defendant is entitled to appeal only from conviction in the superior court or some final judgment thereof, and an appeal from an order of the superior court remanding the case to the recorder's court will be dismissed. *State v. Rooks*, 207 N. C. 275, 176 S. E. 752 (1934).

The statute does not provide for an appeal in criminal cases except from a final judgment. Hence, upon the indictment of members of the armed forces of the United States by State authorities, an appeal from an adverse ruling on objection to jurisdiction is premature. *State v. Inman*, 224 N. C. 531, 31 S. E. (2d) 641 (1944).

**Appeal or Substitute for Writ of Error.**—At common law there was no appeal from the decision of any of the courts, high or low, and these decisions could only be reviewed by writ of error or writ of false judgment. In North Carolina appeals are used as a substitute for those writs. *State v. Bailey*, 65 N. C. 426 (1871); *State v. Webb*, 155 N. C. 426, 70 S. E. 1064 (1911).

**Bond Necessary.**—An appeal by the defendant to the Supreme Court will be dismissed where no appeal bond is filed, if there is no order allowing the appeal without such bond. *State v. Patrick*, 72 N. C. 217 (1875); *State v. Spurtin*, 80 N. C. 362 (1879). See § 15-181.

Where the defendant appealed in three cases without giving appeal bond, and it appeared that he had obtained leave to appeal without bond in one case only, it was held that the other cases would be dismissed. *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614 (1900).

**Appeal "By Consent."**—Where an appeal without bond or affidavit was allowed by consent it was held not to be in compliance with the section. *State v. Kerns*, 90 N. C. 650 (1884).

**Appeal Lies Only from Final Judgment.**—The right to appeal is wholly statutory,

and a defendant may appeal only from a conviction or from some judgment that is final in its nature. Thus an appeal from the denial of defendant's plea in abatement will be dismissed as being an appeal from an interlocutory judgment. *State v. Blades*, 209 N. C. 56, 182 S. E. 714 (1935).

Defendant was not convicted, but was acquitted. There was no judgment on conviction, or judgment prejudicial to the defendant in its nature final. The defendant therefore had no right to appeal to the Supreme Court and it is without jurisdiction to entertain the appeal, or to decide the questions presented by defendant's assignment of error. *State v. Hiatt*, 211 N. C. 116, 189 S. E. 124 (1937).

**Exercise of Right Should Not Prejudice Defendant.**—While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentencing, since defendant's exercise of his right to appeal under this section should not prejudice him in any manner. *State v. Patton*, 221 N. C. 117, 19 S. E. (2d) 142 (1942).

Where defendant could not meet the conditions upon which execution of the judgment was suspended if he exercised his right to appeal, under this section, the judgment on this count is erroneous, and the cause remanded for proper judgment thereon. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

**Applied in** *State v. Cannon*, 227 N. C. 336, 42 S. E. (2d) 343 (1947).

**Quoted in** *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

**Cited in** *Current v. Church*, 207 N. C. 658, 178 S. E. 82 (1935).

**§ 15-181. Defendant may appeal without security for costs.**—In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith. Where the judge of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Supreme Court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission.

And where it shall appear to the presiding judge that a defendant who has been convicted of a capital felony, or having been tried upon a bill of indictment charging a capital felony, has been convicted of a less offense, and who has prayed

an appeal to the Supreme Court from the sentence of death or other sentence pronounced against him upon such conviction, is unable to defray the cost of perfecting his appeal on account of his poverty, it shall be the duty of the county in which the alleged capital felony was committed, upon the order of such judge, to pay the necessary cost of obtaining a transcript of the proceedings had and the evidence offered on the trial from the court reporter for the use of the defendant and the necessary cost of preparing the requisite copies of the record and briefs which the defendant is required to file in the Supreme Court under the rules of said court.

The judge may fix the reasonable value of the services rendered in furnishing such transcript and preparing such copies of the record and briefs, and said copies of the record and briefs shall be prepared in the manner prescribed by the rules of the Supreme Court in pauper appeals. Provided, that this paragraph shall apply only to those cases in which counsel has been assigned by the court. (1869-70, c. 196, s. 1; Code, s. 1235; Rev., s. 3278; C. S., s. 4651; 1933, c. 197; 1937, c. 330; 1951, c. 81.)

**Cross Reference.**—As to appeals in forma pauperis in civil cases, see § 1-288 and notes thereunder.

**Editor's Note.**—The 1933 amendment added the last two paragraphs of this section, and the 1937 amendment extended the 1933 law to include defendants who have been tried on an indictment for a capital felony and convicted of a lesser offense. Again the statute would apply only in cases where counsel had been assigned by the court. See 15 N. C. Law Rev. 347.

The 1951 amendment added the second sentence of the first paragraph.

**The requirements of this section are mandatory and jurisdictional,** "and unless the statute is complied with, the appeal is not in this court, and we can take no cognizance of the case, except to dismiss it from our docket." *State v. Holland*, 211 N. C. 284, 189 S. E. 761 (1937), citing *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762 (1909). See *State v. Robinson*, 214 N. C. 365, 199 S. E. 270 (1938). And are not subject to indulgences or waiver. *State v. Holland*, 211 N. C. 284, 189 S. E. 761 (1937).

The requirements of the statute are mandatory, not directory, and unless complied with the appeal will be dismissed, not as a matter of discretion, but for want of jurisdiction. *State v. Mitchell*, 221 N. C. 460, 20 S. E. (2d) 292 (1942).

**There is no authority for granting an appeal in forma pauperis without a proper supporting affidavit.** *State v. Holland*, 211 N. C. 284, 189 S. E. 761 (1937).

**Essentials of the Affidavit Cannot Be Waived.**—The court has no authority to dispense with, or the prosecutor to waive the requirements of this section in respect to the affidavit which the defendant must file. *State v. Moore*, 93 N. C. 500 (1885).

In *State v. Duncan*, 107 N. C. 818, 12 S. E. 382 (1890), it is said: "It is not a mat-

ter of discretion with the court, but it is the right of the State to have an appeal dismissed where there is a failure to comply with either of the three essential requirements" of this section. As to dismissal of appeal where no bond given or order allowing appeal without security, see *State v. Patrick*, 72 N. C. 217 (1875).

The affidavit is jurisdictional and may not be waived by the solicitor. *State v. Stafford*, 203 N. C. 601, 166 S. E. 734 (1932).

In order that the Supreme Court may have jurisdiction of an appeal in forma pauperis in a criminal action it is required that the application for leave to appeal be supported by an affidavit of the appellant showing that he is wholly unable to give the security required; that he is advised by counsel that he has reasonable cause for appeal, and that the application is made in good faith; and where any of these three statutory requirements have not been complied with the appeal will be dismissed. *State v. Marion*, 200 N. C. 715, 158 S. E. 406 (1931).

#### **Compared with Security in Civil Actions.**

—The requirements of this section for prosecuting an appeal without making deposit or giving security for costs in a criminal prosecution, are different from those in a civil action, but the requirements of both statutes, are jurisdictional, and unless complied with in all respects, the appeal is not properly in this court. *Powell v. Moore*, 204 N. C. 654, 169 S. E. 281 (1933).

**Time of Perfecting Appeal.**—Appeals under this section can be allowed only during term of court and by the judge, *State v. Gatewood*, 125 N. C. 694, 34 S. E. 543 (1899), and if not perfected at this time the appeal is a nullity. *State v. Dixon*, 71 N. C. 204 (1874).

The affidavit is to be filed during the

trial term or within ten days from the adjournment thereof. *State v. Mitchell*, 221 N. C. 460, 20 S. E. (2d) 292 (1942). See § 15-182.

**Proper Form Presumed.**—If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form. *State v. Low*, 103 N. C. 350, 9 S. E. 411 (1889).

**Signature of Judge Essential.**—Where the order allowing an appeal in forma pauperis in criminal cases is not signed by the judge but by the clerk, the defect is jurisdictional, without power of the appellate court to allow amendment, and the appeal will be dismissed. *State v. Parish*, 151 N. C. 659, 65 S. E. 762 (1909).

**Name of Advising Counsel Need Not Appear.**—It is not necessary that an affidavit, filed under this section, should state the name of the counsel by whom the applicant is advised that he has reasonable grounds for appeal. *State v. Perkins*, 117 N. C. 697, 23 S. E. 274 (1895). But it has been suggested that it would be proper to state the name of such counsel. *State v. Divine*, 69 N. C. 390 (1873).

§ 15-182. **Appeal granted; bail for appearance.**—The affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the judge or the clerk, and it shall be the duty of the judge or the clerk on filing the affidavit to grant the appeal without security for costs, and for any bailable offense the judge shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the superior court to be held in the county and to further answer the charge preferred. (1869-70, c. 196, s. 2; Code, s. 1236; Rev., s. 3279; C. S., s. 4652; 1929, c. 236, s. 1.)

**Editor's Note.**—The 1929 amendment added the first provision of this section; namely, "the affidavit required in the preceding section may be filed at any time during the term or within ten days from the adjournment of the term either with the judge or the clerk."

**Correction of Errors Allowed by § 1-288 Applies to Civil Cases Only.**—The amendment to § 1-288 permitting correction of errors or omissions in the affidavit or certificate of counsel in pauper appeals at any time prior to the hearing of the argument of the case, applies only to appeals in civil

**Motion to Reinstate Appeal.**—Where one of the essential elements has been omitted from the affidavit, a motion to reinstate the appeal by offering to file a bond or make a deposit should be made when the motion to dismiss was before the court, and after the case has been regularly dismissed, it is too late. *State v. Martin*, 172 N. C. 977, 90 S. E. 502 (1916).

**Failure to Prosecute According to Rules of Court.**—See *State v. Holland*, 211 N. C. 284, 189 S. E. 761 (1937), where it was held that the affidavit not containing the assertion that "the application is in good faith," prevented the court having jurisdiction. See also, *State v. Bynum*, 199 N. C. 376, 154 S. E. 918 (1930).

**Applied in** *State v. Starnes*, 92 N. C. 973 (1886); *State v. Wylde*, 110 N. C. 500, 15 S. E. 5 (1892); *State v. Atkinson*, 141 N. C. 734, 53 S. E. 228 (1906); *State v. Lampkin*, 227 N. C. 620, 44 S. E. (2d) 30 (1947); *State v. Parrott*, 228 N. C. 752, 46 S. E. (2d) 851 (1948).

**Cited in** *State v. Brumfield*, 198 N. C. 613, 152 S. E. 926 (1930); *State v. Brooks*, 224 N. C. 627, 31 S. E. (2d) 754 (1944).

actions and not to appeals in criminal prosecutions under this and the preceding section. *State v. Mitchell*, 221 N. C. 460, 20 S. E. 292 (1942).

**The affidavit for appeal in forma pauperis** must be made during the trial term or within ten days after the adjournment thereof in order for the Supreme Court to acquire jurisdiction of the appeal, but in a capital case the Supreme Court will nevertheless examine the exception or exceptions defendant undertakes to have considered on the appeal. *State v. Harrell*, 226 N. C. 743, 40 S. E. (2d) 205 (1946).

§ 15-183. **Bail pending appeal.**—When any person convicted of a misdemeanor and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal. (1850-1, c. 2; R. C., c. 35, s. 12; Code, s. 1181; Rev., s. 3280; C. S., s. 4653.)

**Cross Reference.**—As to right of bail to surrender principal, see § 15-122.

**In General.**—But for this section an ac-

cused would have no right to bail pending an appeal. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349 (1925).

**Amount of Bail.**—The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475 (1941).

**§ 15-183.1. When copy of evidence and charge furnished solicitor; taxed as costs.**—When an appeal in a criminal action is taken to the Supreme Court, and the defendant's attorney has ordered from the court reporter a transcript of the evidence and charge of the court or a transcript of the evidence alone, the court reporter shall furnish to the State solicitor a copy of the evidence of the case and the charge of the court. The county commissioners shall pay the court reporter for said transcript of the evidence and charge of the court, and the same shall be taxed as costs in said criminal action. Whenever there has been a change of venue, the bill for said copy of the evidence and charge of the court shall be paid by the county commissioners of the county in which the criminal action originated. (1951, c. 1080.)

**§ 15-184. Appeal not to vacate judgment; stay of execution.**—In criminal cases an appeal to the Supreme Court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in forma pauperis, there shall be a stay of execution during the pendency of the appeal. The clerk of the superior court shall, as soon as may be after execution is stayed, as provided in this section, notify the Attorney General thereof. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the Supreme Court, he may go, or be taken, before the clerk of the superior court in which he was convicted, and said clerk shall enter such withdrawal upon the record of the case, and notify the sheriff, who shall proceed forthwith to execute the sentence. (1887, c. 191, s. 1; 1887, c. 192, s. 4; Rev., s. 3281; 1919, c. 5; C. S., s. 4654.)

**The effect of an appeal is to stay all proceedings in the lower court pending the disposition of the appeal,** and where, after appeal bond has been given, the defendant makes motions before the superior court judge for a mistrial for prejudice of jurors and for a new trial for newly discovered evidence, the motions are coram non iudice. *State v. Casey*, 201 N. C. 185, 159 S. E. 337 (1931).

**Clerk to Notify Attorney General of Appeal.**—Where an appeal is taken in a criminal case and the execution of the judgment stayed under this section, the clerk of the superior court is required to notify the Attorney General of the appeal, and, if the statutory time for perfecting the appeal is extended, he should notify him of such extension. *State v. Etheridge*, 207 N. C. 801, 178 S. E. 556 (1935); *State v. Watson*, 208 N. C. 70, 179 S. E. 455 (1935).

**Effect of Failure to Serve Statement of**

**Case within Time Fixed.**—Where defendants fail to make out and serve their statement of case on appeal within the time fixed, they lose their right to prosecute the appeal, and the motion of the Attorney General to docket and dismiss will be allowed, but where defendants have been convicted of a capital felony, this will be done only after an inspection of the record for errors appearing upon its face. *State v. Allen*, 208 N. C. 672, 182 S. E. 140 (1935). See also, *State v. McLeod*, 209 N. C. 54, 182 S. E. 713 (1935).

**Conditions on Suspension of Execution.**—Suspension of execution of judgment must not be so conditioned as to interfere with right of appeal. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

**Applied in** *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931); *Current v. Church*, 207 N. C. 658, 178 S. E. 82 (1935).

**§ 15-185. Judgment for fines docketed; lien and execution.**—When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed upon appeal to the

Supreme Court, the clerk of the superior court, on receipt of the certificate from the Supreme Court, shall issue execution on such judgment. (1887, c. 191, s. 3; Rev., s. 3282; C. S., s. 4655.)

**Cross Reference.**—As to stay of execution upon appeal in civil cases, see § 1-289 et seq.

**Time Lien Attaches.**—A judgment for a fine, duly docketed, constitutes a lien on the real estate of defendant, under this

section, which lien attaches immediately upon the docketing of the judgment. *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642 (1935).

**Cited in** *Current v. Church*, 207 N. C. 658, 178 S. E. 82 (1935).

**§ 15-186. Procedure upon receipt of certificate of Supreme Court.**

—The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the Supreme Court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. (1887, c. 192, s. 3; Rev., s. 3283; C. S., s. 4656.)

**This section applies to final judgments where nothing further is required to be done by the court**, and not to orders suspending the execution of sentences on compliance with conditions imposed. *State v. Bowser*, 232 N. C. 414, 61 S. E. (2d) 98 (1950).

Where defendant appealed from a con-

viction of willful failure to support his illegitimate child notwithstanding the suspension of execution of judgment, neither the clerk nor his deputy had authority to issue a mittimus upon receipt of certificate of opinion of the Supreme Court affirming the judgment. *State v. Bowser*, 232 N. C. 414, 61 S. E. (2d) 98 (1950).

ARTICLE 19.

*Execution.*

**§ 15-187. Death by administration of lethal gas.**—Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; C. S., s. 4657; 1935, c. 294, s. 1.)

**Cross Reference.**—As to punishment for capital crimes committed before July 1, 1935, see § 15-191.

**Editor's Note.** — Prior to the 1935 amendment this section provided for electrocution.

**This section applies only to crimes committed after the effective date of the statute**, 1 July, 1935, and it will not support a sentence of death by lethal gas imposed for a capital crime committed prior to the effective date of the statute although defendant was tried and convicted after the effective date thereof. *State v. Hester*, 209 N. C. 99, 182 S. E. 738 (1935). See also,

*State v. Dingle*, 209 N. C. 293, 183 S. E. 376 (1936); *State v. McNeill*, 211 N. C. 286, 186 S. E. 872 (1937).

**Cited in** *State v. Jackson*, 199 N. C. 321, 154 S. E. 402 (1930); *State v. Ferrell*, 205 N. C. 640, 172 S. E. 186 (1934); *State v. Wall*, 205 N. C. 657, 172 S. E. 216 (1934); *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935); *State v. Horne*, 209 N. C. 725, 184 S. E. 470 (1936); *State v. Brice*, 214 N. C. 34, 197 S. E. 690 (1938); *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35 (1948); *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948); *State v. Hall*, 233 N. C. 310, 63 S. E. (2d) 636 (1951).

**§ 15-188. Manner and place of execution.**—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent



of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article. (1909, c. 443, s. 2; C. S., s. 4658; 1935, c. 294, s. 2.)

Cited in *State v. Brooks*, 206 N. C. 113, 172 S. E. 879 (1934); *State v. Exum*, 213 N. C. 16, 195 S. E. 7 (1938); *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614 (1946).

**§ 15-189. Sentence of death; prisoner taken to penitentiary.**—Upon the sentence of death being pronounced against any person in the State of North Carolina convicted of a crime punishable by death, it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person. The clerk of the superior court in which such death sentence is pronounced shall prepare a certified copy of said judgment or sentence of death, including therewith a copy of any notice or entries of appeal made in such case; if no entries or notice of appeal have been made or given in such case, a statement to the effect shall be included in the certificate of the clerk; it shall also be the duty of the solicitor, assistant solicitor, or attorney prosecuting in behalf of the State in the absence of the solicitor, to prepare and sign a certificate stating in substance that he prosecuted said case in behalf of the State and that notice or entries of appeal have or have not been made or given in said case, and further that he has examined a copy of said judgment or sentence of death certified by the clerk, including the copy of the notice or entries of appeal or statement to the effect that no appeal has been given, and to the best of his knowledge the same is correct; the certificate of said solicitor, or other prosecuting officer above named, shall be attached to the certified copy of said sentence of death, as prepared and certified by the clerk, and both certificates shall be transmitted by the clerk of the superior court in which said sentence of death is pronounced to the warden of the State penitentiary at Raleigh, North Carolina; at the same time and in the same manner, a duplicate original of said certificates shall be prepared by the clerk of the superior court and the solicitor, or other prosecuting officer above named, and the said duplicate original or said certificates shall be transmitted to the Attorney General of North Carolina. If notice of appeal is given or entries of appeal are made after the expiration of the term of superior court in which said sentence of death is pronounced, said certificates shall be prepared by the clerk of the superior court in which said sentence is pronounced and by the solicitor, or other prosecuting officer above named, prosecuting in behalf of the State, in the same manner and shall be transmitted as soon as possible to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina. The above certificates so prepared by the clerk of the superior court in which such sentence of death is pronounced and by the solicitor, or other prosecuting officer above named, shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the State penitentiary at Raleigh, North Carolina, and to the Attorney General of North Carolina, not more than twenty (20) or less than ten (10) days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal, said sentence of death shall not be carried out by the warden of the State penitentiary or by any of his deputies or agents until said certificates so prepared and transmitted by the clerk of the superior court in which said sentence of death is pronounced, and by the solicitor, or the prosecuting officer above named, have been received in the office of the warden of the State penitentiary at Raleigh, North Carolina. In all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary, at

Raleigh, North Carolina, such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary. (1909, c. 443, s. 3; C. S., s. 4659; 1951, c. 899, s. 1.)

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

**Judgment Must Be Written and Signed by Trial Judge.**—The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of this section, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. *State v. Jackson*, 199 N. C. 321, 154 S. E. 402 (1930).

**Death Sentence without Reference to Crime.**—A judgment sentencing defendant to death for the commission of a capital felony, though making no reference to the trial or the crime of which the defendant was convicted, while not commended is held sufficient. *State v. Taylor*, 194 N. C. 738, 140 S. E. 728 (1927).

**Judgment Must Show Degree of Murder.**—Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the

face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State penitentiary. *State v. Montgomery*, 227 N. C. 106, 40 S. E. (2d) 614 (1946).

Where in a prosecution for murder the jury returns a verdict of guilty of murder in the first degree, the judgment of the court, which alone is certified to the warden of the State prison, under this section and §§ 15-188, 15-190, must recite that the defendant had been convicted of murder in the first degree, and where it recites that the prisoner had been convicted of murder, and sentences the prisoner to death by electrocution, the case will be remanded. *State v. Langley*, 204 N. C. 687, 169 S. E. 705 (1933).

**When No Reference to Trial or Crime Is Made.**—A judgment, while somewhat informal, because it made no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, sufficient to meet the requirements of this section. *State v. Edney*, 202 N. C. 706, 164 S. E. 23 (1932).

**§ 15-190. A guard or guards or other person to be named and designated by the warden to execute sentence.**—Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be asphyxiated as provided by this article and all amendments thereto. The asphyxiation shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be asphyxiated as provided by this article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars (\$35.00). (1909, c. 443, s. 4; C. S., s. 4660; 1925, c. 123; 1935, c. 294, s. 3.)

**Cited in** *State v. Montgomery*, 227 N. C. 100, 40 S. E. (2d) 614 (1946).

**§ 15-191. Pending sentences unaffected.**—Nothing in §§ 15-187, 15-188, and 15-190 shall be construed to alter in any manner the execution of the sentence of death imposed on account of any crime or crimes committed before July 1, 1935. (1935, c. 294, s. 4.)

**Editor's Note.** — The act from which this section was codified changed the mode of executing a death sentence from

electrocution to the administration of lethal gas.

§ 15-192. **Certificate filed with clerk.**—The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof. (1909, c. 443, s. 5; C. S., s. 4661.)

§ 15-193. **Notice of reprieve or new trial.**—Should the condemned person, convict or felon be granted a reprieve by the Governor or obtain a writ of error, or a new trial be granted by the Supreme Court of the State of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake County, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself. (1909, c. 443, s. 6; C. S., s. 4662.)

§ 15-194. **Judgment sustained on appeal, reprieve, time for execution.**—In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, or in case the certificates of the clerk of the superior court and of the solicitor, or other prosecuting officer as set forth in G. S. 15-189, showing that no appeal has been entered, have not been transmitted to the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out the sentence of death on the date fixed by the court in said judgment or sentence of death, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; or in case certificates of the clerk of the superior court and of the solicitor, or other prosecuting officer provided for in G. S. 15-189, showing that no notice of appeal has been given, are not received in the office of the warden of the State penitentiary at Raleigh, North Carolina, in time to carry out sentence of death upon the date provided for in said judgment or sentence of death, then said convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the date of the receipt of said certificates of the clerk and solicitor, or other prosecuting officer, showing that no notice of appeal has been given or entered; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; C. S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2.)

**Editor's Note.**—The 1951 amendment inserted the two provisions beginning "or in case the certificates of the clerk, etc."

**Upon appeal from sentence of death,** it is necessary that the Supreme Court find that there was no error in the trial before

the sentence can be carried out. *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35 (1948).

**Cited in** *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

§ 15-195. **New trial granted, prisoner taken to place of trial.**—Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the

penitentiary, he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary. (1909, c. 443, s. 7; C. S., s. 4664.)

**§ 15-196. Disposition of body.**—Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; C. S., s. 4665; 1925, c. 275, s. 6.)

**Cross Reference.**—As to disposition of other bodies of convicts, see § 90-212.

## ARTICLE 20.

### *Suspension of Sentence and Probation.*

**§ 15-197. Suspension of sentence and probation.**—After conviction or plea of guilty or nolo contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. (1937, c. 132, s. 1.)

**Cross References.**—As to suspension of sentence in bastardy proceedings, see § 49-8. As to probation in cases of prostitution, see § 14-208. As to restoration of citizenship in case of pardon or suspension of judgment, see § 13-6.

**Editor's Note.**—For a discussion of the act from which this article was codified, see 15 N. C. Law Rev. 345.

For comment on 1939 amendatory act, see 17 N. C. Law Rev. 350.

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

**History.** — For nearly half a century prior to 1937, the trial judges in North Carolina operated a system of probation on their own initiative, permitted convicted criminals to go at large on specified conditions, and arrested them upon bench warrants if the terms of probation were violated. Either the sentence of imprisonment would be formally entered and execution suspended on conditions, or prayer for judgment would be continued in like manner. Since 1937 this power has been expressly continued by this article as a part of the State's probation system. *Pelley v. Colpoys*, 122 F. (2d) 12 (1941).

**Probation Must Be Consistent with Right of Appeal.**—Where the privilege of probation, granted by this article, is so conditioned as to be inconsistent with a defendant's right of appeal, the judgment

is erroneous. *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941).

**An order suspending the imposition or execution of sentence on condition** is favorable to the defendant, and when he sits by as the order is entered and does not appeal, he impliedly consents and thereby waives or abandons his right to appeal on the principal issue of his guilt or innocence and commits himself to abide by the stipulated conditions. He may not thereafter complain that his conviction was not in accord with due process of law. He is relegated to his right to contest imposition of judgment or execution of sentence for want of evidence to support a finding that conditions imposed have been breached, or that the conditions are unreasonable or unenforceable, or are for an unreasonable length of time. And the court may not pronounce judgment or invoke execution, after adjournment of the term, so long as defendant observes the conditions imposed. *State v. Miller*, 225 N. C. 213, 34 S. E. (2d) 143 (1945).

Where on conviction of defendant in a criminal case and judgment and execution are suspended on condition, without appeal taken, the court moves to impose sentence on the grounds of conditions broken, the defenses available to defendant involve questions of fact for the judge and not issues of fact for the jury, and no appeal is

provided by statute from an adverse ruling, so that defendant's remedy is by certiorari or recordari. *State v. Miller*, 225 N. C. 213, 34 S. E. (2d) 143 (1945).

S. E. (2d) 922 (1942); *State v. Graham*, 225 N. C. 217, 34 S. E. (2d) 146 (1945); *State v. Jackson*, 226 N. C. 66, 36 S. E. (2d) 706 (1946).

Cited in *State v. Ward*, 222 N. C. 316, 22

**§ 15-198. Investigation by probation officer.**—When directed by the court the probation officer shall fully investigate and report to the court in writing the circumstances of the offense and the criminal record, social history, and present condition of the defendant, including, whenever practicable, the findings of a physical and mental examination of the defendant. When the services of a probation officer are available to the court, no defendant charged with a felony, and, unless the court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court. (1937, c. 132, s. 2.)

**§ 15-199. Conditions of probation.**—The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall:

- (a) Avoid injurious or vicious habits;
- (b) Avoid persons or places of disreputable or harmful character;
- (c) Report to the probation officer as directed;
- (d) Permit the probation officer to visit at his home or elsewhere;
- (e) Work faithfully at suitable employment as far as possible;
- (f) Remain within a specified area;
- (g) Pay a fine in one or several sums as directed by the court;
- (h) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court;
- (i) Support his dependents. (1937, c. 132, s. 3.)

**To Remain Law-Abiding.**—Upon conviction of a misdemeanor, judgment was entered that defendant be imprisoned in the county jail for a term of eight months, with further provision that execution of the judgment should be suspended upon the payment of a fine and upon further condition that defendant remain law-abiding for a period of five years. Held: The condition upon which execution was suspended was twofold; first, the payment of the fine and, second, that defendant remain law-abiding for a term of five years;

and upon conviction of defendant of a subsequent violation of the criminal law within the period of five years, the order of the court putting into effect the suspended execution is proper, notwithstanding defendant had paid the fine, defendant's contention that judgment suspending execution did not contemplate imprisonment if the fine should be paid, being untenable. *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440 (1939).

Cited in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.).

**§ 15-200. Termination of probation, arrest, subsequent disposition.**—The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation; and said statement shall be sufficient warrant for the

detention of said probationer in the county jail, or other appropriate place of detention, until said probationer shall be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court, or in superior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what manner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. (1937, c. 132, s. 4; 1939, c. 373.)

**Editor's Note.**—The 1939 amendment inserted in the first sentence the words "terminated or suspended by the court at any time". It also inserted in the sixth sentence the provision as to superior court cases, and in the last sentence the words "in or out of term".

**Common-Law System.** — Under the North Carolina law the trial court had authority to issue its *capias* for petitioner's arrest on the suspended sentence either under the common-law system which prevailed in 1935 or under the provisions of this article. *Pelley v. Colpoys*, 122 F. (2d) 12 (1941).

**Suspension May Be for Five Years Although Maximum Imprisonment Is Two Years.**—The superior court has the power to suspend execution of a sentence in a criminal prosecution for a period of five years, notwithstanding that the maximum imprisonment authorized for the offense of which defendant is convicted is two years. *State v. Wilson*, 216 N. C. 130, 4 S. E. (2d) 440 (1939).

**Absence from State after Service of Capias.**—Defendant was convicted upon an

indictment containing two counts. Execution of sentence on one count was suspended upon specified conditions for a period of five years and prayer for judgment was continued on the other count for a like period. Thereafter, upon alleged violation of conditions of probation, *capias* was issued under this section, and alias *capias* subsequently served upon defendant out of the State before the expiration of the period of probation. Defendant refused to appear, and by habeas corpus and numerous appeals in his fight against extradition, delayed his appearance in court for hearing upon the alleged violation of conditions of probation beyond the period of probation. It was held that upon issuance of notice or service of *capias* the defendant was under duty to respond and appear and time ceased to run against the period of probation during the period defendant absented himself from the State and was a fugitive from justice. *State v. Pelley*, 221 N. C. 487, 20 S. E. (2d) 850 (1942).

Cited in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.).

**§ 15-200.1. Appeal from invocation of suspended sentence in court inferior to superior court.**—In all cases where a suspended sentence theretofore entered in a court inferior to the superior court is invoked by the court inferior to the superior court, the defendant shall have the right to appeal therefrom to the superior court, and, upon such appeal, the matter shall be heard *de novo*, but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence: Provided nothing herein shall apply to a person under the supervision of the Probation Commission. (1951, c. 1038.)

**§ 15-201. Establishment and organization of a State Probation Commission.**—There is hereby established a State Probation Commission to be composed of five members, who shall be appointed by the Governor and shall serve without a salary as members of such Commission, but shall receive their actual traveling expenses while in the performance of their official duties. The first appointments shall be made within thirty days after March 13, 1937, and shall be made in such manner that the term of one member of the State Probation Commission shall expire each year. Their successors shall be appointed by the Governor within thirty days thereafter for terms of five years each. All vacancies occurring among the members shall be filled as soon as practicable thereafter by the Governor for the unexpired terms. This Commission shall be deemed a "commission for special purpose" within the meaning of the language of section seven

of Article XIV of the Constitution, and the membership thereof may be composed of persons holding other official positions in the State, if the Governor shall so elect.

The State Probation Commission shall organize immediately after the appointment of the first members thereof, and elect a chairman from its members. Thereafter a chairman shall be elected annually between January fifteenth and January thirtieth of each year. (1937, c. 132, s. 5.)

**§ 15-202. Duties and powers of the Commission; meetings; appointment of Director of Probation; qualifications.**—With respect to the administration of probation in the State, except cases within the jurisdiction of the juvenile courts, the State Probation Commission shall exercise general supervision; formulate policies; adopt general rules, not inconsistent with law, to regulate methods of procedure; and set standards for personnel. It shall meet at stated times to be fixed by it not less often than once every three months, and on call of its chairman, to consider any matters relating to probation in the State.

The State Probation Commission, with the approval of the Governor, shall appoint a Director of Probation, who shall serve as its executive secretary, and shall receive a salary to be fixed by the Governor and the Council of State and who shall give his entire time to the work. When the necessity of the service requires, it shall appoint one or more assistants and fix their salaries.

The person appointed as Director of Probation shall be qualified by education, training, experience and temperament for the duties of the office. (1937, c. 132, s. 6; 1943, c. 638.)

**Cross Reference.**—As to administration of probation with respect to cases within the jurisdiction of juvenile courts, see § 110-31 et seq.

**Editor's Note.** — Prior to the 1943 amendment this section provided a minimum salary of \$3,600 and a maximum salary of \$4,500 for the Director.

**§ 15-203. Duties of the Director of Probation; appointment of probation officers; reports.**—The Director of Probation shall appoint, subject to the approval of the State Probation Commission, such probation officers as are required for service in the State and such clerical assistance as may be necessary: Provided, that before any persons other than the Director of Probation shall be appointed, the State Probation Commission shall make up and submit to the Governor a budget covering its proposed organization and expenditures, and no fund shall be available to carry out the purpose of this article except to the extent that said budget is approved first by the State Highway and Public Works Commission, and then by the Director of the Budget.

The Director of Probation shall direct the work of the probation officers appointed under this article. He shall consult and cooperate with the courts and institutions in the development of methods and procedure in the administration of probation, and shall arrange conferences of probation officers and judges. He shall make an annual written report with statistical and other information to the Probation Commission and the Governor. (1937, c. 132, s. 7.)

**§ 15-204. Assignment and compensation and oath of probation officers.**—Probation officers appointed under this article shall be assigned to serve in such courts or districts or otherwise as the Director of Probation may determine. They shall be paid annual salaries to be fixed by the Probation Commission, and shall also be paid traveling and other necessary expenses incurred in the performance of their official duties as probation officers when such expense accounts have been authorized and approved by the Director of Probation.

Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve, which oath shall be as follows:

“I, . . . . ., do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional

powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain, and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God," and shall be noted of record by the clerk of the court. (1937, c. 132, s. 8.)

**Cited** in *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.).

**§ 15-205. Duties and powers of the probation officers.**—A probation officer shall investigate all cases referred to him for investigation by the judges of the courts or by the Director of Probation, and shall report in writing thereon. He shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision by visiting, requiring reports, and in other ways, and shall report thereon in writing as often as the court or the Director of Probation may require. Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the court, or the Director of Probation, to aid and encourage persons on probation to bring about improvement in their conduct and condition. Such officer shall keep detailed records of his work; shall make such reports in writing to the Director of Probation as he may require; and shall perform such other duties as the Director of Probation may require. A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State. (1937, c. 132, s. 9.)

**§ 15-206. Co-operation with Commissioner of Parole and officials of local units.**—It shall be the duty of the Director of Probation and the Commissioner of Parole to co-operate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or State official or department to render all assistance and co-operation within his or its fundamental power which may further the objects of this article. The State Probation Commission, the Director of Probation, and the probation officers are authorized to seek the co-operation of such officials and departments, and especially of the county superintendents of public welfare and of the State Board of Charities and Public Welfare. (1937, c. 132, s. 10.)

**§ 15-207. Records treated as privileged information.**—All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this article to receive reports, unless and until otherwise ordered by a judge of the court or the director of probation. (1937, c. 132, s. 11.)

**§ 15-208. Payment of salaries and expenses.**—All salaries and expenses necessary for carrying out the provisions of this article shall be fixed in accordance with the Executive Budget Act and the Personnel Act, and shall be paid by the State Highway and Public Works Commission out of the State highway funds, under direction of the Director of the Budget. (1937, c. 132, s. 12.)

**§ 15-209. Accommodations for probation officers.**—The county commissioners in each county in which a probation officer serves shall provide, in or near the courthouse, suitable office space for such officer. (1937, c. 132, s. 13.)



## ARTICLE 21.

*Segregation of Youthful Offenders.*

§ 15-210. **Purpose of article.**—It is the purpose of this article to improve the chances of rehabilitation of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals. (1947, c. 262, s. 1.)

**Editor's Note.**—For brief comment on prison camp for youthful and first term article, see 25 N. C. Law Rev. 404. As to offenders, see §§ 148-49.1 through 148-49.5.

§ 15-211. **Definition of "youthful offender."**—As used in this article a "youthful offender" is a person

(1) Who, at the time of imposition of sentence, is less than twenty-one years of age, and

(2) Who has not previously served a term or terms or parts thereof totaling more than six months in jail or other prison. (1947, c. 262, s. 1.)

§ 15-212. **Sentence of youthful offender.**—Any judge of any court who sentences a youthful offender to imprisonment in the State prison or to jail to be assigned to work under the State Highway and Public Works Commission, if in his opinion such person will be benefited by being kept separate, while performing his sentence, from prisoners other than youthful offenders, shall, as a part of the sentence of such person, provide that he shall be segregated as a youthful offender. (1947, c. 262, s. 1.)

§ 15-213. **Duty of State Highway and Public Works Commission as to segregation of youthful offenders.**—The State Highway and Public Works Commission shall segregate all youthful offenders whose sentences provide for such segregation and shall neither quarter nor work such prisoners, except in cases of emergency or when temporarily necessary, with other prisoners not coming within that classification.

The State Highway and Public Works Commission shall, in so far as is possible, provide personnel specially qualified by training, experience and personality to operate units that may be set up to effect the segregation provided in this article. (1947, c. 262, s. 1.)

§ 15-214. **Extension to persons sentenced prior to July 1st, 1947.**

—(a) The benefits of this article, as far as practicable, shall also be extended to:

(1) All persons who on July 1st, 1947, shall be serving sentences in the State prison or sentences to jail with assignment to work under the State Highway and Public Works Commission, and

(2) All persons who shall be so sentenced prior to July 1st, 1947, even though they begin to serve such sentences after that date,

Provided such persons at the time of imposition of sentence came within the meaning of the term "youthful offender" as used in this article.

(b) The State Highway and Public Works Commission shall determine which of the prisoners coming within the provisions of subsection (a) of this section will probably be benefited by being segregated as provided in § 15-213, and such prisoners shall thereafter be so segregated as if their sentences so provided. (1947, c. 262, s. 1.)

§ 15-215. **Termination of segregation.**—The State Highway and Public Works Commission shall have authority to terminate the segregation as a youthful offender of any prisoner who, in the opinion of the Commission, exercises a bad influence upon his fellow prisoners, or fails to take proper advantage of the opportunities offered by such segregation. (1947, c. 262, s. 1.)

§ 15-216. **Persons to whom article not applicable.**—(a) Since offenders who may be sentenced to terms of less than six months, but who come

within the meaning of the term "youthful offender" as used in this article, may be placed upon probation if the judge imposing sentence is of the opinion that they may be rehabilitated, this article shall not apply to any person sentenced for a term of less than six months.

(b) Since special provision has already been made for suitable quarters for women prisoners, and since judges may specifically assign women convicted of offenses to such quarters, this article shall not apply to women. (1947, c. 262, s. 1.)

#### ARTICLE 22.

##### *Review of the Constitutionality of Criminal Trials.*

**§ 15-217. Institution of proceeding; service of petition upon solicitor.**—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction may institute a proceeding under this article. The proceeding shall be commenced by filing with the clerk of the superior court of Wake County, or in any county in which the conviction took place, a petition with a copy thereof, verified by affidavit. The petitioner shall serve another copy upon the solicitor of the solicitorial district who prosecutes the criminal docket of the superior court of the county in which said petition is filed, and said service of petition shall be by any of the methods provided by law for the service of process or by mailing said petition to the home address of said solicitor by registered mail, with return receipt requested. If said copy of petition is served by registered mail, the return receipt shall be filed with the clerk of the superior court of the county in which said petition is filed. The clerk shall place upon the criminal docket the petition upon his receipt thereof, and after service of the petition upon the solicitor of the district as above provided. No proceeding under this article shall be commenced more than five years after rendition of final judgment resulting from said conviction, or more than three years after the effective date of this article, whichever is later, unless the petitioner alleges facts showing that the delay was not due to laches or negligence on his part. (1951, c. 1083, s. 1.)

**§ 15-218. Contents of petition; waiver of claims not alleged.**—The petition shall identify the proceeding or trial in which the petitioner was convicted, give the date of the rendition of the final judgment claimed of, and shall clearly set forth the respects with which petitioner's constitutional rights were violated, and that the constitutional questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussions of authorities shall be omitted from the petition. Any claim of substantial denial of constitutional rights not raised or set forth in the original or any amended petition is waived. (1951, c. 1083, s. 1.)

**Editor's Note.**—It seems that the word "plained", which was probably the word "claimed" in the first sentence was inadvertently inserted in place of "com-  
plained", which was probably the word the legislature intended to use.

**§ 15-219. Petitioner unable to pay costs or procure counsel.**—If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the

costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred. (1951, c. 1083, s. 1.)

**§ 15-220. Answer of the State; withdrawal of petition; amendments.**—Within 30 days after the date of the service of the petition upon the solicitor of the district, or within such further time as the court may fix, the solicitor shall answer or move to dismiss on behalf of the State. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may, in its discretion, grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may, in its discretion, make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time for filing any pleading other than the original petition, as shall seem to the court appropriate, just and reasonable. (1951, c. 1083, s. 1.)

**§ 15-221. Evidence to be received upon hearing.**—The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and the court shall pass upon all issues or questions of fact arising in the proceeding without the aid of a jury. In its discretion, the court may order the petitioner brought before the court for the hearing. When said hearing is completed, the court shall make appropriate findings of fact, conclusions of law thereon and shall enter judgment upon said hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted, and such supplementary orders as to re-arraignment, retrial, custody, bail or discharge as may be necessary and proper. Such proceeding may be heard by any resident judge of the district or by any regular or special judge holding the courts of the district, and such proceeding may be heard at term, in chambers, or in vacation, or at any regular or special term of court. If said proceeding is set for hearing at any time other than a regular term of the court of the county in which the petition is filed, then notice of time and place of hearing shall be served upon the solicitor of the district. (1951, c. 1083, s. 1.)

**§ 15-222. Review by application for certiorari.**—Any final judgment entered upon such a petition and proceeding may be reviewed by the Supreme Court of North Carolina upon application for a writ of certiorari brought within 60 days from the entry of the judgment in such proceeding. The law of this State governing the application, granting and disposition of writs of certiorari shall be applicable to any application for writ of certiorari brought under the provisions of this article for the purpose of seeking a review of such judgment or proceeding. (1951, c. 1083, s. 1.)

## Chapter 16.

### Gaming Contracts and Futures.

#### Article 1.

##### Gaming Contracts.

Sec.

- 16-1. Gaming and betting contracts void.  
16-2. Players and betters competent witnesses.

#### Article 2.

##### Contracts for "Futures."

- 16-3. Certain contracts as to "futures" void.

Sec.

- 16-4. Entering into or aiding contract for "futures" misdemeanor.  
16-5. Opening office for sales of "futures" misdemeanor.  
16-6. Evidence in prosecutions under this article.

#### ARTICLE 1.

##### *Gaming Contracts.*

§ 16-1. **Gaming and betting contracts void.**—All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void. (1810, c. 796, P. R.; R. C., c. 51, ss. 1, 2; Code, ss. 2841, 2842; Rev., s. 1687; C. S., s. 2142.)

**Cross Reference.**—As to criminal laws regarding gambling, see § 14-289 et seq.

**In General.**—A gaming contract or wager is a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event. *Bouv. Law Dict.*

At common law all gambling contracts were void. And generally in this country, all wagering contracts are held to be illegal and void as against public policy. *Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225 (1884).

**Liberal Construction.**—This section is construed liberally. *Turner v. Peacock*, 13 N. C. 303 (1830).

**Gambling contracts are void**, because they are so declared by this section. *Morehead Banking Co. v. Tate*, 122 N. C. 313, 30 S. E. 341 (1898).

**Judgments in Invitum Not Included.**—This section does not include judgments taken in invitum, but only such as are confessed or taken by consent. *Teague v. Perry*, 64 N. C. 39 (1870).

**No Recovery Where Game Fair.**—It is settled that money, or a horse, or a judgment, won at cards and actually paid and delivered, can not be recovered back, the game being fairly played. *Hodges v.*

*Pitman*, 4 N. C. 276 (1816); *Hudspeth v. Wilson*, 13 N. C. 372 (1830); *Warden v. Plummer*, 49 N. C. 524 (1857); *Teague v. Perry*, 64 N. C. 39 (1870).

**Unfair Gaming Always Illegal.**—Unfair gaming was not only illegal by force of the statute against gaming, but was unlawful at common law, so that the money, or thing won, if it had been paid, might be recovered back in an action at law. *Webb v. Fulchire*, 25 N. C. 485 (1843); *Warden v. Plummer*, 49 N. C. 524 (1857).

**Same—Recovery.**—Where a man is cheated out of his money, though it is in playing at a game forbidden by law, he may recover back what he has paid from the person who practiced the fraud upon him. *Webb v. Fulchire*, 25 N. C. 485 (1843).

**No Recovery on Bond Unfairly Won.**—Where A., at a game of cards unfairly played, won a justice's judgment from B., and took from the defendants in the judgment a bond payable to himself for the amount, on which he brought suit, to which the statute against gaming was pleaded, it was held that he could not recover. *Warden v. Plummer*, 49 N. C. 524 (1857).

**Subsequent Note Valid.**—A note given subsequently, in purchase of a magistrate's judgment which had been won at cards

by the payee from the maker, is not void under this section against gaming. *Teague v. Perry*, 64 N. C. 39 (1870).

**Rights of Innocent Holder of Gambling Note.**—This section applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. *Wachovia Bank, etc., Co. v. Crafton*, 181 N. C. 404, 107 S. E. 316 (1921).

**Intent of Parties.**—Where the transaction is legitimate on its face, one party cannot avoid it by claiming that it was a gambling contract where the proof shows that the other party did not so understand it, but believed it to be a valid agreement. *Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 817 (1893).

**Money Loaned for Gaming.** — Money lent to play with at gaming, or to play at the time of loss, is not recoverable. *Mooring v. Stanton*, 1 N. C. 70 (1795).

**When Stakeholder Liable.** — Where money is deposited with a stakeholder, to be delivered to the winner, and the stakeholder pays over the money, after notice from the loser not to do so, the loser may recover the money from the stakeholder. *Wood v. Wood*, 7 N. C. 172 (1819); *For-*

*rest v. Hart*, 7 N. C. 458 (1819).

**Note Given in Foreign State Unenforceable.**—A note given in consideration of a bet won on a horse race cannot be enforced in this State although given in a state where wagering contracts are not invalid. *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362 (1898). See *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11 (1912).

**Cards a Game of Chance.**—It is a matter of common knowledge that a game of cards is a game of chance. *State v. Taylor*, 111 N. C. 680, 16 S. E. 168 (1892).

**Betting on Horse Race.**—It was the intention of this section to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouncement of the wager as unlawful came in by amendment at a later time. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286 (1942).

**The game of tenpins** is not a "game of chance." *State v. Gupton*, 30 N. C. 271 (1848); *State v. King*, 113 N. C. 631, 18 S. E. 169 (1893).

**"Shuffleboard."**—The keeping of a gaming table called "a shuffleboard" is not indictable, as the game is not one of chance, but of skill. *State v. Bishop*, 30 N. C. 266 (1848).

**"Shooting for beef"** and other similar trials of skill, for which the participants pay for the "chance" or privilege of shooting, is not a game of chance there being no "chance" in the sense of the acts against gambling. *State v. DeBoy*, 117 N. C. 702, 23 S. E. 167 (1895).

**Cited in Moore v. Schwartz**, 195 N. C. 549, 142 S. E. 772 (1928).

**§ 16-2. Players and betters competent witnesses.**—No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking. (R. C., c. 51, s. 3; Code, s. 2843; Rev., s. 1688; C. S., s. 2143.)

**Cross References.**—As to rule of evidence generally that defendant is not compellable to testify, see § 8-54. As to exception with reference to testimony as to

gambling, etc., see also, § 8-55.

**Stated in State v. Brown**, 221 N. C. 301, 20 S. E. (2d) 286 (1942).

## ARTICLE 2.

### *Contracts for "Futures."*

**§ 16-3. Certain contracts as to "futures" void.**—Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and

at a time specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm or corporation, or his or their agents, engaged in the business of manufacturing or wholesale merchandising in the purchase and/or sale of the necessary commodities required in the ordinary course of their business; nor shall this section be construed so as to apply to any contract with respect to the purchase and/or sale for future delivery of any of the articles or things mentioned and referred to in this section, where such purchase and/or sale is made on any exchange on which any such article or things are regularly bought and sold, or contracts therefor regularly entered into, and the rules and regulations of such exchange are such that either party to such contract may require delivery thereof: Provided, such contract is made in accordance with such rules and regulations. (1889, c. 221, s. 1; 1905, c. 538, s. 7; Rev., s. 1689; 1909, c. 853, s. 1; C. S., s. 2144; 1931, c. 236, s. 1.)

**Editor's Note.**—On examination of the original statute, it appears that the act, defining and declaring contracts in "futures" unlawful, was passed in 1889, chapter 221. In 1905, chapter 538, the legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in §§ 1 and 2, the statute contains several additional sections relating to the statute of 1889 and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The law of 1905 then, in its closing section,

provided: "This act shall not be construed so as to apply to any person, firm, or corporation, etc." This is the first time these words appear in our legislation on this subject, and, so far as they had reference to the law of 1889, it is clear that the legislature, in the original statutes, only intended that they should affect questions of proof. See *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 817 (1911).

From these considerations, it seems clear that the last sentence of this section was inserted "unnecessarily and out of abundance of caution"—and it does not

confer any exclusive right or privilege upon manufacturers or wholesale merchants; nor does it authorize them to engage in any business prohibited by the section. It simply provides that the courts shall not construe the section to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business. See *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905); *State v. Clayton*, 138 N. C. 732, 50 S. E. 866 (1905); *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 817 (1911).

The 1931 act amended the "Bucket Shop Act" of 1889, now this section, so as to exempt contracts with respect to purchase or sale where they are made in accordance with the regulations of any exchange, and where the rules of the exchange permit either party to require delivery. It was intended to remove the ban of illegality from transactions on legitimate exchanges, as distinguished from "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." *Gatewood v. North Carolina*, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906). See 9 N. C. Law Rev. 358.

**Section Constitutional.**—This section is in furtherance of our declared public policy, and is constitutional and valid. *Garseed v. Sternberger*, 135 N. C. 501, 47 S. E. 603 (1904); *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905); *State v. Clayton*, 138 N. C. 732, 50 S. E. 866 (1905); *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854 (1906); *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731 (1916).

The legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be prima facie evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a prima facie case that such purchases were void, and other circumstances shall not constitute such prima facie evidence, is not a discrimination forbidden by the Fourteenth Amendment. *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905). This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

**Within Police Power.**—This section for-

bidding the business of running a "bucket shop," is clearly within the police power of the State. *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905).

**Defines Illegal Contract.**—This section clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the differences in the prices of the commodity at the time fixed. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948 (1917).

**Not Contrary to Federal Constitution.**—When, in an action pending in the courts of this State to recover on a judgment in a sister state, the legislature amended this section by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that it impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, §§ 1 and 2 of the federal Constitution, "the full faith and credit clause," if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by our statute on gaming, and that the question was not raised, investigated, or determined in the courts of the state in which the judgment was originally rendered. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969 (1909).

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the full faith and credit clause of the Constitution, on the ground that the State had not provided a court with jurisdiction to entertain suit on such a judgment though properly rendered in another state. *Lockman v. Lockman*, 220 N. C. 95, 16 S. E. (2d) 670 (1941).

In an action on a judgment of the state of New York, defendant moved for leave to amend his answer to allege that the judgment was based on a gaming contract, and that therefore our court was without jurisdiction of the action. The trial court, in its discretion, denied the motion to amend, and, there being no valid defense set up in the answer as constituted, entered judgment on the pleadings. It was held that the denial of the motion to amend was affirmed, but the cause was remanded in order that the court find facts determinative of whether the question of the invalidity of the contract was concluded by the New York judgment, and

if not, whether the contract constituting the basis of the judgment was one condemned by this section, since the court cannot render final judgment until it has determined the jurisdictional question. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30 (1941).

**Example of "Margin."** — A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbroker's parlance as a "margin." *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177 (1925); *McClain v. Fleshman*, 106 F. 880 (1901). This case was decided under what formerly constituted § 2145 of the Consolidated Statutes which section was repealed by P. L. 1931, c. 236.

**Contract Made in Foreign State.** — An action upon a wagering or "future contract" in cotton cannot be maintained in this State, though entered into in another state where it is lawful. *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11 (1912).

**Action upon judgment obtained in foreign state.** See *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479 (1940). For note on this case, see 18 N. C. Law Rev. 224.

**Bucket Shop.** — A "bucket shop" has been defined as "an establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of lots or wagers, usually for small amounts, on the rise or fall of stock, grain, etc., there being no transfer or delivery of the stocks or things dealt with." *Gatewood v. North Carolina*, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305 (1906). For other definitions, see *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905).

**Contracts for Future Delivery.** — It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. *Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 817 (1893).

And the fact that it is the practice of persons making sales for future delivery to settle the same by setting off one sale against another, will not render it invalid. *Board v. Christie Grain, etc., Co.*, 198 U. S. 236, 25 S. Ct. 637, 49 L. Ed. 1031 (1905).

**Lawful Agreement.** — The 1931 amendment to this section made entirely lawful

an "arrangement and agreement" between the plaintiffs and the defendant whereby the plaintiffs were to negotiate certain contracts for the sale of cotton on the New York Cotton Exchange for the defendant's account. *Marx v. Maddrey*, 94 F. Supp. 784 (1951).

**Test of Validity under Section.** — The test of the validity of a contract for "future" which this section requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that on the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract. *State v. Clayton*, 138 N. C. 732, 50 S. E. 866 (1905); *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 817 (1911).

When there is no real transaction, no real contract for purchase or sale, but only a wager upon the rise or fall of the price of stock, or an article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done — nothing is bought or sold or contracted for, there is only a bet. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948 (1917).

This section does not render void a contract for the purchase and sale of stocks on margin when actual delivery of the stocks is made to the purchaser or to his agent, and the stocks are paid for in whole or in part. *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165 (1939).

**Same—Intention of Parties.** — The true test of validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. *Williams v. Carr*, 80 N. C. 295 (1879); *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905); *State v. Clayton*, 138 N. C. 732, 50 S. E. 866 (1905); *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177 (1925).

The contract, by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it in the intention of both parties that the cotton



should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854 (1906); *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614 (1908); *Edgerton & Son v. Edgerton & Bro.*, 153 N. C. 167, 69 S. E. 53 (1910); *Harvey & Son v. Pettaway*, 156 N. C. 375, 72 S. E. 364 (1911); *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 817 (1911); *Hold v. Wellons*, 163 N. C. 124, 79 S. E. 450 (1913).

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by this section and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity. *Fenner v. Tucker*, 213 N. C. 419, 196 S. E. 357 (1938).

**Same — Same — Parol Evidence.** — This section rendering void and unenforceable in our courts a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for the loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177 (1925).

**Contracts to Which This Section Applies.** — Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held, that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. *Gladstone v. Swain*, 187 N. C. 712, 122 S. E. 755 (1924).

A note given for margins upon an illegal contract for cotton futures, without intention of delivery of the cotton, cannot be collected by suit in our courts, and the

promisor's repeated promise to pay it cannot impart any validity to it. *Garseed v. Sternberger*, 135 N. C. 501, 47 S. E. 603 (1904); *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614 (1908); *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005 (1912); *Cobb Bros. & Co. v. Guthrie*, 160 N. C. 313, 76 S. E. 81 (1912); *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948 (1917).

Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties, the evidence is sufficient to support a finding that the contracts were void under this section and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. *Martin v. Bush*, 199 N. C. 93, 154 S. E. 43 (1930).

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. *Bodie v. Horn*, 211 N. C. 397, 190 S. E. 236 (1937).

**Both Parties Must Have Intent.** — It was never held that when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both. *Rodgers, etc., Co. v. Bell*, 156 N. C. 378, 72 S. E. 317 (1911).

**Parties Included.** — The owner of a draft which he knows to have been given in the unlawful purchase of cotton futures, or in maintaining or purchasing margins in contracts of that character, is a party to the prohibited contract, the consideration is illegal and he cannot recover from the payee in his action on the draft. *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11 (1912).

**Subsequent Promise Void.** — A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614 (1908).

**Unauthorized Act of Agent.** — A bona fide wholesale dealer who sues upon a contract for the future delivery of cotton, which is resisted on the ground that the contract was a wagering one and void under the provisions of this section, is bound by the acts and statements of his agents in negotiating and closing the trade, to the effect that actual delivery was not contemplated or required; and the plaintiff may

not recover on the contract merely because he was a bona fide wholesale dealer in cotton and only authorized his agent to make a contract for actual delivery, if the agent at the time entered into a contract with the vendor which was condemned by the statute as being a wagering one. *Sprunt & Sons v. May*, 156 N. C. 388, 72 S. E. 821 (1911).

**Agent's Right to Recover.**—An agent for a principal to a contract made in violation of this section, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of § 16-4, making it a misdemeanor. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614 (1908).

If agents have no knowledge that it was the intention of their principals to enter into a wagering or gambling contract, they are entitled to recover, not only their commissions, but any sums of money which they have advanced to carry out purposes for their principals. *Embrey v. Jemison*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172 (1889).

**Burden of Proof.**—Where in an action by an assignee and trustees under § 23-1, et seq., it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under this section, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. *Martin v. Bush*, 199 N. C. 93, 154 S. E. 43 (1930).

When the defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon the plaintiff to show that it was a lawful one, i. e., that actual delivery was intended by the parties, and not merely that either had the privilege of calling therefor. *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614 (1908). This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

**Burden Not upon Administrator.**—Where an administrator paid certain notes and it was later alleged by the legatees that the notes were given for a gambling contract which should not have been paid, it was held that former § 2146 did not apply so as to put the burden of proving that the notes were given for a valid contract upon the

administrator. *Overman v. Lanier*, 157 N. C. 544, 73 S. E. 192 (1911). This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

**Evidence Sufficient.**—The purchaser makes out a prima facie case upon evidence that the contract was founded upon a gambling or wagering consideration in violation of this section. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177 (1925). This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

Where the plaintiff himself testified that he did not buy certain cotton in the ordinary course of his business as a cotton manufacturer for use in his mill, this was prima facie a "future contract." *Burns v. Tomlinson*, 147 N. C. 634, 61 S. E. 615 (1908). This case was decided under what formerly constituted § 2145 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

**When Question for Jury.**—Where the contract is not a gambling one on its face the underlying purpose and intent of the parties should be left to the jury. *Harvey v. Pettaway*, 156 N. C. 375, 72 S. E. 364 (1911).

Upon conflicting evidence as to whether or not the contract is a gambling contract, it becomes a question for the jury under proper instructions from the court. *Welles & Co. v. Satterfield*, 190 N. C. 89, 129 S. E. 177 (1925). This case was decided under what formerly constituted § 2146 of the Consolidated Statutes, which section was repealed by P. L. 1931, c. 236.

**Same—Example.**—Where there was evidence offered by the plaintiffs tending to show that they were wholesale dealers in cotton as a commodity, and that they purchased certain cotton as a commodity and sold it to manufacturers and exporters, and dealt in actual spot cotton and were in no wise dealers in futures, they were entitled to have this issue submitted to a jury. *Eure v. Sabiston*, 195 F. 721 (1912).

**Judgment by Default Void.**—A judgment rendered by default of an answer upon notes regular and valid upon their face, but growing out of transactions in cotton futures made void by our statute, which also declares that actions thereon may not be maintained in the courts of our State, will be set aside as utterly void, irrespective of whether it was obtained through excusable neglect, etc. *Randolph v. Heath*, 171 N. C. 383, 88 S. E. 731 (1916).

**Cited in Meyer v. Fenner**, 196 N. C. 476, 146 S. E. 82 (1929).

**§ 16-4. Entering into or aiding contract for "futures" misdemeanor.**—If any person shall become a party to any contract declared void in this article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

If any person shall, while in this State, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this State do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court. (1889, c. 221, ss. 3, 4; Rev., ss. 3823, 3824; C. S., s. 2147.)

**This Section Is Constitutional.**—Garseed v. Sternberger, 135 N. C. 501, 47 S. E. 603 (1904); State v. McGinnis, 138 N. C. 724, 51 S. E. 50 (1905); State v. Clayton, 138 N. C. 732, 50 S. E. 866 (1905); Rankin v. Mitchem, 141 N. C. 277, 52 S. E. 854 (1906); Randolph v. Heath, 171 N. C. 383, 88 S. E. 731 (1916).

**§ 16-5. Opening office for sales of "futures" misdemeanor.**—If any person, corporation or other association of persons, either as principal or agent, shall establish or open an office or place of business in this State for the purpose of carrying on or engaging in making such contracts as are forbidden in this article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court. (1905, c. 538, ss. 1, 2; Rev., s. 3825; C. S., s. 2148.)

**§ 16-6. Evidence in prosecutions under this article.**—No person shall be excused on any prosecution under the provisions of this article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principal or agent, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this article. (1905, ss. 3, 4, 5; Rev., s. 3826; C. S., s. 2149.)

## Chapter 17. Habeas Corpus.

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## ARTICLE 1.

### *Constitutional Provisions.*

§ 17-1. **Remedy without delay for restraint of liberty.**—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C. S., s. 2203.)

**Cross Reference.**—As to costs in habeas corpus, see § 6-21, subsec. 3.

**Editor's Note.**—"By the Habeas Corpus Act passed in 1679 the liberty of every

Englishman was made as certain as law could make it; it being guaranteed to him that if accused of crime, he, instead of languishing in prison, as had often been the case, should be brought to a fair and speedy trial." Buckle, *History of Civilization in England*, Vol. I, p. 385.

"From the time of the Great Charter, the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the Habeas Corpus Act supplied." Macauley's *History of England*, Vol. I, Popular Edition, p. 122.

**Definition.**—The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. In pursuance to its command, the body of the petitioner is brought before the court, that it may inquire into the legality of his detention. *United States v. Ju*

§ 17-2. **Habeas corpus not to be suspended.**—The privileges of the writ of habeas corpus shall not be suspended. (Const., art. 1, s. 21; Rev., s. 1820; C. S., s. 2204.)

**Cross Reference.**—As to constitutional provision, see the North Carolina Constitution, Art. I, § 21.

**Can Not Be Abrogated.**—This section is an express provision, and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed so as to give effect to each, and

*Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040 (1905).

**Nature.**—The writ of habeas corpus is a high prerogative writ, known to the common law, similar in nature to the writs of quo warranto, mandamus, certiorari and prohibition, and the proceedings thereunder are regarded as appellate in character, but it cannot be made to perform the office of a writ of error on appeal. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1879).

The proceeding is, in its nature, civil rather than criminal, legal rather than equitable, appellate rather than original, collateral rather than direct, and summary rather than cumbersome. *Perrine v. Slack*, 164 U. S. 452, 17 S. Ct. 79, 41 L. Ed. 510 (1896).

**Object.**—The object of the proceeding by a writ of habeas corpus is to inquire into the legality of the detention of the petitioner. *United States v. McBratney*, 104 U. S. 621, 26 L. Ed. 869 (1881).

prevent conflict. This is done by giving to Art. XII, § 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons to be made by military authority, but requiring, by force of Art. 1, § 21, the persons arrested to be surrendered for trial to the civil authorities, on habeas corpus, should they not be delivered over without the writ. *Ex parte Moore*, 64 N. C. appx., 802 (1870).

## ARTICLE 2.

### *Application.*

§ 17-3. **Who may prosecute writ.**—Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in § 17-4, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (1868-9, c. 116, s. 1; Code, s. 1623; Rev., s. 1821; C. S., s. 2205.)

**Prisoner under Illegal Sentence.**—Where a defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary, a writ of habeas corpus will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below. *State v. Queen*, 91 N. C. 659 (1884).

**Denial of Due Process of Law.**—A per-

son convicted without due process of law may be discharged on habeas corpus. In *re Frederick*, 149 U. S. 70, 13 S. Ct. 793, 37 L. Ed. 653 (1893).

**Voluntary Custody.**—If the prisoner is in custody by his own voluntary act, the writ will not issue for his release. *McElvaine v. Brush*, 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971 (1891).

**Where one is actually confined in the State prison for a longer term of imprison-**

ment than is legal, a writ of habeas corpus will issue to the end that a proper sentence may be imposed. *State v. Green*, 85 N. C. 600 (1881).

There must be actual confinement, or the present means of enforcing it, in order to justify the issuance of the writ of habeas corpus and granting a release therefrom. *Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885).

**One Imprisoned for Contempt.**—Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by habeas corpus proceedings, taken to the Supreme Court, if necessary, by writ of certiorari. *State v. Little*, 175 N. C. 743,

94 S. E. 680 (1917).

**Relief of Soldier in Army.**—A soldier actually and rightfully in the army can have no relief by the writ of habeas corpus against any abuse of military authority, and if he be wrongfully held as a soldier he is not entitled to a habeas corpus while he is undergoing punishment or awaiting trial for a military offense. *Cox v. Gee*, 60 N. C. 516 (1864).

**Proceedings to obtain control of a minor child** between persons with whom the child had been placed for adoption and welfare officers seeking to place the child with his family are not proceedings under this section, to set the infant free but is a proceeding to fix and determine the right of custody. *In re Thompson*, 228 N. C. 74, 44 S. E. (2d) 475 (1947).

**§ 17-4. When application denied.**—Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application. (1868-9, c. 116, s. 2; Code, s. 1624; Rev., s. 1822; C. S., s. 2206.)

**In General.**—In construing this term, "final judgment or decree of a competent tribunal," it has come to be well understood that the exception refers only to judgments warranted by the law applicable to the case in hand, and where it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the cause and was manifestly without power to enter the judgment or impose the sentence in question, in such case there would be no final sentence of a competent tribunal, and the exception established by the statute does not obtain. *State v. Queen*, 91 N. C. 659 (1884); *In re Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

**Presumption of Validity.**—Proceedings before a court of competent jurisdiction will be presumed to be regular and valid, unless upon their face they plainly appear to be void; and when they do not so appear, they are not subject to review in habeas corpus proceedings. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364 (1917).

**Meaning of "Competent Jurisdiction."**—The term, "competent jurisdiction," used

by this section in making an exception to the power of this court to review a judgment in habeas corpus proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional. *In re Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

**Cannot Be Used as Writ of Error.**—The writ of habeas corpus cannot be used in the nature of a writ of error. *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014 (1912).

Habeas corpus is in the nature of a writ of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. *State v. Edwards*, 192 N. C. 321, 135 S. E. 37 (1926); *In re Chase*, 193 N. C. 450, 137 S. E. 305 (1927).

The writ of habeas corpus may not be used as a substitute for appeal. In *re Smith*, 218 N. C. 462, 11 S. E. (2d) 317 (1940).

**Process by United States Judge.**—The petitioner in habeas corpus proceedings adjudged in contempt of court shall, under the provisions of this section, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922).

**Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by this section.** In *re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749 (1948).

Where one is imprisoned under the final process of a court of competent jurisdiction the writ of habeas corpus may not successfully be sued out since this section expressly forbids it. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906); In *re Holley*, 154 N. C. 163, 69 S. E. 872 (1910); *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207 (1911).

**Same—Where Sentence Erroneous.**—The application must be refused, even where it appears that the applicant is imprisoned in the State's prison, and the sentence of the court is erroneous, and the applicant, in default of appeal, must be left to his remedy by writ of certiorari when he is detained by virtue of a final judgment of a court of competent jurisdiction. In *re Schenck*, 74 N. C. 607 (1876).

**Same—Reason for Rule.**—Without reference to the positive prohibition of this

section, it is otherwise clear that the power cannot extend to cases where the person is confined on final process. For if so, this unseemly and discordant result would follow, that one superior court judge might try and sentence a person to death or the penitentiary, and another might issue the writ of habeas corpus and discharge the prisoner. Results so disgraceful and destructive to the orderly and harmonious administration of justice were never contemplated by the framers of our judicial system; on the contrary, they were carefully guarded against, both by the Constitution and legislation. In *re Schenck*, 74 N. C. 607 (1876).

**Prior Writ of Habeas Corpus.**—See In *re Adams*, 218 N. C. 379, 11 S. E. (2d) 163 (1940).

**Examples.**—Where the petitioner in habeas corpus proceedings directed to a superior court judge has previously been convicted in that court of an offense of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity, and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. In the *Matter of Croom*, 175 N. C. 455, 95 S. E. 903 (1918).

An indictment and judgment against the prisoner for an illegal sale of spirituous liquors alleged to have been based upon illegal evidence authorized by an unconstitutional statute, may not be passed upon in habeas corpus proceedings, for such would be to permit one superior court judge to examine into the proceedings before another judge, upon parol evidence, and review his action. *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014 (1912).

**§ 17-5. By whom application is made.**—Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf. (1868-9, c. 116, s. 3; Code, s. 1625; Rev., s. 1823; C. S., s. 2207.)

**Application May Be Withdrawn.**—One who has petitioned for a writ of habeas corpus may withdraw his application when-

ever he chooses. *State v. Wiley*, 64 N. C. app., 821 (1870).

**§ 17-6. To judge of Supreme or superior court; in writing.**—Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the Supreme Court.

2. To any one of the superior court judges, either at term time or in vacation. (1868-9, c. 116, s. 4; Code, s. 1626; Rev., s. 1824; C. S., s. 2208.)

**Cross Reference.**—As to jurisdiction of special or emergency judges of the superior court, see §§ 7-52, 7-58.

**In General.**—The Constitution required the legislature to furnish an adequate remedy, and when it was declared that all such persons should have the right to "prosecute a writ of habeas corpus", it followed *ex vi termini*, that they were entitled to

demand this remedy before any judge of any court of general jurisdiction in this country. The power of all judges to grant it was conceded before the Magna Charta, and was only reaffirmed, like many other cardinal principles, in that instrument and those that followed reaffirming it. *Harkins v. Cathey*, 119 N. C. 649, 26 S. E. 136 (1896).

**Concurrent Jurisdiction in State and Federal Courts.**—On habeas corpus, the state courts have concurrent jurisdiction with the federal courts of all cases of imprisonment within their territorial jurisdiction, except in the case where the petitioner is in custody under the authority, or claim of authority, of the United States. *Robb v. Connolly*, 111 U. S. 624, 4 S. Ct. 544, 28 L. Ed. 542 (1884).

The federal and state courts have concurrent jurisdiction to inquire into the legality of detention under a governor's warrant in interstate extradition cases. *United States v. Jung Ah Lung*, 124 U. S. 621, 8 S. Ct. 663, 31 L. Ed. 591 (1888).

**Source from Which Authority of State Judges Emanates.**—It is to be observed that the authority of the state judges in cases of habeas corpus emanates from the several states, and not from the United States. In order to destroy their jurisdiction, therefore, it is necessary to show, not that the United States has given them jurisdiction, but that Congress possesses and has exercised the power of taking away that jurisdiction which the states have vested in their own judges. In the *Matter of Bryon*, 60 N. C. 1 (1863).

**Jurisdiction of Courts.**—The courts of this State, as well as the individual judges, have jurisdiction to issue writs of habeas corpus, returnable to them in term time, and as a court. In the *Matter of Bryon*, 60 N. C. 1 (1863).

**Judges Mentioned Have Equal Powers.**—A single judge of the Supreme Court has the same and no other jurisdiction to issue

the writ than a judge of the superior court, and the same limitation of power to issue the writ in certain cases extends equally to the two classes of judges. In *re Schenck*, 74 N. C. 607 (1876).

**Extent of Jurisdiction.**—The habeas corpus jurisdiction of every court, and of every judge, extends to every possible case of privation of liberty to the national Constitution, treaties and laws. In *re Burrus*, 136 U. S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890).

**Obtaining Jurisdiction.**—Presenting a petition to a judge for a writ of habeas corpus gives him jurisdiction of the subject. *State v. Edney*, 60 N. C. 463 (1864).

**Section 1-76 et seq. concerning venue all refer to "actions"** and have no application to habeas corpus proceedings. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

**Discretionary Power of Judge as to Place Writ Is Returnable Not Reviewed in Absence of Abuse.**—Since any judge of the superior court or justice of the Supreme Court has the power to issue a writ of habeas corpus at any time or any place, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of habeas corpus proceedings cannot be sustained. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

**§ 17-7. Contents of application.**—The application must state, in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (1868-9, c. 116, s. 5; Code, s. 1627; Rev., s. 1825; C. S., s. 2209.)

**Waiver of Errors.**—The parties may waive all errors and dispense with all forms in the proceedings on the petition. *State v. Edney*, 60 N. C. 463 (1864).



**Necessary Allegation.**—A petition for habeas corpus must allege that the imprisonment has not been already adjudged upon a prior writ of habeas corpus. In the Matter of Brittain, 93 N. C. 587 (1885).

**Where Other Remedies Exist.**—The writ of habeas corpus will be refused

where the prisoner can be otherwise discharged. In re Belt, 159 U. S. 95, 15 S. Ct. 987, 40 L. Ed. 88 (1895).

**Prior Writ of Habeas Corpus.**—See In re Adams, 218 N. C. 379, 11 S. E. (2d) 163 (1940).

§ 17-8. **Issuance of writ without application.**—When the Supreme or superior court, or any judge of either, has evidence from any judicial proceeding before such court or judge that any person within this State is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (1868-9, c. 116, s. 10; Code, s. 1632; Rev., s. 1826; C. S., s. 2210.)

**When Illegal Imprisonment Appears.**—If a case comes before the Supreme Court by appeal, or by certiorari, and upon the trial it appears that the prisoner was suffering an illegal confinement in the penitentiary, it would be the duty of that court, by virtue of its supervisory power, and of

this section, enacted to carry into effect this constitutional power of the Supreme Court, to issue the writ of habeas corpus, even of its own motion, and discharge the prisoner. In re Schenck, 74 N. C. 607 (1876).

ARTICLE 3.

*Writ.*

§ 17-9. **Writ granted without delay.**—Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ. (1868-9, c. 116, s. 6; Code, s. 1628; Rev., s. 1827; C. S., s. 2211.)

**Cross Reference.**—As to when application shall be denied, see § 17-4.

**Duty of Court to Issue.**—There can be no doubt of the duty and power of the

court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. In re Boyett, 136 N. C. 415, 48 S. E. 789 (1904).

§ 17-10. **Penalty for refusal to grant.**—If any judge authorized by this chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars. (1868-9, c. 116, s. 9; Code, s. 1631; Rev., s. 1828; C. S., s. 2212.)

**The writ of habeas corpus always issues when legally applied for,** because this section subjects a judge who refuses to entertain the petition to a penalty of \$2,500. In

the Matter of Croom, 175 N. C. 455, 95 S. E. 903 (1918).

**Cited in** McEachern v. McEachern, 210 N. C. 98, 185 S. E. 684 (1936).

§ 17-11. **Sufficiency of writ; defects of form immaterial.**—No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (1868-9, c. 116, ss. 7, 8; Code, ss. 1629, 1630; Rev., s. 1829; C. S., s. 2213.)

§ 17-12. **Service of writ.**—The writ of habeas corpus may be served by any qualified elector of this State thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (1868-9, c. 116, s. 32; Code, s. 1657; Rev., s. 1833; C. S., s. 2214.)

**To Whom Issued.**—The writ should be issued to the person who has the immediate custody of the petitioner with the power to produce the body of such party before the court or judge. *Wales v. Whitney*, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885).

#### ARTICLE 4.

##### *Return.*

§ 17-13. **When writ returnable.**—Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (1868-9, c. 116, s. 31; Code, s. 1656; Rev., s. 1830; C. S., s. 2215.)

§ 17-14. **Contents of return; verification.**—The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he has or has not the party in his custody or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

4. If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (1868-9, c. 116, s. 11; Code, s. 1633; Rev., s. 1831; C. S., s. 2216.)

§ 17-15. **Production of body if required.**—If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (1868-9, c. 116, s. 14; Code, s. 1636; Rev., s. 1832; C. S., s. 2217.)

#### ARTICLE 5.

##### *Enforcement of Writ.*

§ 17-16. **Attachment for failure to obey.**—If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and

by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this State, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (1868-9, c. 116, s. 15; Code, s. 1637; Rev., s. 1834; C. S., s. 2218.)

**In General.**—The attachment warranted by this section does not rest on the idea of punishing for a contempt of the judge, or court, but of compelling a return to the writ and a production of a body. It is a substitute for the provision in the old habeas corpus act, which punished the officer or person refusing or neglecting to make due return, "upon conviction by indictment," with a fine of \$500 for the first offense, and of \$1,000, and incapacity to hold office, for the second. *Ex parte Moore*, 64 N. C. appx., 802 (1870). See also, *Ex parte Kerr*, 64 N. C. appx., 816 (1870).

**No Power to Arrest Governor.**—Under

the habeas corpus act, a judge has no power to order the arrest of the Governor of the State. *Ex parte Moore*, 64 N. C. appx., 802 (1870).

**Excuse for Refusal to Make Return.**—Where a military officer detaining persons arrested in counties declared by the Governor to be in a state of insurrection, answered to a writ of habeas corpus, that he held them under the orders of the Governor, who had also ordered him not to obey the writ, it was held, that such return was a sufficient excuse, under this section, and, therefore, that such officer was not liable to be attached. *Ex parte Moore*, 64 N. C. appx., 802 (1870).

**§ 17-17. Liability of judge refusing attachment.**—If any judge willfully refuses to grant the writ of attachment, as provided for in § 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (1870-1, c. 221, s. 2; Code, s. 1638; Rev., s. 1835; C. S., s. 2219.)

**§ 17-18. Attachment against sheriff to be directed to coroner; procedure.**—If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (1868-9, c. 116, s. 16; Code, s. 1639; Rev., s. 1836; C. S., s. 2220.)

**Cross Reference.**—As to requirement of coroner to act for sheriff in certain cases, see § 152-8.

**§ 17-19. Precept to bring up party detained.**—The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted. (1868-9, c. 116, s. 17; Code, s. 1640; Rev., s. 1837; C. S., s. 2221.)

**§ 17-20. Liability of judge refusing precept.**—If any judge refuses to grant the precept provided for in § 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (1870-1, c. 221, s. 3; Code, s. 1641; Rev., s. 1838; C. S., s. 2222.)

**§ 17-21. Liability of judge conniving at insufficient return.**—If any judge grants the attachment, or the precept, and gives the officer or other person

charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars. (1870-1, c. 221, s. 4; Code, s. 1642; Rev., s. 1839; C. S., s. 2223.)

**§ 17-22. Power of county to aid service.**—In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (1868-9, c. 116, s. 18; Code, s. 1643; Rev., s. 1840; C. S., s. 2224.)

**Editor's Note.**—The posse comitatus is discussed in *Worth v. Craven County Com'rs*, 118 N. C. 112, 24 S. E. 778 (1896).

**Means "Men of the County."**—The power of the county, or "posse comitatus," means the men of the county in which the writ is to be executed. *Ex parte Moore*, 64 N. C. appx., 802 (1870).

**§ 17-23. Obedience to order of discharge compelled.**—Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained. (1868-9, c. 116, s. 24; Code, s. 1649; Rev., s. 1841; C. S., s. 2225.)

**§ 17-24. No civil liability for obedience.**—No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (1868-9, c. 116, s. 25; Code, s. 1650; Rev., s. 1842; C. S., s. 2226.)

**§ 17-25. Recommittal after discharge; penalty.**—If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 3581; C. S., s. 2227.)

**Cross Reference.**—See also, § 17-38 and notes.

**When Rearrest Valid.**—A party, set at large by writ of habeas corpus, upon the ground that the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction. *State v. Weatherspoon*, 88 N. C. 19 (1883).

**§ 17-26. Disobedience to writ or refusing copy of process; penalty.**—If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office. (1868-9, c. 116, s. 27; Code, s. 1652; Rev., s. 3597; C. S., s. 2228.)

**§ 17-27. Penalty for false return.**—If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor. (1868-9, c. 116, s. 28; Code, s. 1653; Rev., s. 3582; C. S., s. 2229.)

**§ 17-28. Penalty for concealing party entitled to writ.**—If any one having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been

issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor. (1868-9, c. 116, ss. 29, 30; Code, ss. 1654, 1655; Rev., s. 3583; C. S., s. 2230.)

#### ARTICLE 6.

##### *Proceedings and Judgment.*

**§ 17-29. Notice to interested parties.**—When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; Code, s. 1634; Rev., s. 1843; C. S., s. 2231.)

**§ 17-30. Notice to solicitor.**—When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the solicitor of the district in which the person prosecuting the writ is detained. (1868-9, c. 116, s. 13; Code, s. 1635; Rev., s. 1844; C. S., s. 2232.)

**Hearing May Be Continued.**—If it appear from the return on a writ of habeas corpus that the petitioner is detained on a criminal charge, the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case. *State v. Jones*, 113 N. C. 669, 18 S. E. 249 (1893).

**§ 17-31. Subpœnas to witnesses.**—Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (1868-9, c. 116, s. 34; Code, s. 1659; Rev., s. 1845; C. S., s. 2233.)

**Cross Reference.**—As to issuance of subpœnas, see §§ 2-16, 8-59.

**§ 17-32. Proceedings on return; facts examined; summary hearing of issues.**—The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (1868-9, c. 116, s. 19; Code, s. 1644; Rev., s. 1846; C. S., s. 2234.)

**Proceedings Must Be Summary.**—Proceedings under the writ of habeas corpus, which have for their principal object a release of a party from illegal restraint, must necessarily be summary and prompt to be useful, and if an action could be arrested by an appeal, they would lose many of their most beneficial results. *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887).

**Hearing Not Perfunctory.**—The words

of the section preclude the idea that such hearing shall be perfunctory and merely formal. *In re Bailey*, 203 N. C. 362, 166 S. E. 165 (1932).

**Hearing Confined to Record.**—The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine

supported in numerous and authoritative decisions here and elsewhere. In *re Schenck*, 74 N. C. 607 (1876); *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957 (1905); In the *Matter of Croom*, 175 N. C. 455, 95 S. E. 903 (1918); In *re Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274 (1888); In *re Swan*, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207 (1893).

**Same—Questions Open to Inquiry.**—Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922).

**Evidence Not Reviewable.**—As was held in *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014 (1912), the Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364 (1917).

**Question of Insanity Determined.**—When the petitioner in habeas corpus has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the superior court in this State by whom the proceedings of habeas corpus are heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. In *re Chase*, 193 N. C. 450, 137 S. E. 305 (1927).

**Discretion of Judge.**—The quantum of evidence and the number of witnesses to be examined must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. *State v. HERNON*, 107 N. C. 934, 12 S. E. 268 (1890). See also, In *re Bailey*, 203 N. C. 362, 166 S. E. 165 (1932).

**Presumption of Innocence and Burden of Proof.**—The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal; therefore, where, upon the return of a sheriff to a writ of habeas corpus, it

appeared that the petitioners were in custody on a mittimus, regular in every way, from a justice of the peace, for failure to give bond for their appearances at the next term of the superior court to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was upon the petitioner to show wherein it was illegal; and not upon the State to show that they were lawfully in custody. *State v. Jones*, 113 N. C. 669, 18 S. E. 249 (1893).

**No Appeal Lies.**—Appeal to the Supreme Court will not lie from the refusal of a superior court judge to discharge the defendant from custody in proceedings in habeas corpus, the remedy being by a petition for a writ of certiorari which is addressed to the sound discretion of the Supreme Court. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364 (1917); In the *Matter of Croom*, 175 N. C. 455, 95 S. E. 903 (1918).

**Constitutional Provision.**—In habeas corpus proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, § 8, under the power given to the court "to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts." In *re Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

**Writ of Certiorari Proper Remedy.**—Where it appears that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue. *Walton v. Gatlin*, 60 N. C. 310 (1864); *Ex parte Biggs*, 64 N. C. 202 (1870); *State v. Jefferson*, 66 N. C. 209 (1872); *State v. HERNON*, 107 N. C. 934, 12 S. E. 268 (1890).

The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in habeas corpus proceedings in matters not involving the care and custody of children, Constitution, Art. IV, § 8, shall only be exercised by certiorari. In *re Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

**Same—When Denied.**—A petition for certiorari in the Supreme Court will be denied in habeas corpus proceedings when it appears therefrom that the prisoner is not entitled to his discharge. In the *Matter of Croom*, 175 N. C. 455, 95 S. E. 903 (1918).

If the judge, upon the investigation of the evidence on a petition for habeas

corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies, either in favor of the State or the petitioner. *Walton v. Gatlin*, 60 N. C. 310 (1864); *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887); *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890).

In habeas corpus proceedings, where it appears from the application for certiorari in the Supreme Court, or the documents annexed thereto, that the petition is determined under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court. *In re Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

**Proceeding Where Judgment Reversed.**

—If, upon certiorari, the court reverses

§ 17-33. **When party discharged.**—If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

3. Where the process is defective in some matter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (1868-9, c. 116, s. 20; Code, s. 1645; Rev., s. 1847; C. S., s. 2235.)

**Cross Reference.**—See also, notes under § 17-32.

**Where Imprisonment for Contempt.**—It was held in *Ex parte Summers*, 27 N. C. 149 (1844), that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a reviewing tribunal may, on a habeas corpus, discharge the party if it appears plainly that the facts do not amount to a contempt. *State v. Queen*, 91 N. C. 659 (1884).

**Sentence Partly Void.**—Where a prisoner is detained by virtue of a sentence in part valid and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when

and sets aside the judgment of the court below, and the proceedings are remanded, no procedendo issues to any particular judge, but the petitioner can exercise his statutory right to apply, *de novo*, to any judge authorized to grant the writ of habeas corpus. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890).

**Judicial Review of Questions of Law.**—

In deciding questions which arise under writs of habeas corpus the judiciary may review and control the action of the Governor in regard to points of law; but cannot interfere with such action in regard to any matter within the discretion of the Governor. In the *Matter of Hughes*, 61 N. C. 57 (1867).

it appears that the time during which he may legally be detained has not expired. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922).

**State Cannot Appeal.**—The State cannot appeal from an order in habeas corpus proceedings discharging from imprisonment one convicted of crime. Proceedings in habeas corpus, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results. *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887); In the *Matter of Williams*, 149 N. C. 436, 63 S. E. 108 (1908).

§ 17-34. **When party remanded.**—It is the duty of the court or judge

forthwith to remand the party, if it appears that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

4. That the time during which such party may be legally detained has not expired. (1868-9, c. 116, s. 21; Code, s. 1646; Rev., s. 1848; C. S., s. 2236.)

**Cross Reference.**—See also, § 17-4, when application for writ shall be denied. can not be collaterally impeached. In the Matter of Croom, 175 N. C. 455, 95 S. E. 903 (1918).

**Judgment Imports Verity.**—A judgment in habeas corpus imports verity, and it

**§ 17-35. When the party bailed or remanded.**—If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (1868-9, c. 116, s. 22; Code, s. 1647; Rev., s. 1849; C. S., s. 2237.)

**Judge May Admit to Bail.**—Any person charged (but not convicted) of any crime whatever may be admitted to bail if the judge, upon hearing the testimony upon a writ of habeas corpus, adjudges that, upon the facts developed, the petitioner is entitled to be released on bail. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890). And although a sentence is not valid the defendant may not be unconditionally released, as the court may hold

him to bail. *State v. Burnette*, 173 N. C. 734, 91 S. E. 364 (1917).

**No Discharge After Indictment.** — Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. *State v. Herndon*, 107 N. C. 934, 12 S. E. 268 (1890).

**§ 17-36. Party held in execution not to be discharged.**—When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (2 Hen. V, c. 2; R. C., c. 31, s. 111; Code, s. 937; Rev., s. 1850; C. S., s. 2238.)

**§ 17-37. When party ill, cause determined in his absence.**—When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (1868-9, c. 116, s. 23; Code, s. 1648; Rev., s. 1851; C. S., s. 2239.)

**§ 17-38. No second committal after discharged; penalty.**—No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recogni-



zance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 1852; C. S., s. 2240.)

**Cross Reference.** — As to recommittal after discharge, see § 17-25.

**Surrender by Sureties.**—Where the defendant was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906).

**When Rearrest Permissible.**—According to the express terms of this section, a party once discharged may be again arrested and imprisoned for the same cause, provided it be done by the legal order or process of a court of competent jurisdiction. *State v. Weatherspoon*, 88 N. C. 19 (1883).

## ARTICLE 7.

### *Habeas Corpus for Custody of Children in Certain Cases.*

§ 17-39. **Custody as between parents in certain cases; modification of order.**—When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a nonresident of North Carolina and the custody of the child has been awarded, by an order of a court of this State, to the mother who is a resident of North Carolina, no motion on the part of such nonresident father may be heard or entertained by the court for a modification of the order of the court, unless such father has first shown under oath that, since the making of the original order, he has regularly contributed to the support of said child according to his means and according to the needs of the child, and, if said motion is heard and at said hearing such fact is not established to the satisfaction of the court, the motion for a modification of the order shall be denied, unless the court shall find that, at the time of said hearing the mother is not a fit and proper person to have the custody of said child. Provided, that such proviso shall only apply after the case has been reopened on time. (1858-9, c. 53; 1868-9, c. 116, s. 36; Code, s. 1661; Rev., s. 1853; C. S., s. 2241; 1929, c. 270, s. 1.)

**Cross References.** — As to custody of children in divorce cases, see § 50-13 and note. As to persons entitled to custody of children in general, see § 33-2.

**Editor's Note.** — The 1929 amendment added the two provisos to this section.

**Broad Powers Conferred.**—This section confers upon the court very large powers to "promote the interest and welfare of the children." *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553 (1887); *Knott v. Taylor*, 96 N. C. 553, 2 S. E. 680 (1887); *Jones v. Cotten*, 108 N. C. 457, 13 S. E. 161 (1891).

**Proceeding Is Equitable.**—A proceeding under this section, involving custody of children, is, notwithstanding the fact that it is statutory, equitable, in view of the wide latitude given the court, the definite personal nature of the orders, and the fact that the welfare and rights of infants are

involved. *In re Biggers*, 226 N. C. 647, 39 S. E. (2d) 805 (1946).

**When Section Applies.**—When, without being divorced, parents are living apart, the question concerning the disposition of their offspring must be decided under the provisions of this section. *In re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217 (1910).

Habeas corpus to determine the right to the custody of a child applies only when the issue arises between husband and wife who are living in a state of separation without being divorced. *In the Matter of Blake*, 184 N. C. 278, 114 S. E. 294 (1922); *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936); *In re Young*, 222 N. C. 708, 24 S. E. (2d) 539 (1943); *Robbins v. Robbins*, 229 N. C. 430, 50 S. E. (2d) 183 (1948). Such jurisdiction is ousted im-

mediately upon the filing of the complaint in an action for divorce between the parties. *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906 (1948).

**Except as between parents**, the right of custody of a child can not be determined by writ of habeas corpus. In *re Parker*, 144 N. C. 170, 56 S. E. 878 (1907); In *re Young*, 222 N. C. 708, 24 S. E. (2d) 539 (1943).

**When Parents Divorced § 50-13 Applies.**—When this section is considered in connection with § 50-13, it becomes apparent that the legislature intended that the custody of children shall be determined by the court in which the divorce was granted, and, where there is no divorce, by proceedings in habeas corpus. Jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing. In the *Matter of Blake*, 184 N. C. 278, 114 S. E. 294 (1922). See *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

Where the parties have been divorced and the decree does not award the custody of the children, the procedure to determine the right to their custody, is by motion in the cause, and habeas corpus will not lie, and where in habeas corpus proceedings a decree for absolute divorce between the parties is introduced in the record without objection, but the court makes no finding as to whether the parties had been divorced, but awards the custody of the child to its mother, on appeal the case will be remanded for a finding as to whether the parties had been divorced. In *re Albertson*, 205 N. C. 742, 172 S. E. 411 (1934).

**A decree awarding custody under this section does not oust the jurisdiction of the court under § 50-13** to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. *Robbins v. Robbins*, 229 N. C. 430, 50 S. E. (2d) 183 (1948).

**Jurisdiction of Juvenile Court.**—In *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824 (1923), it was held that the jurisdiction of the superior court or judge thereof in habeas corpus proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the juvenile court. See In the *Matter of Blake*, 184 N. C. 278, 114 S. E. 294 (1922).

Original jurisdiction has been conferred upon the juvenile court, under § 110-21, to

find a child delinquent or neglected, but the statute does not repeal this section, and is not inconsistent therewith. The superior court as such has exclusive jurisdiction, by writ of habeas corpus, to hear and determine the custody of children of parents separated but not divorced. In *re Prevatt*, 223 N. C. 833, 28 S. E. (2d) 564 (1944).

**Where Foreign Decree Invalid.**—When, under an invalid decree of divorce rendered in favor of the wife in another state, in which the custody of a child was awarded to the wife, it is sought by habeas corpus proceeding in this State to obtain the custody of the child domiciled with its father in this State, the proceeding will be regarded as one between husband and wife living in separation without being divorced. And the custody of the child rests in the sound discretion of the judge, subject to review, on appeal, upon the facts found. *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894).

**Parents Have Prima Facie Right to Custody.**—In habeas corpus proceedings for the possession of a nine-year old child, the parents of the child, who are living together as lawful man and wife, have prima facie the right to its control and custody. In *re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217 (1910).

Where the father of an infant upon the death of its mother told the grandparents of the child that the latter should always remain with them, but subsequently desired the custody of the child and upon refusal brought habeas corpus proceedings, and it appeared that the father was of good moral character, industrious and kind and in every way fitted to care for and educate the child, the custody was properly awarded to him. *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012 (1895).

**Same—Welfare of Child First Consideration.**—In habeas corpus for the custody of a child the welfare of the child is the first consideration but the father has a natural right of such custody. To lose this right it must be shown that he is not fit to exercise it. In *re Fain*, 172 N. C. 790, 90 S. E. 928 (1916).

The right of the parent is not absolute and yields to the welfare of the child when so required. In *re Hamilton*, 182 N. C. 44, 108 S. E. 385 (1921).

**Same — Same — Custody Awarded to Mother.**—The mother, in habeas corpus proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it. *Clegg*

v. Clegg, 186 N. C. 28, 118 S. E. 824 (1923). In the opinion of this case, written by Justice Clarkson, there is a comprehensive and able discussion and review of the authorities relating to the custody of children.

But the court will not award the custody of a child to a nonresident mother if it does not appear that the child desires to go to her or that the husband is not a proper person to have it, or that the child will be benefited by the change. *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894).

**In the case of illegitimate children,** the same prima facie right of the parent to the custody of the offspring exists as in case of legitimacy, perhaps to a lesser degree, in the mother, where she evinces a capacity and disposition to properly care for her children. *In re Habeas Corpus of Jones*, 153 N. C. 312, 69 S. E. 217 (1910).

Habeas corpus will not lie at the instance of the father of an illegitimate child to obtain its custody and control from its mother. *In re McGraw*, 228 N. C. 46, 44 S. E. (2d) 349 (1947).

**Action by Father against Grandmother.**—Where the father of a child brings a writ of habeas corpus against the grandmother for the custody of the child but the contest is to all intents and purposes between the husband and wife for the custody of the child the writ comes within the spirit and letter of this section. *In re Ten Hoopen*, 202 N. C. 223, 162 S. E. 619 (1932).

**Controversy between Father and Maternal Grandparents.**—See *In re McGraw*, 228 N. C. 46, 44 S. E. (2d) 349 (1947).

**Same—Jurisdiction of Juvenile Court.**—It has been held that habeas corpus is not an appropriate writ to determine the custody of a child in a controversy between the father and the parents of his deceased wife, but that jurisdiction of such a case is vested exclusively in the juvenile court by § 110-21(3). *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906 (1948). But see next following paragraph.

**Same—Effect of 1949 Amendment to § 50-13.**—It seems that the 1949 amendment to § 50-13 was intended to overrule *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906 (1948), in so far as it held that original jurisdiction was in the juvenile court under § 110-21(3) to determine custody of a child as between the father and the child's maternal grandparents, when the mother had secured custody in the divorce action but subsequently died. The amendment provides that controversies not provided for in this section or elsewhere in § 50-13 may be determined in a special proceeding

instituted by either of the parents, or by the surviving parent if the other be dead, in the superior court of the county where in the petitioner, or the respondent or the child is a resident at the time of filing the petition. 27 N. C. Law Rev. 452.

Under the 1949 amendment to § 50-13 either parent may institute a special proceeding to obtain custody of his or her child in cases not theretofore provided for by this section or § 50-13 and this amendment authorizes a special proceeding by the mother of an illegitimate child to obtain its custody from her aunt, with whom she had entrusted the child, and thus restricts the jurisdiction of the juvenile court in such instances. *In re Cranford*, 231 N. C. 91, 56 S. E. (2d) 35 (1949).

**Award Not Necessarily Final with Changed Conditions.**—An award in habeas corpus proceedings does not finally determine the rights of the parties to the custody of the child sought in habeas corpus proceedings; and where, in our courts, the award has been in favor of a nonresident mother against the father of the child, the courts, properly established and having jurisdiction at the domicile of the mother, may further hear and determine the matter touching the care and control of the child on such changed conditions, properly established, as would require it. *In re Means*, 176 N. C. 307, 97 S. E. 39 (1918).

**Habeas Corpus Not Available Where Divorce Is Granted in Another State Where Parents Resided.**—Habeas corpus is not available to determine the custody of a child as between its divorced parents and where the divorce is granted in another state of which the parents were residents, the writ is not available to enforce the provisions of the divorce decree relating to the custody of the child as against the mother moving to this State and bringing the child with her. *In re Ogden*, 211 N. C. 100, 189 S. E. 119 (1937).

**Effect of Failure to Give Notice.**—In a proceeding under this section, the failure to give statutory notice of the hearing, when a full hearing was had, was held not to invalidate an order with respect to care and custody. *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617 (1945).

**Findings of Fact Are Conclusive When Based on Evidence.**—The findings of fact by the court in proceedings in habeas corpus, to determine the custody of minor children of the parties, are conclusive when based on evidence. *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

**Modification of Earlier Order.**—In a

proceeding under this section the contention that entry of an earlier order was res judicata and therefore court had no authority to modify order at subsequent term without allegations or affidavits showing conditions had changed was without merit where earlier order specified that for change in conditions question of custody could be further heard and modification was based on finding of fact that there had been substantial change in circumstances of parties. *Ridenhour v. Ridenhour*, 225 N. C. 508, 35 S. E. (2d) 617 (1945).

**Judgment Based on Consent of Parties.**

§ 17-40. **Appeal to Supreme Court.** — In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the Supreme Court from the final judgment. (1858-9, c. 53, s. 2; Code, s. 1662; Rev., s. 1854; C. S., s. 2242.)

**No Appeal Except under This Section.**

—There is no provision for appeal from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children under this section. In *rc Holley*, 154 N. C. 163, 69 S. E. 872 (1910).

It is a significant indication of the legislative intent in giving an appeal in this case only, not to recognize it in other cases. *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887).

**Death of Party Pending Appeal.** —

Where in a habeas corpus proceeding brought to secure the custody of infant children, the respondent (in whose favor judgment had been rendered below) died pending appeal, it was held, that the proceeding abated, and could not be revived against the personal representative. *Brown v. Rainor*, 108 N. C. 204, 12 S. E. 1028 (1891).

**Judgment of Superior Court Stayed Pending Appeal.** — Upon appeal to the Supreme Court from an order of the judge of the superior court in habeas corpus proceedings between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the justices, and after a regular hearing, for the justice to allow a supersedeas bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824 (1923).

**Discretion in Supreme Court.** — When

—When the jurisdiction of court is invoked, a judgment based on consent of parties is not a mere affirmation of a civil contract, but an order which carries with it the sanctions of the jurisdiction invoked, and one of those sanctions is imprisonment for contempt of court. In *re Biggers*, 226 N. C. 647, 39 S. E. (2d) 805 (1946).

**Applied in** *In re Barwick*, 228 N. C. 113, 41 S. E. (2d) 599 (1947); *In re Biggers*, 228 N. C. 743, 47 S. E. (2d) 32 (1948).

**Cited in** *In re Gibson*, 222 N. C. 350, 23 S. E. (2d) 50 (1942).

the superior court judge has entered judgment in habeas corpus proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment and affirm, reverse, or modify it. *Atkinson v. Downing*, 175 N. C. 244, 95 S. E. 487 (1918); *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824 (1923).

**What Reviewed.**—Upon an appeal from a judgment upon a writ of habeas corpus awarding the custody of a minor child, the court will only review errors of “law or legal inference,” Constitution, Art. IV, § 8, and not the findings of fact made by the lower court upon competent evidence; and this section allowing an appeal in such cases, does not affect the matter. *Stokes v. Cogdell*, 153 N. C. 181, 69 S. E. 65 (1910).

**Decree as between Divorced Parents Is Not Appealable.**—A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, since the proceeding does not come within the provisions of this and § 17-39, nor will the provisions made for the child be considered when the judge below finds that the child is in school and is being properly cared for by the parent having its custody, and awards its custody to such parent during the school term, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. In *re Ogden*, 211 N. C. 100, 189 S. E. 119 (1937).

**Applied in** *In re Albertson*, 205 N. C. 742, 172 S. E. 411 (1934).

## ARTICLE 8.

*Habeas Corpus Ad Testificandum.*

§ 17-41. **Authority to issue the writ.**—Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the State, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person is confined in a county in which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the Supreme or superior court. (1868-9, c. 116, ss. 37, 38; Code, ss. 1663, 1664; Rev., ss. 1855, 1856; C. S., s. 2243.)

**An Inherent Power.**—The right to bring a person, whose presence is necessary, before a court for the exercise of its powers is inherent in every court of general jurisdiction, and its exercise is essential to the preservation of its power and dignity. *State v. Haskins*, 77 N. C. 530 (1877); *Harkins v. Cathey*, 119 N. C. 649, 26 S. E. 136 (1896).

**No Application to State.**—This section applies only to parties strictly so called, and not to the State. *Ex parte Harris*, 73 N. C. 65 (1875), citing *State v. Adair*, 68 N. C. 68 (1873).

**Murderer Is Competent Witness.**—One who has been convicted of murder, and is under sentence of death, is a competent witness; and the solicitor for the State is

entitled to a habeas corpus to bring such condemned prisoner into court for the purpose of testifying before the grand jury. *Ex parte Harris*, 73 N. C. 65 (1875).

**Same — Objection Untenable.** — When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of habeas corpus ad *testificandum* under this section, is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law, could not testify, the witness having been present and having testified. *State v. Jones*, 176 N. C. 702, 97 S. E. 32 (1918).

§ 17-42. **Contents of application.**—The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant; and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (1868-9, c. 116, s. 39; Code, s. 1665; Rev., s. 1857; C. S., s. 2244.)

§ 17-43. **Service of writ.**—The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus *cum causa*. (1868-9, c. 116, s. 40; Code, s. 1666; Rev., s. 1858; C. S., s. 2245.)

**Cross Reference.**—As to service of writ in habeas corpus proceedings, see § 17-12.

§ 17-44. **Applicant to pay expenses and give bond to return.**—The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person

is a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be; conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C. S., s. 2246.)

§ 17-45. **Duty of officer to whom writ delivered or on whom served.**

—It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars. (1868-9, c. 116, s. 42; Code, s. 1668; Rev., s. 1860; C. S., s. 2247.)

§ 17-46. **Prisoner to be remanded.**—After having testified, the prisoner shall be remanded to the prison from which he was taken. (1868-9, c. 116, s. 43; Code, s. 1669; Rev., s. 1861; C. S., s. 2248.)

**Chapter 18.**

**Regulation of Intoxicating Liquors.**

**Article 1.**

**The Turlington Act.**

- Sec.
- 18-1. Definitions; application of article.
- 18-2. Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.
- 18-3. Advertisements, signs, and billboards.
- 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.
- 18-5. Soliciting orders for liquor.
- 18-6. Seizure of liquor or conveyance; arrests; sale of property.
- 18-6.1. Officers to refer to State courts cases involving vehicles seized and arrests made for unlawful transportation.
- 18-7. Use of seized property forbidden.
- 18-8. Witnesses; self crimination; immunity.
- 18-9. Place of sale and delivery; place of prosecution.
- 18-10. Uniting separate offenses in indictment, etc.; bill of particulars; trial.
- 18-11. Possession prima facie evidence of keeping for sale.
- 18-12. Summons on citizens having interest in property.
- 18-13. Search warrants; disposal of liquor seized.
- 18-14. Grand jury, witnesses before; effect of evidence.
- 18-15. Clubrooms and other places for keeping, etc., of liquor.
- 18-16. Records of transportation companies; evidence.
- 18-17. Indictments; allegations of sale; circumstantial evidence.
- 18-18. Serving liquor with meals.
- 18-19. Sale by druggists or pharmacists.
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## ARTICLE 1.

*The Turlington Act.*

§ 18-1. **Definitions; application of article.**—When used in this article—

(1) The word “liquor” or the phrase “intoxicating liquor” shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use for beverage purposes: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process of which beer, ale, porter, or wine is produced, if it contains less than one-half of one per cent of alcohol by volume, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, sealed and labeled bottles, casks, or containers, and is made in accordance with the regulations set forth in Title II of “The Volstead Act,” an act of Congress enacted October twenty-eight, one thousand nine hundred and nineteen, and an act supplemental to the National Prohibition Act, “H. R. 7294,” an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one.

(2) The word “person” shall mean and include natural persons, associations, copartnerships, and corporations.

(3) This article shall not make unlawful any acts authorized or permitted by §§ 18-100 through 18-104, as amended, authorizing cultivation and manufacture of light domestic wines; by §§ 18-36 through 18-62, the Alcoholic Beverage Control Act of 1937 as amended; by §§ 18-63 through 18-92, the Beverage Control

Act of 1939 as amended; and by §§ 18-94 through 18-99, the Fortified Wine Control Act of 1941. (1923, c. 1, s. 1; C. S., s. 3411(a).)

**Editor's Note.**—For a summary review of this statute, see 1 N. C. Law Rev. 303.

This article is popularly known as the Turlington Act and is often referred to in cases as such. The act was intended to make the State law conform in a substantial manner to the federal Volstead Act. See *State v. Davis*, 214 N. C. 787, 1 S. E. (2d) 104 (1939); *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34 (1939).

**Similarity to Volstead Act.**—This and the following section are, in many respects, the same as "The Volstead Act," although more stringent. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

An act by our legislature to make the State law conform to the "Volstead Act" passed by Congress, is valid, and in some respects more stringent than the congressional act. *State v. Hickey*, 198 N. C. 45, 150 S. E. 615 (1929).

**Same—Power of State to Pass Stricter Regulation.**—The State has the power through legislation to further regulate and control the manufacture, sale, etc., of intoxicating liquor beyond the restrictions contained in a federal statute upon the subject, the latter prevailing in interstate regulations in case of conflict; and the State statute may consistently give further effect of efficiency to the federal statute upon the subject as it relates to State regulation. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**Effect upon Existing Legislation.**—This act, with certain reservations as to existing State laws, establishes the rule now prevailing on the subject of prohibition and it applies to the extent that it is inconsistent with former legislation and is in conformity with valid federal statutes on the subject where interstate regulation is concerned. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**The Turlington Act remains in full force and effect except as modified by the Alcoholic Beverage Control Act of 1937, codi-**

fied as article 3 of this chapter, and as thus modified is the primary law in territory which has not elected to come under the A. B. C. Act. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949); *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**The Two Acts Must Be Read Together.**—To ascertain the status of law regulating the possession, transportation, and sale or possession for the purpose of sale, of intoxicating beverages in nonconforming territory—territory where A. B. C. stores have not been established—the Turlington Act and the Alcoholic Beverage Control Act of 1937 must be read together. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**Beverages Not Enumerated.**—It may be shown in evidence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute. *State v. Fields*, 201 N. C. 110, 159 S. E. 11 (1931).

**"Spirituous Liquors."**—See *State v. Giersch*, 98 N. C. 720, 4 S. E. 193 (1887).

**"Intoxicating liquors" as defined in this section includes the more restrictive term "alcoholic beverages" as defined in § 18-60, and the terms are not synonymous.** *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Sloe Gin Is Intoxicating Liquor.**—Testimony that defendant had in his possession sloe gin is evidence of possession of intoxicating liquor. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948).

**Cited in** *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928); *Sprunt v. Hewlett*, 208 N. C. 695, 182 S. E. 655 (1935); *Inscoc v. Boone*, 208 N. C. 698, 182 S. E. 926 (1935); *Hill v. Board of County Com'rs*, 209 N. C. 4, 182 S. E. 709 (1935); *State v. Ellis*, 210 N. C. 166, 185 S. E. 663 (1936); *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149 (1943).

**§ 18-2. Manufacture, sale, etc., forbidden; construction of law; nonbeverage liquor.**—No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of Congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act,

"H. R. 7294," an act of Congress approved November twenty-third, one thousand nine hundred and twenty-one. (1923, c. 1, s. 2; C. S., s. 3411(b).)

**Cross References.**—As to law allowing sale, the Alcoholic Beverage Control Act of 1937, see §§ 18-36 through 18-62, and the Beverage Control Act of 1939, see §§ 18-63 through 18-93.

**Constitutionality.**—The State in its inherent and reserved power preserved to it by the Tenth Amendment to the federal Constitution may enact valid laws relating to prohibition when not in conflict with the Eighteenth Amendment to the federal Constitution, or congressional legislation, and this section, making the purchase of intoxicating liquor a criminal offense, is valid and enforceable. *State v. Lassiter*, 198 N. C. 352, 151 S. E. 721 (1930).

**State's Regulations in Relation to Interstate Commerce Clause.**—Both by the Constitution of the United States (Amendment XXI) and this chapter liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted federal powers and congressional action thereunder. *State v. Hall*, 224 N. C. 314, 30 S. E. (2d) 158 (1944).

**Effect of Acquiring Possession Prior to Act.**—Evidence tending to show that the defendant had intoxicating liquor in his possession before the efficacy of this act, is not a defense under the provisions of this act for the defendant's possession a year thereafter, upon the trial for violating the prohibition law. *State v. Knight*, 188 N. C. 630, 125 S. E. 406 (1924).

**Effect on Recovery under Compensation Act.**—The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to this section does not alone prevent the recovery of compensation. *Jackson v. Dairymen's Creamery*, 202 N. C. 196, 162 S. E. 359 (1932).

**When Receipt Prohibited.**—There is no provision in this act which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

It is bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge that the mere receipt of same, though only in the home of the recipient, and kept there only for a lawful purpose, is forbidden, is not warranted by any proper construction

of the statute that has been suggested to us. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**A person is guilty of unlawfully transporting intoxicating liquor** in violation of this section, as modified by the Alcoholic Beverage Control Act of 1937, if he knowingly transports intoxicating liquor for any purpose other than those specified in the Alcoholic Beverage Control Act, or in a quantity in excess of the gallon, unless such liquor is in actual course of delivery to an alcoholic beverage control board established in a county coming under the provisions of the Alcoholic Beverage Control Act. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**The word "transport" means to carry or convey** from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**The exemption from criminal liability for the transportation of liquor** into or through a county not within the provisions of article 3 of this chapter applies to liquor being transported from a county which is under the provisions of § 18-49, or from without the State as provided in § 18-58. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948). See *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

This section prohibiting the transportation of intoxicating liquor has been modified by §§ 18-49 and 18-58 so that it is not unlawful to transport through a county which has not elected to come under the provisions of the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any alcoholic beverage control board, or for a person to transport into such county not in excess of one gallon of alcoholic beverages lawfully purchased outside the State or in counties of the State which have elected to come under the Alcoholic Beverage Control Act, provided the liquor is for personal use and the seals of the containers have not been broken. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Guilty Knowledge.**—This section relating to alcoholic liquors must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge

of the nature of the goods transported. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Section Liberally Construed — What Amounts to Possession.**—This section was expressly made to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739 (1924).

**Character of Possession Necessary.**—The possession may, within this statute, be either actual, or constructive. *State v. Meyers*, 190 N. C. 239, 129 S. E. 600 (1925). See also, *State v. Norris*, 206 N. C. 191, 173 S. E. 14 (1934).

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. *State v. Pierce*, 192 N. C. 766, 136 S. E. 121 (1926).

If a man procures another to obtain liquor for him and put it in a given place, and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The constructive possession, as well as the actual possession, is in the contemplation of the statute. *State v. Meyers*, 190 N. C. 239, 129 S. E. 600 (1925); *State v. Pierce*, 192 N. C. 766, 136 S. E. 121 (1926).

**Transportation as Including Possession.**—Where the evidence is sufficient to convict the defendant of transporting whiskey under this and the following section, the transportation of spirituous liquor includes the possession. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

Where an indictment for violating our prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

**Purpose of Possession.**—Upon the trial for transporting intoxicating liquors in violation of our statute, the purpose of the possession of the intoxicants, or that they

were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient. *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

**The possession of nontax-paid liquor** in any quantity anywhere in the State is, without exception, unlawful. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**Possession of One Gallon of Tax-Paid Liquor for Personal Use.**—A person living in a county which has not elected to come under the Alcoholic Beverage Control Act may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor; but subject to this exception, possession within such territory of any quantity of liquor is prima facie evidence that its possession is in violation of this section. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

A person living in nonconforming territory may lawfully transport, in sealed containers, to his own private dwelling for family uses, not in excess of one gallon of tax-paid liquor at any one time, provided it is acquired from an A. B. C. store in this State or legally purchased in another state (§§ 18-49, 18-58), and he may there keep and possess the same for family use. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**Burden of Showing Right to Possess.**—The Turlington Act contemplates that no person shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944). See also notes to §§ 18-49 and 18-58.

**Possession — Admissibility of Evidence.**—Where on a trial for unlawful possession of intoxicating liquor there is evidence tending to show that on the premises of the defendant's gasoline station two barrels partly containing whiskey were found concealed, buried in the ground and encased in concrete of the same character and material as the filling station, etc., testimony of the officer that the barrels, from the indication, had thus been there since the building of the station is competent as tending to show that the possession of the whiskey was for an unlawful purpose. *State v. Hege*, 194 N. C. 526, 140 S. E. 80 (1927).

Evidence tending to show that defendant was apprehended while driving a car owned by him, that he fled the scene with his

companion in the car when it bogged down in the mud, and that three and a half gallons of untaxed liquor was found in the car, is held sufficient to be submitted to the jury on the charge of illegal possession of intoxicating liquor for the purpose of sale and on the charge of unlawfully transporting intoxicating liquor, as charged in the bill of indictment. *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938).

**Same—Evidence Sufficient to Go to Jury.**—On a trial for the unlawful possession of intoxicating liquors, evidence of the State tending to show that the defendant had several gallons of whiskey concealed on the premises of his gasoline station held, sufficient to take the case to the jury on defendant's motion to dismiss upon the State's evidence. *State v. Hege*, 194 N. C. 526, 140 S. E. 80 (1927).

**Same—Defense.**—Where the defendant is indicted for the unlawful possession of whiskey under this section, evidence of its possession before the enactment of the statute is no defense. *State v. Hege*, 194 N. C. 526, 140 S. E. 80 (1927).

**Purchase and Transportation for Use in Home.**—It is unlawful to purchase and transport intoxicating liquor under this section even though it is intended for use in the home under § 18-11. *State v. Winston*, 194 N. C. 243, 139 S. E. 240 (1927).

**Separate Offenses Charged in Same Warrant.**—The offenses of delivering, and of keeping for sale, are separate offenses under this act and although charged in the same warrant, they will be treated as separate counts. *State v. Jarrett*, 189 N. C. 516, 127 S. E. 590 (1925).

**Purchase or Sale in Mecklenburg County.**—The Alcoholic Beverage Control Acts have not modified this section in such a manner as to permit the purchase or sale of intoxicating liquors in Mecklenburg County, which has not authorized the establishment of A. B. C. stores. *State v. Gray*, 223 N. C. 120, 25 S. E. (2d) 434 (1943).

**Evidence That Liquor Is Not Tax-Paid Admissible.**—In a prosecution under this section, evidence tending to show that the liquor in defendant's possession was not tax-paid is competent. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

**Testimony by officers searching without a warrant** that they found a quantity of nontax-paid liquor in defendant's car was held competent. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Sufficiency of Evidence—To Convict of Transporting.**—Where a car, parked with the rear to the road and with the tail light concealed by a cap but with the front lights

on, and the rear of the car smelled of liquor, and empty jugs, and a funnel which smelled of liquor, were found on the ground near, and someone ran through the field as the officers approached the car, and the officers arrested the defendant who came up after their arrival, carried him to jail, and upon return to the place found the jug and funnel gone, and a car which passed ran up the road a piece turned around and came back, it was held that the facts were sufficient to justify a finding "beyond a reasonable doubt that not only defendant was transporting liquors, but he had confederates and had been getting the liquor and had sold out and gone back to them to get another load. He had all the implements of a blind tiger transporting liquor. The officers caught him before he had gotten his new supply." *State v. Sigmon*, 190 N. C. 684, 130 S. E. 854 (1925).

Evidence that officers found two full bottles of nontax-paid whiskey in defendant's car immediately after arresting him for driving the car recklessly and at excessive speed is sufficient to support his conviction of illegal transportation of intoxicating liquor. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Same—To Deny Nonsuit.**—Evidence in this case tending to show that the defendant lived in a part of his filling station used as a residence, where was found a quantity of empty bottles smelling of whiskey, and that in the vicinity was a used roadway leading to several places where cartons with bottles of whiskey were concealed, etc., was sufficient, to deny defendant's motion as of nonsuit. *State v. Pierce*, 192 N. C. 766, 136 S. E. 121 (1926).

A motion for nonsuit upon the evidence on the trial for a violation of the prohibition law, will be denied when, though circumstantial, the evidence is sufficient upon the question of possession and unlawful transportation of intoxicating liquor. *State v. Meyers*, 190 N. C. 239, 129 S. E. 600 (1925).

Where the man went to feed his hogs, the wife ran out of the house with liquor and hid it; the boy took some and ran and spilled it as he ran; the daughter covered up an old 30-gallon drum, the evidence as to violation of this section and § 18-4 was sufficient to refuse a nonsuit. *State v. Norris*, 206 N. C. 191, 173 S. E. 14 (1934).

The State's evidence tending to show that officers found in defendant's car, which defendant was driving, four fifth-gallon bottles of intoxicating liquor intact and four broken bottles from which some of the contents had leaked out, all of which contained or had contained sloe gin, is sufficient to

overrule defendant's motion to nonsuit in a prosecution under this section for transportation and possession of intoxicating liquor in a county which has not elected to come under article 3 of this chapter. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948).

**Harmless Error.**—When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count. *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938).

**General Verdict Sufficient for Conviction.**—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739 (1924).

**Same—Erroneous Charge as to Separate Count Harmless.**—Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, an erroneous charge as to receiving and transporting it, is harmless error. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739 (1924).

**Sufficiency of Charge.**—The charge in a prosecution for the unlawful transportation of intoxicating liquor was held to be in

substantial compliance with the requirements of § 1-180. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Sentence of Two Years Constitutional.**—A sentence of two years for violating this act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258 (1924).

**Separate Punishment for Different Counts.**—Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting. *State v. Chavis*, 232 N. C. 83, 59 S. E. (2d) 348 (1950).

**Distinct Charges Supporting Separate Sentences.**—A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors, are distinct charges of separate offenses, and support separate sentences by the court on a general plea of guilty. *State v. Moschoure*, 214 N. C. 321, 199 S. E. 92 (1938).

**Cited in** *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928); *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927 (1930); *State v. Calcutt*, 219 N. C. 545, 15 S. E. (2d) 9 (1941) (dis. op.); *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

**§ 18-3. Advertisements, signs, and billboards.**—It shall be unlawful to advertise, anywhere or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the means, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises: Provided, the foregoing provision shall not prohibit newspaper, radio, billboard or other forms of advertising for sale of beer, lager beer, ale, porter, fruit juices and/or other light wines containing not more than 3.2 per cent of alcohol by weight. (1923, c. 1, s. 3; C. S., s. 3411(c); 1933, cc. 216, 229.)

**Cross References.**—As to unlawful posting of advertisements without consent of owner, see § 14-145. As to advertising un-

der the Alcoholic Beverage Control Act, see §§ 18-53, 18-54, and 18-55.

**§ 18-4. Advertising, etc., of utensils, etc., for use in manufacturing liquor.**—It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or receipt advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have or possess and liquor or property designed for the manufacture of liquor intended for

use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property. (1923, c. 1, s. 4; C. S., s. 3411(d).)

**Possession of Property Designed for Manufacture.**—An indictment charging the defendant with a violation of this section, in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. *State v. Jaynes*, 198 N. C. 728, 153 S. E. 410 (1930).

**“Designated.”**—In the interpretation of this section making it unlawful to possess any property “designated” for use in manufacturing intoxicating liquors, the word “designated” is construed to mean “de-

signed,” and so used it is held in this case that evidence of the defendant’s guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery was immaterial under the language of the statute. *State v. Jaynes*, 198 N. C. 728, 153 S. E. 410 (1930).

**Cited in** *State v. Beasley*, 226 N. C. 577, 39 S. E. (2d) 605 (1946).

**§ 18-5. Soliciting orders for liquor.**—No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this article. (1923, c. 1, s. 5; C. S., s. 3411(e).)

**§ 18-6. Seizure of liquor or conveyance; arrests; sale of property.**—When any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquor in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquor transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this article in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days from conviction or default of appearance of such person be destroyed: Provided that any taxpaid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. Unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile,



the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage.

When any vehicle confiscated under the provisions of this section is found to be specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition. However, if the court should find that such equipment and modifications are so extensive that it would be impractical to restore said vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk: Provided, that nothing herein contained shall affect the rights of lien holders and other claimants to said vehicles as set out in this section. (1923, c. 1, s. 6; C. S., s. 3411(f); 1945, c. 635; 1951, c. 850.)

**Cross References.**—As to disposal of tax-paid liquor that has been seized, see § 18-13. As to fines to be paid into treasurer's office for school fund, see § 153-58, § 115-177 et seq.; N. C. Const., Art. IX, § 5. As to search warrants, see § 18-13.

**Editor's Note.**—The 1945 amendment inserted the provisions as to returning seized liquor to the owner, turning it over to hospitals or selling it.

The 1951 amendment added the second paragraph.

For article discussing limits to search and seizure, see 15 N. C. Law Rev. 229. See also, 15 N. C. Law Rev. 101.

**Meaning of "Absolute Personal Knowledge."**—Under this section an officer "discovers any person in the act" and has "absolute personal knowledge" (1) when he sees the liquor; (2) when he has absolute personal knowledge \* \* \* acquired through the senses of seeing, hearing, smelling, tasting or touching. 15 N. C. Law Rev. 131, citing *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924).

**Constitutionality.**—The provisions of this section do not contravene the provisions of the State Constitution, Art. I, §§ 11 and 15. *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924).

**Arrest without Warrant.**—An arrest may not be lawfully made by the properly authorized officers of the law for the

violation of our prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers' presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. *State v. DeHerradora*, 192 N. C. 749, 136 S. E. 6 (1926).

It follows that for an officer to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result, is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal. *State v. Simmons*, 192 N. C. 692, 135 S. E. 866 (1926).

But where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobile, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924).

**Same—Evidence Not Excluded.**—The

arrest by the officer of the law without a warrant, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded. *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924).

**A search warrant is not necessary** to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when under the circumstances the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of this section. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538 (1928).

**The "baggage"** of the proviso of this section, refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538 (1928).

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunk of a passenger, but which are not, however, designed for such use, but for other purposes, such as sale and the like. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538 (1928).

A suitcase or traveling bag with four one-half gallon cans of contraband liquor in it is not baggage, under the definition in this section. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538 (1928).

**"Other Vehicle"—Suitcase.**—A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of this section. *State v. Jenkins*, 195 N. C. 747, 143 S. E. 538 (1928).

**Search without Warrant.**—Officers have no authority to search a car without a warrant, under this section where they do not see or have "absolute personal knowledge" that there is intoxicating liquor in the car. *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924); *State v. Simmons*, 192 N. C. 692, 135 S. E. 866 (1926); *State v. DeHerradora*, 192 N. C. 749, 136 S. E. 6 (1926).

**This section does not provide for seizure of all intoxicating liquor found in vehicle**, but for seizure of any and all intoxicating liquor found therein being transported contrary to law. *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414 (1945).

**Forfeiture of Property Used.**—See article in 2 N. C. Law Rev. 126 for a review of the cases and statutes.

**Confiscation and Forfeiture Are Mandatory.**—Where one, who was in possession of seized liquor at the time he was

arrested for unlawful acts with respect thereto, pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of this section are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. *State v. Hall*, 224 N. C. 314, 30 S. E. (2d) 158 (1944).

**Jurisdiction to declare forfeiture** of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. *State v. Reavis*, 228 N. C. 18, 44 S. E. (2d) 354 (1947).

**Order Confiscating Car.**—Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with the statute. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1919).

**Order for Forfeiture Nunc Pro Tunc.**—Where defendant has been convicted of illegal transportation of nontax-paid liquor, the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such transportation. *State v. Maynor*, 226 N. C. 643, 39 S. E. (2d) 833 (1946).

**Use of Vehicle without Knowledge of Owner.**—An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a capias on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury. *State v. Ayres*, 220 N. C. 161, 16 S. E. (2d) 689 (1941).

**Rights under Lien on Automobile Forfeited and Sold.**—This section expressly transfers the lien upon an automobile seized and sold for the unlawful trans-

portation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with Const., Art. I, § 17, or with the due process clause of the federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. *C. I. T. Corporation v. Burgess*, 199 N. C. 23, 153 S. E. 634 (1930).

One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of this section, after notice by publication required by the statute, may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. *C. I. T. Corporation v. Bur-*

*gess*, 199 N. C. 23, 153 S. E. 634 (1930).

**Liability of Sheriff for Destruction of Vehicle.**—In a case arising prior to this section it was held that where the sheriff took an automobile in custody under a corresponding statute and while he was holding it in a storage garage according to law, it was destroyed by fire through no fault of his, he was not liable on his forthcoming bond. There were two dissenting opinions filed. *Motor Co. v. Sands*, 186 N. C. 732, 120 S. E. 459 (1923).

**Where a vehicle is seized by a municipal police officer** for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. *State v. Law*, 227 N. C. 103, 40 S. E. (2d) 699 (1946).

**Stated** in *Alexander v. Lindsey*, 230 N. C. 663, 55 S. E. (2d) 470 (1949).

**Cited** in *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944).

**§ 18-6.1. Officers to refer to State courts cases involving vehicles seized and arrests made for unlawful transportation.**—All members of the State Highway Patrol and other State and local law enforcing officers shall, whenever seizing any vehicle on account of the unlawful transportation of intoxicating beverages, or making arrests of persons on account of same, refer the cases to the State court having jurisdiction thereof, to be determined by such State court in accordance with the law of this State. Any such officer who shall, in violation of this section, refer such cases to courts of another jurisdiction, shall be guilty of misfeasance in office and subject to a fine of one hundred dollars (\$100.00). (1945, c. 779.)

**Local Modification.** — Mecklenburg: 1951, c. 1061, s. 1.

**§ 18-7. Use of seized property forbidden.**—It shall be unlawful for any State, county, township or municipal officer to use or cause to be used for any purpose whatsoever any automobile or other article of personal property seized by said officer for the reason that the owner of said property or one in possession thereof at time of seizure has violated the terms of the State or federal prohibition laws, or any other laws, until the respective rights of the owner, or person in possession at time of seizure, or mortgagee if one should intervene, are passed upon by the proper court, and final order is made as to proper disposition of said personal property so seized.

It shall be the duty of the officer seizing said automobile or other personal property to store same in a safe and suitable place, until final disposition is ordered.

Any officer or officers violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days. (1927, c. 18.)

**§ 18-8. Witnesses; self crimination; immunity.**—No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this article, but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence;

but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. (1923, c. 1, s. 7; C. S., s. 3411(g).)

**Cross References.**—As to general rule of evidence that defendant in criminal action is competent but not compellable to testify, see § 8-54. As to perjury, see § 14-209 et seq.

**Validity.**—Former statute held valid. *State v. Randall*, 170 N. C. 757, 87 S. E. 227 (1915).

**Immunity Must Be Claimed under Section.**—The immunity from punishment of an offender against our prohibition law when testifying against others charged with the same offense, must be claimed by him under the provisions of this section which superseded C. S. § 3406, so as to make our statute conform to the federal act, whereunder no discovery made by such person shall be used against him and he shall be altogether pardoned for the offense done or participated in by him. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162 (1926).

**Only a witness required to testify under duress is granted immunity** from prosecution by this section. Hence an officer, who purchased liquor in order to obtain evidence against a suspect and voluntarily testified for the prosecution, could not claim the immunity afforded by this section, and it was error to instruct the

jury to the contrary. *State v. Love*, 229 N. C. 99, 47 S. E. (2d) 712 (1948).

**Voluntary Testimony of Offender.**—The evidence in criminal prosecutions that may not be received from the offender, is such as is compulsory, and does not apply to one volunteering his testimony and willingly giving it. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162 (1926).

**Same—Waiver.**—An offender against the criminal law relating to prohibition may waive his constitutional right not to give evidence that would tend to incriminate himself by his voluntary act in so doing. *State v. Luquire*, 191 N. C. 479, 132 S. E. 162 (1926).

**Testimony at Former Trial.**—Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of this section. *State v. Burnett*, 184 N. C. 785, 115 S. E. 57 (1922).

**§ 18-9. Place of sale and delivery; place of prosecution.**—In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8; C. S., s. 3411(h).)

**§ 18-10. Uniting separate offenses in indictment, etc.; bill of particulars; trial.**—In any affidavit, information, warrant, or indictment for the violation of this article, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, warrant, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful; but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. (1923, c. 1, s. 9; C. S., s. 3411(i).)

**§ 18-11. Possession prima facie evidence of keeping for sale.**—The possession of liquor by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and

of his bona fide guests when entertained by him therein. (1923, c. 1, s. 10; C. S., s. 3411(j).)

**Editor's Note.**—For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawful handling for gain, see 5 N. C. Law Rev. 302.

**Liberal Construction.**—This section is to be liberally construed to prevent the use of liquor as a beverage; and the possession of such liquor is made prima facie evidence of the violation of the law, but the possession thereof for the personal consumption of the owner and bona fide guests, etc., is allowed. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**Section Does Not Apply in Prosecution under § 18-50.**—The statutory presumption from the fact of possession does not arise in a prosecution under § 18-50 for possessing nontax-paid liquor for the purpose of sale. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629 (1945).

Where a warrant charged generally that defendant had in his possession nontax-paid whiskey for the purpose of sale it was held that upon the facts of the case the word nontax-paid was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of § 18-50 and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804 (1949).

**Section Limited to Private Dwelling Used Exclusively as a Dwelling.** — The provision of this section that a person may legally possess intoxicating liquor in his dwelling for his personal consumption is limited by its terms to a private dwelling occupied and used exclusively as a dwelling, and a person may not lawfully possess intoxicating liquor in a building or structure used and operated by such person as a filling station and dwelling combined when the parts of the structure used for the respective purposes are connected. *State v. Hardy*, 209 N. C. 83, 182 S. E. 831 (1935).

The provision of this section permitting the possession of intoxicating liquor for personal use applies only to possession in a structure used exclusively as a dwelling, and therefore defendants' possession in the structure used as a dwelling and store house was illegal. *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34 (1939).

**Possession as Evidence of Sale.** — If one had possession of liquor as disclosed by this record it was prima facie evidence that he had it for sale. If not in his private dwelling, if he had actual contruc-

tive possession, whether for sale or not, it is a violation of law. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739 (1924); *State v. Knight*, 188 N. C. 630, 125 S. E. 406 (1924); *State v. Pierce*, 192 N. C. 766, 136 S. E. 121 (1926).

But the prima facie case so established may be rebutted by showing that possession was lawful under the statutory qualification, the burden remaining with the State to show guilt beyond a reasonable doubt. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

However, the mere possession unrebutted is sufficient to carry the issue to the jury. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**Prima Facie Evidence Applies to Possession in Private Dwelling.**—The prima facie evidence arising under this section from the possession of liquor applies to possession in a private dwelling or elsewhere. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928).

**Keeping in Home.**—As shown in this section one is not allowed "to manufacture, sell, barter, etc., or possess intoxicating liquors," except as heretofore explained and modified, but if received only in one's home (without violation of the acts as specified and prohibited in the statute), and is kept there only for the consumption of the owner and his family and the bona fide guests entertained by him, this constitutes no breach of the present statute, though received since the same was enacted. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

Such possession in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. *State v. Mull*, 193 N. C. 668, 137 S. E. 866 (1927).

**When Possession in Private Dwelling Unlawful.**—Under this section the possession of liquor in the private dwelling of defendant, for any other purpose than stated in the exception, is unlawful. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928).

**Purchase and Transportation to Home Unlawful.**—While this section does not make it a criminal offense for one to have intoxicating liquor in his own dwelling for his own personal use or that of his family and friends, it is a violation of the criminal law, by the express provisions of § 18-2, for him to either purchase it elsewhere or

carry it there. *State v. Winston*, 194 N. C. 243, 139 S. E. 240 (1927).

**The possession in one's dwelling of not more than one gallon** of liquor upon which the tax has been paid raises no presumption that the possession is unlawful. This applies even though the dwelling is in dry territory. And in order to convict the State must establish by independent evidence, unaided by any presumption, that the possession is unlawful. In such cases, in the absence of evidence of possession of nontax-paid liquor or more than one gallon of tax-paid intoxicating beverage, prima facie evidence of the violation of the statute is wanting. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

The presence of four bottles containing less than a gallon of whiskey in a cabin near his filling station which was occupied by defendant would not be sufficient to constitute prima facie evidence that the liquor was being kept for the purpose of sale. *State v. Watts*, 224 N. C. 771, 32 S. E. (2d) 348 (1844).

Where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling in a county in which the sale of such intoxicating liquors is not authorized by § 18-36 et seq., nothing else appearing, such possession is not now prima facie evidence that such intoxicants are so possessed for the purpose of sale under this section. *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

**Proof of the possession of more than one gallon** of intoxicating liquor, even though it is found in the private dwelling of defendant and the tax thereon has been paid, is prima facie evidence that such liquor is unlawfully possessed and is being kept for the purpose of sale. Defendant is protected against the presumption of illegality or the rule of evidence created by this section only so long as he does not possess more than one gallon. Where he possesses more than one gallon he has the burden to rebut the prima facie evidence by showing that such possession not only comes within the exceptive provisions of this section, but also that it was legally acquired and transported to his dwelling and kept there for family uses only. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949). See §§ 18-49, 18-58.

Evidence tending to show that more than one gallon of intoxicating liquor upon which the tax had not been paid was found in a house owned by defendant in dry territory justifies an instruction to the effect that it is unlawful to possess at any

one time more than one gallon of intoxicating liquor even in the possessor's home when defendant offers no evidence tending to show that the liquor was acquired from an A. B. C. store in this State or was purchased in another state and legally transported to his residence in quantities of not more than one gallon at any one time. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**Burden of Proving Proper Purposes.**—Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of this act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act. *State v. Foster*, 185 N. C. 674, 116 S. E. 561 (1923). See the discussion in 5 N. C. Law Rev. 302.

Under this section the State is not required to allege or prove that the case does not fall within the exception allowing possession for personal use, etc. This being a matter of defense, must be alleged and proven by the defendant. *State v. Dowell*, 195 N. C. 523, 143 S. E. 133 (1928).

The provision of this section making it lawful to possess liquor in a private dwelling for family purposes is an exception to the general rule, and the burden of proof in respect thereto is on defendant. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

**Same — Rebuttal by Proof of Large Quantity.** — The possession of a large quantity of whiskey in the home of the defendant raised the prima facie case of her guilt, permitting the inference from the method of its being bottled, etc., that it was for the purpose of an unlawful sale, or that it had been received for unlawful purposes, defendant's motion as of nonsuit thereon was properly denied. *State v. Hammond*, 188 N. C. 602, 125 S. E. 402 (1924).

**Testimony that defendant frequently sleeps in a house is insufficient to show that it is his private dwelling** within the meaning of this section. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**Charge Negating Proper Purpose Unnecessary.** — Where the indictment sufficiently charges the offense of the unlawful possession of whiskey under this section, a charge negating the exception making it lawful to have such possession for family purposes, etc., as provided in this section is unnecessary to a convic-

tion. *State v. Hege*, 194 N. C. 526, 140 S. E. 80 (1927).

An indictment for illegal possession and transportation of intoxicating liquor need not negative the conditions under which intoxicating liquor may be possessed for the purpose of sale and may be transported, since the exceptions are matters of defense. *State v. Epps*, 213 N. C. 705, 197 S. E. 580 (1938).

**Instruction Using Language of This Section Proper.**—In a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the court may properly charge the law in the language of this section and § 18-13, since the law therein stated constitutes a material part of the law of the case. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

**Prima Facie Case for Jury.**—In a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontax-paid whiskey and left with it, is sufficient to make out a prima facie case for the jury. *State v. Graham*, 224 N. C. 347, 30 S. E. (2d) 151 (1944).

Where, in a prosecution under § 18-2 for

**§ 18-12. Summons on citizens having interest in property.**—In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court. (1923, c. 1, s. 11; C. S., s. 3411(k).)

**§ 18-13. Search warrants; disposal of liquor seized.**—Upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor seized under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days from conviction or default of appearance of such person

unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the State offers evidence that defendant had in his possession approximately 17½ gallons of liquor, and there is no evidence that defendant's possession was for the use of himself, his family and bona fide guests, defendant's motion to nonsuit is properly denied, since this section applies. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

Evidence tending to show that defendant was driving his automobile on a highway, that when officers attempted to stop him he attempted to elude them, threw a carton containing three gallons of nontax-paid whiskey from the car, and drove in a reckless manner until struck from the rear by the officers' car and run off the road, was held sufficient to overrule nonsuit upon each of the charges of illegal possession of whiskey for the purpose of sale and unlawful transportation of same. *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804 (1949).

**Applied in** *State v. Libby*, 213 N. C. 662, 197 S. E. 154 (1938).

**Stated in** *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591 (1946).

be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes, or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; C. S., s. 3411(1); 1939, c. 12; 1941, c. 310.)

**Editor's Note.**—The 1939 amendment added the proviso at the end of this section. The 1941 amendment revised the proviso and added the ten-day limitation in the last sentence. For comment on the 1941 amendment, see 19 N. C. Law Rev. 477.

For article discussing limits to search and seizure, see 15 N. C. Law Rev. 229. See also, 15 N. C. Law Rev. 101.

**Legislative Intent.**—Our statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation of the law is the restoration of the liquor

permitted. However, the processes of our courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. *State v. Hall*, 224 N. C. 314, 30 S. E. (2d) 158 (1944).

**Hearing Contemplated.**—While § 18-6, provides only for a hearing in respect of the seized vehicle used in transporting intoxicating liquor contrary to law, because thereunder the liquor itself is to be destroyed, this section clearly contemplates a hearing in the criminal case to determine the "established owner" or rightful claimant. This remedy appears adequate and is approved. *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414 (1945).

**Cited in** *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944).

**§ 18-14. Grand jury, witnesses before; effect of evidence.**—When the solicitor of any judicial district has good reason to believe that liquor has been manufactured or sold contrary to law within a county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue a subpoena for the person so having knowledge of said offense to appear before the next grand jury drawn for the county, there to testify upon oath what he may know touching the existence, establishment, and whereabouts of said distillery, or persons who have sold intoxicating liquor contrary to law, who shall give the names and personal description of the keepers thereof, and of any person who has sold liquor unlawfully; and such evidence, when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section he shall be guilty of laches in office, and such failure be cause for removal from office. (1923, c. 1, s. 13; C. S., s. 3411(m).)

**§ 18-15. Clubrooms and other places for keeping, etc., of liquor.**—No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquor is received, kept, or stored for barter, sale, exchange, distribution, or division among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquor for any such purpose. (1923, c. 1, s. 14; C. S., s. 3411(n).)

**§ 18-16. Records of transportation companies; evidence.**—All express companies, railroad companies, or other transportation companies doing



business in this State are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or, if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the State, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this State. Any express company, railroad company, or other transportation company, or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 1, s. 15; C. S., s. 3411(o).)

**Editor's Note.**—See *State v. R. Co.*, 169 N. C. 295, '84 S. E. 283 (1915).

**§ 18-17. Indictments; allegations of sale; circumstantial evidence.**—In indictments for violating any provisions of this article it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence. (1923, c. 1, s. 16; C. S., s. 3411(p).)

**Editor's Note.**—The cases which follow were decided under a similar section, C. S. § 3383, which has been superseded by this section.

**Evidence—Sale to Unknown Persons.**—To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown," it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment. *State v. Watkins*, 164 N. C. 425, 79 S. E. 619 (1913).

**Same—Other Sales.**—The rule of evidence that one illegal sale of intoxicating liquors should not be received as any evidence that another such sale had been made, applies where the sales are entirely separated and distinct transactions, the one having no fair or reasonable tendency to establish the other, but inapplicable when it tends to show that the defendant, accused of violating the prohibition law at a certain city number, with evidence tending to show such violation there, kept the spirituous liquor elsewhere in the city, or under his control, for the purpose of making illegal sales. *State v. Boynton*, 155 N. C. 456, 71 S. E. 341 (1911).

**Same—Liquors on Hand.**—Upon trial on indictment for the sale of intoxicating liquors at a certain city number, testimony that the accused had and kept liquors on hand in other portions of the city is a relevant circumstance tending to show that he had it on hand and was prepared and equipped to make the illegal sale charged in the bill of indictment, and to be consid-

ered by the jury with other evidence tending to show that he had sold such liquor at the place charged in the indictment. *State v. Boynton*, 155 N. C. 456, 71 S. E. 341 (1911).

Upon indictment for violating the prohibition law, the possession of liquors by the accused, at the time of the offense charged, is always a circumstance admissible against him, and in general the circumstances under which liquors are kept, and even that they are kept at other places or in other rooms, may be shown. *State v. Boynton*, 155 N. C. 456, 71 S. E. 341 (1911).

**Same—Photographs.**—Photographs are admissible in evidence. *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577, wherein it is said: "It has always been permissible to use diagrams in the trial of causes, both civil and criminal, and especially in the latter class to use diagrams, if shown to be correct, to illustrate the position of persons and places and to better enable the witnesses to properly locate them. If, then, a diagram may be used for such a purpose, we can see no good reason why a photograph may not be, by which is presented to view everything within the range of the camera at the time the photograph was taken." *State v. Jones*, 175 N. C. 709, 95 S. E. 576 (1918).

**Same — Conversation between Accused and Wife.**—Where the husband is on trial for violating the prohibition law, it is competent for a third person to testify as to the conversation between the defendant

and his wife, with statements by the latter tending to fix the former with guilt of the offense charged. *State v. Randall*, 170 N. C. 757, 87 S. E. 227 (1915).

§ 18-18. **Serving liquor with meals.**—It is unlawful for any person to serve with meals, or otherwise, any liquor or intoxicating bitters, where any charge is made for such meal or service. (1923, c. 1, s. 17; C. S., s. 3411(q).)

**Editor's Note.**—See *Felia v. Betton*, 170 N. C. 112, 86 S. E. 999 (1915).

§ 18-19. **Sale by druggists or pharmacists.**—It is unlawful for any druggist or pharmacist to sell, or otherwise dispose of for gain, any intoxicating liquor. (1923, c. 1, s. 18; C. S., s. 3411(r).)

§ 18-20. **Grain alcohol for use in medicine or surgery; manufacture or sale of cider.**—The provisions of this article shall not apply to grain alcohol, received by duly licensed physicians, druggists, dental surgeons, college, university, and State laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinbefore provided: Provided, however, that nothing contained in this article shall prohibit the importation into the State of North Carolina and the delivery and possession in the State for use in industry, manufactures, and arts of any denatured alcohol or other denatured spirits which are compounded and made in accordance with the formulae prescribed by acts of Congress of the United States and regulations made under authority thereof by the Treasury Department of the United States and the Commissioner of Internal Revenue thereof, and which are not now subject to internal revenue tax levied by the government of the United States: Provided further, that this article shall not apply to wines and liquors required and used by hospitals or sanatoriums bona fide established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs, when the same are administered to patients actually in such hospitals or sanatoriums for treatment, and when the same are administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing: Provided, further, that this article shall not prohibit the manufacture or sale of cider or vinegar. (1923, c. 1, s. 19; C. S., s. 3411(s).)

§ 18-21. **Wine for sacramental purposes.**—It is lawful for any ordained minister of the gospel who is in charge of a church and at the head of a congregation in this State to receive in the space of ninety consecutive days a quantity of vinous liquor not greater than five gallons, for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles. (1923, c. 1, s. 20; C. S., s. 3411(t); 1935, c. 114.)

**Editor's Note.**—By the 1935 amendment the quantity which could be received was increased from three to five gallons.

§ 18-22. **Sheriffs and police to search for and seize distilleries; confiscation; disposal of property.**—It is the duty of the sheriff of each county in the State and of the police of each incorporated town or city in the State to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquor in violation of the laws of North Carolina, and to deliver same, with any materials used for making such liquor found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper. (1923, c. 1, s. 21; C. S., s. 3411(u).)

§ 18-23. **Destruction of liquor at distillery; persons arrested.**—It

is the duty of the sheriff and other officers mentioned in § 18-22 to seize and then and there destroy any and all liquor which may be found at any distillery for the manufacture of intoxicating liquor in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquor. (1923, c. 1, s. 22; C. S., s. 3411(v).)

**§ 18-24. Laches of officers; removal from office.**—If any officer mentioned in §§ 18-22, 18-23, shall fail or refuse to use diligence in the execution of the provisions of such sections, after being informed of violation thereof, he shall be guilty of laches in office, and such failure shall be cause for removal therefrom. (1923, c. 1, s. 23; C. S., s. 3411(w).)

**Cross Reference.**—As to removal of officers, see § 126-16.

**§ 18-25. Rewards for seizure of still.**—For every distillery seized under this article the sheriff or other police officer shall receive such sum as the board of county commissioners of the county in which the seizure was made shall, in the discretion of such board, allow, which sum shall not be less than five dollars nor more than twenty dollars: Provided, that the commissioners shall not pay any amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made: Provided further, that when the sheriff of a county captures a distillery he shall receive the fee for his own use, regardless of whether he be on fees or salary. (1923, c. 1, s. 24; C. S., s. 3411(x).)

**Local Modification.** — Sheriff's fees for seizure of stills were prior to 1923 regulated by C. S. 3401, 3402. Section 18-25, part of the Turlington Act, would seem to supersede C. S. 3401, 3402, and Public Law-1933, c. 480, specifically repealed C. S. 3401, 3402, except in three counties. However, many local laws have been passed with reference to C. S. 3401, as well as to §§ 18-25 and 18-26. Citations to all these laws which have been discovered are listed here, not as a statement of the present status of the law in any county, but merely as an aid in tracing down the fees in the counties named.

These citations are: Alamance, Avery, Caswell, Chowan, Graham, Green, Jackson, Northampton, Surry, Wilson, Yadkin: C. S. 3401, 3402; 1933, c. 480; Anson: 1937, c. 442; Burke: 1933, c. 136; Haywood, Lincoln, Pitt, Transylvania: C. S. 3909; Ex. Sess. 1908, c. 97; Pub. Loc. 1919, c. 30; Lenoir: 1933, c. 246; Moore: 1933, c. 246; 1935, c. 253; Nash: 1931, c. 91; Surry: 1925, c. 173; Union: Pub. Loc. 1933, c. 160; Warren: 1933, c. 230.

Montgomery County was exempted from this section by Session Laws 1949, c. 68.

**§ 18-26. Same—In certain counties.**—The board of commissioners of the several counties in the State, hereinafter named, shall pay by way of reward to the sheriff or other officers in the various counties for the capture and destruction of stills used in the manufacture of spirituous liquors, the sum of twenty dollars (\$20.00) and no more, upon the production of a certificate from the clerk of the superior court or other court having final jurisdiction, that one or more operators of the still captured and destroyed were by the sheriff or other officer apprehended, captured and have been convicted and that no appeal has been taken from the judgment rendered, which said twenty dollars (\$20.00) shall be in lieu of any and all other rewards authorized by law to be paid for the capture and destruction of stills to the sheriff or other officers in the counties hereinafter named.

This section shall apply to the following counties only: Alleghany, Ashe, Avery, Beaufort, Bladen, Buncombe, Caswell, Catawba, Chowan, Craven, Duplin, Forsyth, Hoke, Hyde, Lee, Lenoir, Lincoln, Mecklenburg, New Hanover, Onslow, Pamlico, Pender, Perquimans, Richmond, Rockingham, Sampson, Scotland,

Vance, Wake, Washington, Watauga, Wilkes, Wilson and Yancey. (1927, c. 42; Pub. Loc. 1933, c. 160; 1947, c. 207.)

**Local Modification.**—Scotland: 1951, c. 193. inserted "Scotland" in the list of counties in the second paragraph.

**Editor's Note.** — The 1947 amendment

**§ 18-27. Officers given power to compel evidence; effect of evidence; process; immunity to witnesses.**—When any justice of the peace, magistrate, recorder, mayor of a town, or judge of the superior courts or Supreme Court shall have good reason to believe that any person within his jurisdiction has knowledge of the unlawful sale of liquor or the existence and establishment of any place where intoxicating liquor is sold or manufactured contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, recorder, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such place where intoxicating liquor is sold or manufactured contrary to law is supposed to be, a subpoena, *capias ad testificandum*, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, recorder, mayor, or judge, and give evidence on oath as to what he may know touching the existence, establishment, and whereabouts of such place where intoxicating liquor is sold or manufactured contrary to law, and the name and personal description of the keeper thereof, or person selling or manufacturing liquor. Such evidence, when obtained, shall be considered and held in law as an information under oath, and the justice, magistrate, recorder, mayor, or judge may thereupon proceed to seize and arrest such keeper or person selling, manufacturing, or having liquor contrary to law, and issue such process as is provided by law. No discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. (1923, c. 1, s. 25; C. S., s. 3411(y).)

**Cross Reference.**—As to testimony enforced in criminal investigations, immunity, see § 8-55.

**§ 18-28. Distilling or manufacturing liquor; first offense misdemeanor.**—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the State of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the State prison for not less than four months and not exceeding five years, in the discretion of the court. (1923, c. 1, s. 26; C. S., s. 3411(z).)

**Process of Manufacturing Need Not Be Complete.**—It is not necessary for a conviction under the provisions of Public Laws 1917, chap. 157, similar to those of this section, making the distilling or manufacturing, etc., of spirituous or malt liquors or intoxicating bitters within the State unlawful, including within its express terms those who aid, assist, or abet therein, that the liquor should have been actually manufactured or the product finished; and where there is evidence tending to show that such manufacture had

been in progress, but had been suspended by the arrest of the prisoner, and that he was aiding or assisting therein, it is sufficient to be submitted to the jury and to sustain conviction of the offense charged. *State v. Horner*, 154 N. C. 788, 94 S. E. 291 (1917).

**When Question for Jury.**—Where there is evidence of defendant's guilty knowledge in aiding in the distilling or manufacturing of intoxicating liquor prohibited by Public Laws 1917, chap. 157, similar to this section, by hauling it away, and also

consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. *State v. Horner*, 174 N. C. 788, 94 S. E. 291 (1917).

**Second Degree.**—Upon a charge in an indictment for manufacturing liquor, etc., the defendant may be convicted of the second degree of the offense—i. e., aiding or abetting its manufacture. *State v. Horner*, 174 N. C. 788, 94 S. E. 291 (1917).

**Accessories Equally Guilty.** — The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. *State v. Clark*, 183 N. C. 733, 110 S. E. 641 (1922).

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. *State v. Smith*, 183 N. C. 725, 110 S. E. 654 (1922).

**Presumption Regarding Previous Con-**

**viction.**—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641 (1922).

**It was proper to reject evidence** as to the quantity of cotton or corn defendant, tried for unlawful manufacture of liquor, etc., had raised on his farm that year. *State v. Smith*, 183 N. C. 725, 110 S. E. 654 (1922).

**Evidence Sufficient for Conviction.**—See *State v. McMillan*, 180 N. C. 741, 105 S. E. 403 (1920); *State v. Smith*, 183 N. C. 725, 110 S. E. 664 (1922); *State v. Grier*, 184 N. C. 723, 114 S. E. 622 (1922).

**Indictment.** — The second offense of manufacturing spirituous liquor is a felony and a person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony. *State v. Sanderson*, 213 N. C. 381, 196 S. E. 324 (1938).

**Cited in** *State v. Clegg*, 214 N. C. 675, 200 S. E. 371 (1939); *State v. Graham*, 224 N. C. 351, 30 S. E. (2d) 154 (1944).

**§ 18-29. Misdemeanor; punishment; effect of previous punishment by federal court.**—Any person violating any of the provisions of this article, except as otherwise specified in this article, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court: Provided, that no person shall be punished who has been previously punished for the same offense by a federal court. (1923, c. 1, s. 27; C. S., s. 3411(aa).)

**Cited in** *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**§ 18-30. Laws repealed; local laws.**—All laws in conflict with this article are hereby repealed, but nothing in this article shall operate to repeal any of the local acts of the General Assembly of North Carolina prohibiting the manufacture or sale or other disposition of any liquor mentioned in this article, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this article or under any local act relating to the same subject. (1923, c. 1, s. 28; C. S., s. 3411(bb).)

**Editor's Note.** — See *State v. Johnson*, 170 N. C. 685, 86 S. E. 788 (1915).

## ARTICLE 2.

### *Miscellaneous Regulations.*

**§ 18-31. Unlawful sale through agents.**—If any person unlawfully and illegally procures and delivers any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and shall be punished in

the discretion of the court. (1905, c. 498, ss. 6, 7, 8; Rev., ss. 3526, 3534; C. S., s. 3371.)

**Local Modification.**—Polk: 1951, c. 750.

**What Constitutes Agent.** — Revisal, § 3534, now this section, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89 (1908).

If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey for another within the meaning of Revisal, § 3534, now this section, and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89 (1908).

**§ 18-32. Keeping liquor for sale; evidence.**—It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, except as otherwise authorized by law, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute prima facie evidence of the violation of this section:

1. The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or
2. The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or
3. The possession of more than one gallon of wine at any one time, whether in one or more places; or
4. The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or
5. The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or
6. The possession of intoxicating liquors as samples to obtain orders thereon: Provided, that this section shall not prohibit any person from keeping in his possession wines and ciders in any quantity where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be. (1913, c. 44, s. 2; 1915, c. 97, s. 8; C. S., s. 3379; 1949, c. 1251, s. 2.)

**Local Modification.**—Polk: 1951, c. 750.

**Editor's Note.**—See 13 N. C. Law Rev. 315.

The 1949 amendment substituted in subsection 3 the words "one gallon of wine" for the words "three gallons of vinous liquors." Section 1 of the amendatory act provides that the types of wine included under the provisions of this act shall include all types of wine as defined in subsection (b) of § 18-64 and article 5 of this chapter. And section 4½ of the amendatory act provides that it shall apply only to the counties and cities that have or may establish alcoholic beverage control stores.

**Constitutionality.**—The section is constitutional and valid. *State v. Randall*, 170 N. C. 757, 87 S. E. 227 (1915); *State v. Langley*, 209 N. C. 178, 183 S. E. 526 (1936).

It is not in contravention of the federal

Constitution. *State v. Brown*, 170 N. C. 714, 86 S. E. 1042 (1915).

For cases holding that this section was unaffected by P. L. 1935, cc. 418, 493, see *State v. Jones*, 209 N. C. 49, 182 S. E. 699 (1935); *State v. Langley*, 209 N. C. 178, 183 S. E. 526 (1936); *State v. Tate*, 210 N. C. 168, 185 S. E. 665 (1936).

**"Prima Facie" Defined.** — The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the legislature had such meaning in mind when such words were used in the statute. *State v. Russell*, 164 N. C. 482, 80 S. E. 66 (1913).

**Section Harmonizes with § 18-11.**—The provisions of § 18-11 are subjective in character, and harmonize with the prima

facie rule of evidence as to possession of more than one gallon of spirituous liquors as contained in this section. *State v. Sudreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

**Effect of the Presumption.**—This (prima facie evidence) neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. *State v. Russell*, 164 N. C. 482, 80 S. E. 66 (1913).

**Same—Sufficient to Sustain Verdict.**—While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it. *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888 (1913).

**Same—Power of Legislature to Change Rule of Evidence.**—See full discussion in *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888 (1913).

**Burden of Proof.**—The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. *State v. Helms*, 181 N. C. 566, 107 S. E. 228 (1921).

Where the possession of the specified quantities of intoxicating liquors under a statutory provision has made out prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. *State v. Helms*, 181 N. C. 566, 107 S. E. 228 (1921).

**U. S. Government License as Defense.**—For cases under the former law, see *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907); *State v. Boynton*, 155 N. C. 456, 71 S. E. 341 (1911); *Pfeifer v. Drug Co.*, 171 N. C. 214, 88 S. E. 343 (1916).

**Possession Means Actual or Constructive.**—This section making the "possession of certain specified quantities of spirituous, vinous, or malt liquors" prima facie evidence of its violation, intends that the

"possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purpose of the act. *State v. Lee*, 164 N. C. 533, 80 S. E. 405 (1913).

The possession of the agent, for the one accused of violating our prohibition law, of more than one gallon of intoxicating liquor is sufficient to make out a prima facie case of guilt, under the provisions of this section. *State v. Blauntia*, 170 N. C. 749, 87 S. E. 101 (1913).

**Possession for Use of Owner.**—The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. *State v. Mull*, 193 N. C. 668, 137 S. E. 866 (1927).

**Evidence.**—Where there is evidence that the defendant, indicted under this section had in his possession sufficient spirituous liquors to raise the prima facie presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. *State v. Simons*, 178 N. C. 679, 100 S. E. 239 (1919).

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitted owning the whiskey, and that empty whiskey bottles were found around premises, is held sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. *State v. Libby*, 213 N. C. 662, 197 S. E. 154 (1938).

In a criminal prosecution, charging defendant with the possession of whiskey for purpose of sale, where the State's evidence showed the presence of four tax-paid, unbroken bottles, containing less than a gallon of whiskey, in the cabin of defendant near his filling station, and four other tax-paid, unbroken bottles, containing four-fifths of a gallon in another cabin nearby on defendant's premises, occupied by a woman who claimed these four bottles as her own purchase for her own use, the evidence was insufficient to make out a prima facie case. *State v. Watts*, 224 N. C. 771, 32 S. E. (2d) 348 (1944).

**Possession of More than Gallon Is Prima Facie Evidence of Possession for Purpose of Sale.**—The possession of more than one gallon of intoxicating liquor is prima facie evidence of possession for the purpose of sale under this section, and is sufficient to take the case to the jury on the issue. *State v. Tate*, 210 N. C. 168, 185 S. E. 665 (1936).

But evidence establishing defendant's possession of more than a gallon of intoxicating liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under this section. *State v. Ellis*, 210 N. C. 166, 185 S. E. 663 (1936).

**Sufficient Evidence to Submit Question of Possession to Jury.**—Evidence that officers found a funnel, a number of containers, and glasses smelling of whiskey, in different places on defendant's premises, is held sufficient to be submitted to the jury in a prosecution on a charge of having possession of intoxicating liquor for the purpose of sale, although the amount of whiskey discovered was insufficient to invoke the presumption under the subdivision (2) of this section. *State v. Rhodes*, 210 N. C. 473, 187 S. E. 553 (1936).

The defendant was convicted of having liquor in his possession for the purpose of sale in violation of this section. He appealed on the ground that the statute was repealed by the Eighteenth Amendment to the Constitution of the United States. The court sustained the conviction. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86 (1921).

**Evidence Sufficient to Support Adverse Verdict.**—Evidence in *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944), held amply sufficient to support an adverse verdict without resort to any statutory presumption, as provided in this section.

**Instructions.**—Where an instruction,

**§ 18-33. Unlawful to handle draft connected with receipt for liquor.**—It is unlawful for any bank incorporated under the laws of this State, or national bank, or any individual, firm or association, to present, collect or in any wise handle any draft, bill of exchange or order to pay money, to which draft, bill of exchange or order to pay money is attached a bill of lading, or order, or receipt for intoxicating liquors, or which draft is enclosed with, connected with, or in any way related to, directly or indirectly, any bill of lading, order, or receipt for intoxicating liquors. Provided, this section shall not apply to such instruments issued in connection with the sale or purchase of intoxicating liquors when such sale or purchase is not prohibited by the laws of this State. (1913, c. 44, s. 4; C. S., s. 3381.)

**Local Modification.**—Polk: 1951, c. 750.

**Cross Reference.**—As to bills of lading generally, see § 21-1 et seq.

that "the possession of more than one gallon of liquor constitutes prima facie evidence of unlawful possession for the purpose of sale in violation of G. S., 18-32," is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on two other counts of unlawful possession, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944).

**Allegation That Whiskey Did Not Contain A. B. C. Stamp Regarded as Surplusage.**—In an indictment sufficiently charging possession of liquor for the purpose of sale under this section an additional allegation that the whiskey did not bear the stamp of the A. B. C. board of the county is an allegation of a nonessential fact, and will be regarded as surplusage. *State v. Atkinson*, 210 N. C. 661, 188 S. E. 73 (1936).

**Effect of Turlington Act.**—The Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor; and the prior statute making the possession of more than one gallon thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. *State v. Foster*, 185 N. C. 674, 116 S. E. 561 (1923).

**Applied** in *State v. Potter*, 185 N. C. 742, 117 S. E. 504 (1923); *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938).

**Stated** in *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591 (1946).

**Cited** in *State v. Scoggins*, 199 N. C. 821, 155 S. E. 927 (1930); *State v. Lockey*, 214 N. C. 525, 199 S. E. 715 (1938); *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804 (1949).



§ 18-34. **Allowing distillery to be operated on land.**—If any person shall knowingly permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control, he shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1905, c. 498, s. 2; Rev., s. 3533; C. S., s. 3407.)

**Local Modification.**—Polk: 1951, c. 750.

**Editor's Note.**—See *State v. Jones*, 175 N. C. 709, 95 S. E. 576 (1918).

§ 18-35. **Federal license as evidence.**—The possession of a license or the issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous liquors is forbidden by the laws of this State shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by such license in violation of the laws of this State. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept. (1905, c. 339, s. 5; Rev., s. 2060; 1907, c. 931; C. S., s. 3408.)

**Local Modification.**—Polk: 1951, c. 750. as prima facie evidence of keeping liquor

**Cross Reference.**—As to federal license for sale, see § 18-32.

§ 18-35.1. **Unlawful to obtain, possess, etc., federal license to manufacture, purchase or handle intoxicating liquor.**—It is unlawful for any person, firm, partnership, or corporation to procure, obtain, possess, purchase, permit to be issued, or to have issued to any person a license, permit stamp or other authorization from the government of the United States to manufacture, sell, possess, transport, handle or purchase intoxicating liquors in the State of North Carolina; and upon conviction or confession any such person, firm, partnership, or corporation shall be guilty of a misdemeanor punishable in the discretion of the court: Provided, this section shall not apply to the Department of Defense and agencies of the armed services operating thereunder, nor to any agency, department, official or agent of the State of North Carolina or any other person or persons engaged in any activity or transactions authorized under the Beverage Control Act of 1939 as amended or alcoholic beverage control laws of this State. (1951, c. 1025.)

### ARTICLE 3.

#### *Alcoholic Beverage Control Act of 1937.*

§ 18-36. **Purposes of article.**—The purpose and intent of this article is to establish a system of control of the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the State. (1937, c. 49, s. 1.)

**The Alcoholic Beverage Control Act is of State-wide operation but does not repeal the Turlington Act**, which remains in full force except as modified by the A. B. C. Act. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949). See note to § 18-1.

The Alcoholic Beverage Control Acts do not repeal the provisions of the Turlington Act in regard to the possession and transportation of intoxicating liquors ex-

cept in so far as the control acts are inconsistent with the Turlington Act. *State v. Carpenter*, 215 N. C. 635, 3 S. E. (2d) 34 (1939).

**Prima Facie Evidence of Possession for Purpose of Sale.**—Where a person has in his possession so-called tax-paid intoxicating liquors in quantity not in excess of one gallon in his private dwelling in a county in which the sale of such intoxicating liq-

uors is not authorized under and by virtue of the Alcoholic Beverage Control Act, nothing else appearing, such possession is not now prima facie evidence that such intoxicating liquors are possessed by such person for the purpose of being sold, and such prima facie rule of evidence, prescribed by § 18-11, is in irreconcilable conflict with the provisions of this article, and to such extent is repealed thereby. State

v. Sudreth, 223 N. C. 610, 27 S. E. (2d) 623 (1943).

Applied in *State v. Davis*, 214 N. C. 787, 199 S. E. 927 (1939).

Cited in *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938); *Bailey v. Bryson*, 214 N. C. 212, 198 S. E. 622 (1938); *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384 (1944); *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948).

**§ 18-37. State Board of Alcoholic Control created; membership; compensation.**—A State Board of Alcoholic Control is hereby created, to consist of a chairman and two associate members. The members of said Board shall be men well known for their character and ability and business acumen and success. The chairman of said Board shall devote his whole time to his official duties and shall receive a salary of six thousand (\$6,000.00) dollars per annum, payable monthly, together with necessary traveling expenses, and the two associate members of said Board shall receive for the time actually engaged in their official duties, seven dollars (\$7.00) per day and necessary traveling expenses. (1937, c. 49, s. 2; 1937, c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5.)

**§ 18-38. Members of Board appointed by Governor; terms of office.**—The members of said State Board shall be appointed by the Governor, and the first appointees shall serve as follows:

The chairman shall serve for a period of three years from the date of his appointment and one associate member shall serve for a period of two years from the date of his appointment and the other associate member shall serve for a period of one year from the date of his appointment, and the subsequent appointments of all of the members of the said Board shall be for a term of three years from the date of each appointment. (1937, c. 49, s. 3.)

**§ 18-39. Powers and authority of Board.**—Said State Board of Alcoholic Control shall have power and authority as follows, to wit:

(a) To see that all the laws relating to the sale and control of alcoholic beverages are observed and performed.

(b) To audit and examine the accounts, records, books and papers relating to the operation of county stores herein provided for, or to have the same audited.

(c) To approve or disapprove the prices at which the several county stores may sell alcoholic beverages and it shall be the duty of said Board to require the store or stores in the several counties coming under the provisions of this article to fix and maintain uniform prices and to require sales to be made at such prices as shall promote temperate use of such beverages and as may facilitate policing.

(d) To remove any member, or members, of county boards whenever in the opinion of the State Board, such member, or members, of the county board, or boards, may be unfit to serve thereon.

(e) To test any and all alcoholic beverages which may be sold, or proposed to be sold to the county stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities, and employ to operate the same such experts, technicians, employees and laborers, as may be necessary to operate the same, in accordance with the opinion of the said Board. In lieu of establishing and operating laboratories as above directed, the Board may, with the approval of the Governor and the Commissioner of Agriculture, arrange with the State Chemist to furnish such information and advice, and to perform such analyses and other laboratory services as the Board may consider necessary, or may, if they deem advisable, cause such tests to be made otherwise.

(f) To supervise purchasing by the county boards when said State Board is of the opinion that it is advisable for it to exercise such power in order to carry into

effect the purpose and intent of this article, with full power to disapprove any such purchase and at all times shall have the right to inspect all invoices, papers, books and records in the county stores or boards relating to purchases.

(g) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this article.

(h) To require that a sufficient amount shall be so allocated as to insure adequate enforcement and the amount shall, in no instance, be less than five per cent, nor more than ten per cent of the net profits arising from the sale of alcoholic beverages.

(i) To remove in case of violation of the terms or spirit of this article, officers employed, elected or appointed in the several counties where county stores may be operated.

(j) To approve or disapprove, in its discretion, the opening of county stores, except each county that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose, at the county seat therein, or at such other place as may be selected by the said county board, provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores due consideration shall be given to communities or towns in which a majority of the votes were cast against control, but nothing herein contained shall be construed so as to abridge any of the provisions elsewhere contained relative to the opening, closing or locating such stores. As to all additional stores in each of said counties the same shall not be opened until and unless the opening of the same and the place of location thereof shall first be approved by the said State Board, which at any time may withdraw its approval of the operation of any additional county store when the said store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the said State Board, the operation of any county store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to said State Board sufficient to warrant the closing of any county store.

(k) To require the use of a uniform accounting system in the operation of all county stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said State Board, be necessary or useful in its auditing of the affairs of the said county stores, as well as in the study of such problems and subjects as may be studied by said State Board in the performance of its duties.

(l) To grant, to refuse to grant, or to revoke, permits for any person, firm or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county store and to provide and to require that such information be furnished by such person, firm or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked or regranted after expiration dates. No permit, however, shall be granted by said State Board, to any person, firm or corporation when the said State Board has reason sufficient unto itself to believe that such person, firm or corporation has furnished to it any false or inaccurate information or is not fully, frankly and honestly cooperating with the said State Board and the several county boards in the observance and performance of all alcoholic beverage laws which may now or hereafter be in force in this State, or whenever the said Board shall be of opinion that such permit ought not to be granted or continued for any cause.

(m) The said State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such

other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said Board.

(n) To permit the establishment of warehouses for the storage of alcoholic beverages within the State, the storage of alcoholic beverages in warehouses already established, and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailment of alcoholic beverages as may be made hereunder shall be for the convenience of delivery to alcoholic boards of control and others authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the State Board of Control relating thereto. (1937, c. 49, s. 4; 1937, cc. 237, 411; 1945, c. 954.)

**Editor's Note.** — The 1945 amendment inserted the words "and others" after the word "control" in the second sentence of subsection (n).

**Rules and Regulations.** — This section would seem to authorize the making of necessary rules and regulations to carry out the provisions of the act. 15 N. C. Law Rev. 323.

**The State Board is given power to grant, deny or revoke permits** for the sale of alcoholic beverages to county liquor stores.

This seems to be a very flexible provision to secure an honest co-operation by those who sell alcoholic beverages with the State Board and the several county boards. There are no provisions for notice or hearing or appeal and it is likely that no such provisions are needed in view of the fact that State agencies are engaged in the purchase of goods and may do so on their own terms. 15 N. C. Law Rev. 328.

**Cited in** *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384 (1944).

**§ 18-40. Removal of member by Governor; vacancy appointments.** — The Governor shall at all times have full power and authority to remove any and all members of the said State Board, upon notice to such member or members, in his discretion, for any cause that appears to him to be sufficient, and to reappoint his successor or successors to the removed members, observing, however, the terms of office of each of them, as herein set forth, and whenever a vacancy shall occur for any cause then the appointment to fill such vacancy shall be for the unexpired portion of the term of the predecessor of each appointee. (1937, c. 49, s. 5.)

**§ 18-41. County boards of alcoholic control.**—In each county which may be permitted to engage in the sale of alcoholic beverages, there is hereby created a county board of alcoholic control, to consist of a chairman and two other members. The members of said board shall be well known for their character, ability and business acumen. The members of said board shall be selected in each respective county in a joint meeting of the board of county commissioners, the county board of health and the county board of education, and each member present shall have only one vote, notwithstanding the fact that there may be instances in which some members are members of another board.

The terms of office of the members of said county boards shall be as follows: The chairman, who shall be so designated by the appointing boards, shall serve for his first term a period of three years and one member shall serve for his first term a period of two years and the other member shall serve for a period of one year, all terms beginning with the date of their appointment and after the said term shall have expired their successors in office shall serve for a period of three years and shall be appointed in the same manner as herein provided in this section.

Any member of any of the county boards hereinabove referred to in this section may be removed at any time by such composite board consisting of the board of county commissioners, the board of education and the board of health, whenever such composite board may find by a majority vote of its entire membership such member or members unfit to serve thereon, each member having only one vote as above provided for the selection of such members of county boards. In the event any member of the county board shall be removed hereunder, his successor shall be selected to serve out the time for which such member was originally selected.

Upon the death or resignation of the chairman or any other member of the county board of alcoholic control, whether selected under the provisions of this article or under the provisions of chapter four hundred and eighteen or chapter four hundred and ninety-three of the Public Laws of one thousand nine hundred and thirty-five, before the expiration of the term of office for which said chairman or member has been appointed, elected or selected, his successor to fill out such unexpired term shall be selected at a joint meeting of the board of county commissioners, the county board of health and the county board of education, which joint meeting shall be held within ten (10) days after such resignation or death, which meeting shall be called by the chairman or some other member of the county board of alcoholic control, by giving notice to each member of the time and place of holding such meeting. (1937, c. 49, s. 6; 1937, cc. 411, 431.)

**Local Modification.** — Bertie: 1937, c. 310; Dare: 1939, c. 168; Halifax: 1937, c. 202; 1943, c. 433; Pasquotank: 1939, c. 131.

**§ 18-42. Compensation for members of county boards.**—The salaries of the members of the said county board shall be fixed by the joint meeting of the several boards that appoint them and shall be fixed with the view to securing the very best members available, with due regard to the fact that such salaries shall be adequate compensation, but shall not be large enough to make said positions unduly attractive or the objects of political aspirations. (1937, c. 49, s. 7.)

**§ 18-43. Persons disqualified for membership on boards.**—No person shall be appointed a member of either the State Board or of any county board or employed thereby who shall be a stockholder in any brewery or the owner of any interest therein in any manner whatsoever, or interested therein directly or indirectly, or who is likewise interested in any distillery or other enterprise that produces, mixes, bottles or sells alcoholic beverages, or who is related to any person likewise interested or associated in business with any person likewise interested and neither of said boards shall employ any person who is interested in, directly or indirectly, or related to, any person interested in any firm, person or corporation permitted to sell alcoholic beverages in this State. (1937, c. 49, s. 8; 1937, c. 411.)

**§ 18-44. Bonds required of members of county boards.**—The several members of the county board shall give bond for the faithful performance of their duties, in the penal sum of five thousand (\$5,000.00) dollars, and the said bond shall be payable to the State of North Carolina and to the county in which said board performs its duties, with some corporate surety, which surety shall be satisfactory to, and approved by, the county attorney of said county, and the chairman of the State Board, and shall be deposited with the chairman of the State Board. The State Board for and on behalf of the State of North Carolina, and the county named in said bond, shall each be secured therein to the full amount of the penalty thereof and the recovery or payment of any sums due thereunder to either shall not diminish or affect the right of the other obligee in said bond to recover the full amount of the said penalties thereof, and the giving and the approval of such bond shall be a part of the qualification of said members and no member shall be entitled to exercise any of the functions or powers incident to his appointment until and unless the said bond shall have been given and approved as herein provided. The three joint boards referred to in § 18-41 shall be authorized to relieve any member of the county boards who does not handle any money or funds from furnishing such bond, and shall be further authorized to require bond in excess of five thousand dollars (\$5,000) of any member of the board handling money or funds in the event said joint boards deem it advisable to increase such bond. (1937, c. 49, s. 9; 1939, c. 202.)

**Editor's Note.** — The 1939 amendment added the last sentence.

§ 18-45. **Powers and duties of county boards.**—The said county boards shall each have the following powers and duties:

(a) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county.

(b) Power to buy and to have in its possession and to sell alcoholic beverages within its county.

(c) Power and authority to adopt rules and regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this article.

(d) To prescribe and regulate and direct the duties and services of all employees of said county board.

(e) To fix the hours for the opening and closing of stores operated by it. No store, however, shall be permitted to remain open between the hours of nine o'clock p. m. and nine o'clock a. m.

(f) To require any county stores to close on such days as it may designate, but all stores in any county operating under the provisions of this article shall remain closed on Sundays, election days, New Year's Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving and Christmas Day.

(g) To import, transport, receive, purchase, sell and deliver and have in its possession for sale for present and future delivery alcoholic beverages.

(h) To purchase or lease property, furnish and equip buildings, rooms and accommodations as and when required for the storage and sale of alcoholic beverages and for distribution to all county stores within said county.

(i) To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse and accept checks, promissory notes, bills of exchange and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of liquor stores in its county.

(j) To investigate and aid in the prosecution of violations of this article and other liquor laws, by whatever name called, and to seize alcoholic beverages in said county sold, kept, imported or transported illegally and to apply for confiscation thereof and to cooperate in the prosecution of offenders in any court in said county.

(k) To regulate and to prescribe rules and regulations that may be necessary or feasible for the obtaining of purity in all alcoholic beverages, including true statements of contents and the proper labeling thereof.

(l) To fix and maintain the prices of all alcoholic beverages sold by liquor stores in said county and to prescribe to whom the same may be sold.

The provisions of this article shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

For scientific, chemical, mechanical, industrial, medicinal and culinary purposes.

For use by those authorized to procure the same tax free, as provided by the acts of Congress and regulations promulgated thereunder.

In the manufacture of denatured alcohol produced and used as provided by the acts of Congress and regulations promulgated thereunder.

In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical, and industrial preparations or products unfit for beverage purposes.

In the manufacture of flavoring extracts and syrups unfit for beverage purposes.

(m) To exercise the power to buy, purchase and sell and to fix the prices at which all alcoholic beverages may be purchased from it, but nothing herein contained shall give said board the power to purchase or sell or deal in alcoholic beverages which contain less than five per centum of alcohol by weight.

(n) To locate stores in its county and to provide for the management thereof and to appoint and employ at least one person for each store conducted by it, who

shall be known as "manager" thereof. The duty of such manager shall be to conduct the said store under directions of the county board and to carry out the law applying thereto, and such manager shall give bond for the faithful performance of his duties in such sum as may be fixed by said county board, with sufficient corporate surety and said surety, or sureties thereon, shall be approved by the said county board as a part of the qualifications of such manager for his appointment, and the said county board shall have the right to sue on said bond and to recover for all failures on the part of said manager faithfully to perform his duties as such manager, to the extent of any loss occasioned by such manager on his part, but as against the surety, or sureties, thereon, such aggregate recovery, or recoveries, shall not exceed the penalty of said bond.

(o) To expend for law enforcement a sum not less than five per cent nor more than ten per cent of the total profits to be determined by quarterly audits and in the expenditure of said funds shall employ one or more persons to be appointed by and directly responsible to the respective county boards. The persons so appointed shall, after taking the oath prescribed by law for the peace officers, have the same powers and authorities within their respective counties as other peace officers. And any person so appointed, or any other peace officer while in hot pursuit of anyone found to be violating the prohibition laws of this State, shall have the right to go into any other county of the State and arrest such offender therein so long as such hot pursuit of such person shall continue, and the common law of hot pursuit shall be applicable to said offenses and such officers. Any law enforcement officer appointed by such county boards and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the prohibition law therein, and while so acting shall have such powers as a peace officer as are granted to him in his own county and be entitled to all the protection provided for said officer while acting in his own county.

(p) To discontinue the operation of any store in its county whenever it shall appear to said board that the operation thereof is not sufficiently profitable to justify a continuance of its operation, or when, in its opinion, the operation of any store is inimical or hurtful to the morals or welfare of the community in which it is operated, or when said county board may be directed to close any store by the State Board.

All the powers and duties herein conferred upon county boards, or required of them, shall be subject to the powers herein conferred upon the State Board and whenever or wherever herein the State Board has been given power to approve or disapprove anything in respect to county stores or county boards, then no power on the part of the county boards and no act of any county board shall be exercisable or valid until and unless the same has been approved by the State Board. (1937, c. 49, s. 10; 1937, cc. 411, 431; 1939, c. 98.)

**Local Modification.**—Moore: 1937, c. 49, N. C. Law Rev. 349.  
s. 10(p); Nash: 1951, c. 738. **Stated** in *Jordan v. Harris*, 225 N. C. 763, 36 S. E. (2d) 270 (1945).

**Editor's Note.** — The 1939 amendment added the last two sentences to subsection (o). For comment on amendment, see 17 **Cited** in *Hunter v. Board of Trustees*, 224 N. C. 359, 30 S. E. (2d) 384 (1944).

**§ 18-46. No sales except during hours fixed by county boards; sales to minors, habitual drunkards, etc.; discretion of managers and employees; list of persons convicted of drunkenness, etc.; unlawful to buy for person prohibited.**—No alcoholic beverage shall be sold knowingly by any county store or the manager thereof or any employee therein at any time other than within the opening and closing hours for said store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. No alcoholic beverage shall be sold knowingly to any minor, or to any person who has been convicted of public drunkenness or of driving any motor vehicle while under the influence of intoxicating liquors, or has been convicted of any crime wherein

the court or judge shall find as a fact that such person committed said crime or aided and abetted in the commission thereof as a result of the influence of intoxicating liquors (within one year of any such conviction), or to any person known to be an habitual drunkard or who has within one year been confined in the inebriate ward of any State institution. The manager and employees of and in any county store may, in their discretion, refuse to sell alcoholic beverage to any individual applicant, and such power and the duty to exercise the same shall vest in and apply to such manager and employees, regardless of the failure of the county boards to make any regulations providing for the same, and in their discretion may refuse to sell more than four quarts at any one time in any one day to any person.

The various clerks of the superior court and of any inferior courts in counties coming under the provisions of this article shall furnish to the chairman of the control board of their county a list of all persons convicted of public drunkenness or convicted of driving an automobile while intoxicated; and the State Motor Vehicle Department shall furnish to the chairmen of all the control boards in this State a list of all persons whose driving licenses have been revoked for driving an automobile while intoxicated, or for the illegal use of whiskey.

It shall be unlawful for any person to buy any alcoholic beverage if he be within the class prohibited from purchasing same as set out in this section, and it shall further be unlawful for any person to buy any alcoholic beverage for any person who may be prohibited from purchasing for himself under any of the provisions of this article. (1937, c. 49, s. 11; 1937, c. 411.)

**§ 18-47. Drinking upon premises prohibited; stores closed on Sundays, election days, etc.**—No alcoholic beverage shall be drunk upon the premises of any county store or warehouse, or room or building occupied or used by any county board or any of its employees for the purpose of performing their duties in respect to alcoholic beverages, and such county boards, managers and employees shall not permit alcoholic beverages to be drunk upon said premises and all county stores shall be closed on Sundays and election days, and such other days as the State Board may designate. (1937, c. 49, s. 12.)

**§ 18-48. Possession illegal if taxes not paid; punishment and forfeiture for violations; possession in container without proper stamp, prima facie evidence.**—It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State, have not been paid and any person convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in § 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportation shall be used and the provisions of said § 18-6 are hereby declared to be in full force and effect in any of the counties of the State which shall operate under the provisions of this article, and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the State of North Carolina shall constitute prima facie evidence of the violation of this section. (1937, c. 49, s. 13.)

**Possession Unlawful without Exception.**—The possession of nontax-paid liquor in any quantity anywhere in the State is, without exception, unlawful. *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

This section and § 18-50 are on an equal

footing, and neither prescribes nor includes a lesser offense or an offense of lesser degree. *State v. McNeill*, 225 N. C. 560, 35 S. E. (2d) 629 (1945).

**Sufficiency of Warrant.**—A warrant which, stripped of nonessential words, charges defendant with unlawful posses-



sion of a quantity of nontax-paid whiskey, is sufficient to survive a motion to quash. *State v. Camel*, 230 N. C. 426, 53 S. E. (2d) 313 (1949).

**Sufficiency of Evidence.**—In a prosecution under this section on a warrant charging possession of nontax-paid liquor, evidence by the State that six gallons of liquor and a jar of “white liquor” were found on defendant’s premises, without evidence that the containers did not bear a revenue stamp of the federal government or a stamp of any of the county A. B. C. boards, is insufficient to sustain conviction. The court will not take judicial notice that “white liquor” means nontax-paid liquor. *State v. Wolf*, 230 N. C. 267, 52 S. E. (2d) 920 (1949).

Evidence of defendant’s illegal possession of a considerable quantity of nontax-paid whiskey was held sufficient to carry

the case to the jury and his motion to nonsuit was properly denied. *State v. Camel*, 230 N. C. 426, 53 S. E. (2d) 313 (1949).

**Confiscation of Car.**—Defendant admitted ownership of the car in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court’s order confiscating his car and ordering it sold in conformity with statute. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Cited in** *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944); *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414 (1945); *State v. Peterson*, 226 N. C. 255, 37 S. E. (2d) 591 (1946); *State v. Maynor*, 226 N. C. 645, 39 S. E. (2d) 833 (1946).

**§ 18-49. Transportation, not in excess of one gallon, authorized; transportation in course of delivery to stores.**—It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article. (1937, c. 49, s. 14.)

**Cross Reference.**—As to transportation into State, etc., see § 18-58.

**Editor’s Note.** — For comment on this section, see 29 N. C. Law Rev. 55.

**Section Modifies § 18-2.**—Section 18-2 prohibiting the transportation of intoxicating liquor has been modified by this section so that it is not unlawful to transport through a county which has not elected to come under the provisions of the Alcoholic Beverage Control Act, alcoholic beverages in actual course of delivery to any alcoholic beverage control board. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Guilty Knowledge.**—This section must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Where Transporter Accompanied by Others.**—This section cannot be construed to permit the driver of an automobile to carry or convey more than one gallon of

alcoholic beverages in his automobile even though he is accompanied by others. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Instance of Violation.**—Where the evidence showed that defendant’s automobile contained two gallons of alcoholic beverages with his knowledge, and that with such knowledge he conveyed such quantity of alcoholic beverages from one place to another in his automobile for some purpose other than that of delivering the same to an alcoholic beverage control board in a county coming under the provisions of the Alcoholic Beverage Control Act, the charge preferred against him of unlawfully transporting intoxicating liquor in a quantity in excess of one gallon was properly affirmed. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Exemption Is Matter of Defense.**—This section, permitting the transportation of alcoholic beverages not in excess of one gallon from a county which has elected to come under this article to another county not coming under the provisions of this article, is a matter of defense, and it is in-

cumbent upon the defendant to bring his case within the exemption either from the State's evidence or from his own. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948).

**Stated** in *State v. Peterson*, 226 N. C.

255, 37 S. E. (2d) 591 (1946).

**Cited** in *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943); *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949); *State v. Merritt*, 231 N. C. 59, 55 S. E. (2d) 804 (1949).

**§ 18-49.1. Regulating transportation in excess of one gallon for delivery to federal reservation or to another state; conditions to be complied with.**—Before any person shall transport over the roads and highways of this State any alcoholic beverages in excess of one gallon within, into or through the State of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this State to another state, such person shall post with the State Board of Alcoholic Beverage Control a bond with surety approved by the said Board, payable to the State of North Carolina in the penal sum of one thousand dollars (\$1,000.00), running in the name of the State of North Carolina, conditioned that such person will not unlawfully transport or deliver any alcoholic beverages within, into or through the State of North Carolina, the forfeiture to be in case of conviction paid to the school fund of the county in which the seizure is made and any such county shall have the right to sue for the same. When such alcoholic beverages are desired to be transported within, into or through the State of North Carolina, such transportation shall be engaged in only under the following conditions:

(1) **Statement as to Bond and Bill of Lading Required.**—There shall accompany such alcoholic beverages a statement signed by the chairman or secretary of the State Board of Alcoholic Beverage Control showing that the bond hereinbefore required has been furnished and approved. There shall accompany such alcoholic beverages at all times during transportation a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle while in the State of North Carolina, and such route must be substantially the most direct route, from the consignor's place of business to the place of business of the consignee.

(2) **Route Stated in Bill of Lading to Be Followed.**—Vehicles transporting alcoholic beverages shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.

(3) **Names of True Consignor and Consignee Must Appear.**—The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who had previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment.

(4) **Officers May Require Driver to Exhibit Papers.**—The driver or any person in charge of any vehicle so transporting such alcoholic beverages shall, when required by any sheriff, deputy sheriff or other police officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment. (1945, c. 457, s. 1.)

**Editor's Note.**—For comment on the act inserting this and the following three sections, see 23 N. C. Law Rev. 352.

**§ 18-49.2. Transportation in excess of one gallon prohibited, exceptions; regulations of A. B. C. Board.**—The wilful transportation of al-

coholic beverages within, into or through the State of North Carolina in quantities in excess of one gallon is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the State of North Carolina, or in transporting it through this State to another state in accordance with the provisions of § 18-49.1 and such regulations as may be adopted by the State Board of Alcoholic Beverage Control pursuant to this section. The State Board of Alcoholic Beverage Control may adopt further regulations governing the transportation of alcoholic beverages within, into and through the State of North Carolina in quantities in excess of one gallon, for delivery to federal reservations or in transit through this State to another state, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. (1945, c. 457, s. 2.)

**§ 18-49.3. Violation of § 18-49.1 or 18-49.2 a misdemeanor; seizure and disposition of vehicle and alcoholic beverages.**—Any person who shall wilfully transport alcoholic beverages in excess of one gallon within, into or through the State of North Carolina in violation of the provisions of § 18-49.1, or such regulations as may be adopted by the State Board of Alcoholic Beverage Control as authorized by § 18-49.2, shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. Any vehicle so illegally transporting such alcoholic beverages and the alcoholic beverages being so illegally transported shall be taken in possession by the officer upon arrest of the person engaged in such illegal transportation and, upon conviction of such person or upon forfeiture of bond and failure of such person to appear for trial, such vehicle shall be disposed of as is provided in § 18-6 and any alcoholic beverages so seized shall be disposed of as is provided in § 18-13. (1945, c. 457, s. 3.)

**§ 18-49.4. Exceptions to the application of §§ 18-49.1 to 18-49.3.**—The provisions of §§ 18-49.1 to 18-49.3 shall not apply to those beverages defined in § 18-64 purchased from a person licensed to sell the same in this State, and those light wines which may be transported as authorized by article six of this chapter, and the wines defined in article five of this chapter. Nothing in said §§ 18-49.1 to 18-49.3 shall be construed to prevent the transportation of alcoholic beverages to be sold under the Alcoholic Beverage Control Act of one thousand nine hundred and thirty-seven, and amendments thereto, or to prevent the transportation of alcoholic beverages not in excess of one gallon, as authorized by law prior to the passage of said sections; nothing contained in the said sections shall be construed to prohibit the transportation in this State of alcoholic beverages legally acquired for one's own personal use and transported as now authorized by the laws of this State; and nothing contained in the said sections shall affect sleeping car companies or railroads in the lawful operations of their business. (1945, c. 457, ss. 3, 4.)

**§ 18-50. Possession for sale and sales of illicit liquors; sales of liquors purchased from stores.**—The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from the county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 15.)

**No Presumption of Intent to Sell Arises from Possession.**—In a prosecution under this section no presumption of intent to sell arises from the unlawful possession of illicit liquor, and the State must prove not only unlawful possession of illicit liquor but also the intent to sell, unaided by any presumption or rule of evidence. State v. Peterson, 226 N. C. 255, 37 S. E. (2d)

591 (1946); State v. Wilson, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

In a prosecution for possession of intoxicating liquor in violation of this section, the fact of possession does not constitute prima facie evidence that the possession was for the purpose of sale, since the statute under which the warrant is drawn does not provide for such prima facie rule.

State v. Lockey, 214 N. C. 525, 199 S. E. 715 (1938).

**One Charged with Violation of This Section Cannot Be Convicted under § 18-48.**—Where defendant was charged with violation of this section and there was no other count or charge in the warrant she could not be convicted under § 18-48, as these two statutes defining misdemeanors are on equal footing and neither prescribes nor includes a lesser offense or offense of lesser degree. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629 (1945).

A conviction on insufficient evidence on a warrant charging unlawful possession of illicit liquor for the purpose of sale under this section, cannot be sustained on the ground that the evidence might be sufficient to sustain a conviction of possession of a quantity of nontax-paid liquor under § 18-48. State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591 (1946).

Where a warrant charged generally that defendant had in his possession "nontax-paid" whiskey for the purpose of sale it was held that upon the facts of the case the word "nontax-paid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of this section and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for

the purpose of sale, obtains. State v. Merritt, 231 N. C. 59, 55 S. E. (2d) 804 (1949).

**Evidence Insufficient to Carry Case to Jury.**—In prosecution under this section evidence tending to show that officers of the law were reluctantly admitted in defendant's house, that the officers heard whispering within the house before they were admitted, that in the kitchen there were defendant, his wife, and a man with whiskey on his breath, and in the front room a man and a woman, that they found in the kitchen a half-gallon jar, with a few drops of whiskey in it, and two glasses and a five-gallon bucket of slops, nearly full, smelling of liquor, and that there was fifty cents in change on the stove, was insufficient to overrule motion for judgment as of nonsuit. State v. Peterson, 226 N. C. 255, 37 S. E. (2d) 591 (1946).

In prosecution under this section where only evidence offered by the State was through its officers, including police officer's uncontradicted testimony that defendant said nontax-paid liquor found in the room was for sick child, such evidence negated possession for the purpose of sale, and was insufficient to carry case to jury. State v. McNeill, 225 N. C. 560, 35 S. E. (2d) 629 (1945).

**Stated in State v. Sawyer, 233 N. C. 76, 62 S. E. (2d) 515 (1950).**

**§ 18-51. Drinking or offering drinks on premises of stores and public roads or streets; drunkenness, etc., at athletic contests or other public places.**—It shall be unlawful for any person to drink alcoholic beverages or to offer a drink to another person, or persons, whether accepted or not, at the place where the same is purchased from the county store, or the premises thereof, or upon any premises used or occupied by county boards for the purpose of carrying out the provisions of this article, or on any public road or street, and it shall be unlawful for any person or persons to be or become intoxicated or to make any public display of any intoxicating beverages at any athletic contest or other public place in North Carolina. The violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not exceeding fifty (\$50.00) dollars or imprisoned for not more than thirty days in the discretion of the court. (1937, c. 49, s. 16; 1937, c. 411.)

**§ 18-52. Advertising permitted in newspapers, magazines and periodicals.**—It shall be lawful for newspapers, magazines and periodicals to accept and publish advertisements relating to wines, beers and other alcoholic beverages permitted to be sold and distributed under the laws of North Carolina. (1935, c. 465.)

**§ 18-53. Advertising by county A. B. C. stores and on billboards prohibited.**—It shall be unlawful for any county store to advertise anywhere, or by any means or method, alcoholic beverages which it has for sale and it shall not advertise or post its prices, other than in the store, or stores, which it operates, and in such stores it shall only state the brands or kinds of beverages and the price of each kind and such price list shall only be posted for public view in said store.

It shall be unlawful for any person, firm or corporation to erect or set up, or permit to be set up, any sign or billboard, or other device, containing any advertisement of alcoholic beverages as defined herein on his premises, and if the same shall be set up by any other person, then such owner or lessee of such premises shall not permit the same to remain thereon.

It shall be unlawful for any person, firm, or corporation to display, or permit to be displayed, upon any billboard, signboard, or any other similar advertising medium, any advertisement of any alcoholic beverages or any spirituous liquors as defined herein. (1937, c. 49, s. 17; 1937, c. 398.)

**Cross Reference.** — As to advertising provisions under the Turlington Act, see § 18-3.

**§ 18-54. Advertising by radio broadcasts prohibited.**—No firm, person or corporation in this State shall broadcast, or permit to be broadcast, any statement, speech, or any other message by whatsoever name called, over any radio broadcasting system doing business in this State, when such advertising matter tends to advertise alcoholic beverages as defined herein and the broadcast thereof originates in this State. (1937, c. 49, s. 18.)

**§ 18-55. Additional regulations as to advertising.**—The several county boards by and with the consent and approval of the State Board, shall have power to make such other rules and regulations as will prevent and tend to prevent advertisement of alcoholic beverages otherwise than is expressly prohibited herein and to publish such rules and regulations and to take effective measures to enforce the same. (1937, c. 49, s. 19.)

**§ 18-56. Salaries and expenses paid from proceeds of sales.**—All salaries and expenses incurred under the provisions of this article except those provided for in § 18-37 shall be paid out of the proceeds of the sales of the alcoholic beverages referred to in this article. All salaries and expenses of county boards and their employees shall be paid out of the receipts for their sales as operating expenses. (1937, c. 49, s. 20.)

**§ 18-57. Net profits to be paid into general fund of the various counties.**—After deducting the amount required to be expended for enforcement as herein provided and retaining sufficient and proper working capital, the amount to be determined by the board, and except as hereinbefore provided in chapters four hundred ninety-three and four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, the entire net profits derived from any stores shall be paid quarterly to the general fund of each respective county wherein county stores are operated. (1937, c. 49, s. 21; 1937, c. 411.)

**Local Modification.**—Brunswick: 1937, s. 2; Nash: 1951, c. 738; New Hanover: c. 269; Cumberland: 1941, c. 48; Edge- 1941, c. 135.  
combe: 1951, c. 711; Franklin: 1937, c. 250,

**§ 18-58. Transportation into State; and purchases, other than from stores, prohibited.**—It shall be unlawful for any person, firm, or corporation, to purchase in, or to bring into this State, any alcoholic beverage from any source, except from a county store operated in accordance with this article, except a person may purchase legally outside of this State and bring into the same for his own personal use not more than one gallon of such alcoholic beverage. A violation of this section shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1937, c. 49, s. 22.)

**Cross Reference.**—As to transportation to or through dry counties, see § 18-49.

**Section Modifies § 18-2.**—See note under § 18-2.

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or

conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Guilty Knowledge.**—This section relating to alcoholic liquors must be interpreted in the light of the common-law principles that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Even though the driver of an automobile is accompanied by others**, this section cannot be construed to permit him to carry or convey more than one gallon of alcoholic beverages in his automobile. *State*

*v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**One-Gallon Exemption Is Matter of Defense.**—The exemption from criminal liability for bringing into the State not more than one gallon of liquor is a matter of defense, and the defendant must bring his case within the exemption, either from the State's evidence or from his own. *State v. Holbrook*, 228 N. C. 582, 46 S. E. (2d) 842 (1948).

**Evidence held to support charge of unlawfully transporting intoxicating liquor in a quantity in excess of one gallon.** *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**Cited in** *State v. Suddreth*, 223 N. C. 610, 27 S. E. (2d) 623 (1943); *State v. Barnhardt*, 230 N. C. 223, 52 S. E. (2d) 904 (1949).

**§ 18-59. Violations by member or employee of boards, cause for removal and punishable as misdemeanor.**—A violation of any of the provisions of this article by any person, firm or corporation, and the violation of any provision of this article, or any regulation adopted by any county board or by the State Board, by any member of the State Board, or any member of any county board, or any employee of either of said boards, shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court, and in addition thereto shall constitute sufficient cause for the removal of such person from either of said boards, or from his employment under either of said boards and in addition to the powers of the State Board to remove any of its employees or any member of any county board and the power of any county board to remove any of its employees from such employment, the court in which the said conviction is had shall have the power upon such conviction and as a part of its judgment thereon to remove such person from either of said boards or from the employment of either. (1937, c. 49, s. 23.)

**§ 18-60. Definition of "alcoholic beverage."**—The term "alcoholic beverage", as used in this article, is hereby defined to be and to mean alcoholic beverages of any and all kinds which shall contain more than fourteen per centum of alcohol by volume, and this article is not intended to apply to, or regulate, the possession, sale, manufacture or transportation of beer, wines or ales containing a lower alcoholic content than above specified, and whenever the term alcoholic beverages is used in this article, it shall be construed as defined in this section. (1937, c. 49, s. 24; 1937, c. 411; 1941, c. 339, s. 3.)

**Editor's Note.**—The 1941 amendment reduced the per centum of alcohol from twenty-four to fourteen.

"Intoxicating liquors" in § 18-1 includes

the more restrictive term "alcoholic beverages" as defined in this section, and the terms are not synonymous. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

**§ 18-61. County elections as to liquor control stores; application of Turlington Act; time of elections.**—No county liquor store shall be established, maintained or operated in this State, in any county thereof, until and unless there shall have been held in such county an election, under the same rules and regulations which apply to elections for members of the General Assembly, and at said election there shall be submitted to the qualified voters of such county the question of setting up and operating in such county a liquor store, or stores, as herein provided, and those favoring the setting up and operation of liquor stores in such county shall mark in the voting square to the left of the words, "for county

liquor control stores" printed on the ballot, and those opposed to setting up and operating liquor stores in such county shall mark in the voting square to the left of the words, "against county liquor control stores," printed on the same ballot, and if a majority of the votes cast in such election shall be for county liquor stores, then a liquor store, or liquor stores, may be set up and operated in such county as herein provided, and if a majority of the votes cast at said election shall be against county liquor stores, then no liquor stores shall be set up or operated in said county under the provisions of this article.

Such election shall be called in such county by the board of elections of such county only upon the written request of the board of county commissioners therein, or upon a petition to said board of elections signed by at least fifteen per centum of the registered voters in said county that voted in the last election for Governor. In calling for such special liquor election the county board of elections shall give at least twenty days' public notice of same prior to the opening of the registration books, and the registration books shall remain open for the same period of time before such special liquor election as is required by law for them to remain open for a regular election. A new registration of voters for such special liquor election is not required and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register in said special liquor election, shall be entitled to vote in said election.

If any county while operating any such control store under the provisions of chapter four hundred ninety-three or four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five or under the terms of this article shall hereafter under the provisions of this article hold an election and at such election a majority of the votes shall be cast "against county liquor control stores," then the county control board in such county shall within three (3) months from the canvassing of such vote and the declaration of the result thereof, close said stores and shall thereafter cease to operate the same. During this period of time, the county control board shall dispose of all alcoholic beverages on hand, all fixtures and all other property in the hands and under the control of the county control board and convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general fund of the county. Thereafter, chapter one of the Public Laws of one thousand nine hundred twenty-three [§ 18-1 et seq.], being commonly known as the Turlington Act, shall be in full force and effect in such county, until and unless another election is held under the provisions of this article, in which a majority of the votes shall be cast "for county liquor control stores," except as modified by this article or any acts amendatory hereof.

No election under this section shall be held on the day of any biennial election for county officers, or within sixty days of such an election, and the date of such elections under this section shall be fixed by the board of elections of the county wherein the same is held.

No other election shall be called and held in any of the counties in the State under the provisions of this article within three years from the holding of the last election under this article. In any county in which an election was held either under the provisions of chapter four hundred ninety-three or chapter four hundred eighteen of the Public Laws of one thousand nine hundred thirty-five, an election may be called under the provisions of this article, provided no such election shall be called within three years of the holding of the last election. (1937, c. 49, s. 25; 1937, c. 431.)

**In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act, as modified by the later statute, is in full force and ef-**

fect. *State v. Wilson*, 227 N. C. 43, 40 S. E. (2d) 449 (1946).

**Quoted in** *Hancock v. Bulla*, 232 N. C. 620, 61 S. E. (2d) 801 (1950).

**§ 18-62. Elections in counties now operating stores, not required for continued operation.**—Nothing herein contained shall be so construed as

to require counties in which liquor stores have been established under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five to have any further election in order to enable such counties to establish liquor stores, and as to such counties in which liquor stores are now being operated under chapters four hundred eighteen or four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five, such stores shall from February 22, 1937 be operated under the terms of this article. (1937, c. 49, s. 26.)

**Local Modification.**—Moore: 1937, c. 49, s. 26.

ARTICLE 4.

*Beverage Control Act of 1939.*

§ 18-63. **Title.**—This article shall be known as the Beverage Control Act of one thousand nine hundred thirty-nine. (1939, c. 158, s. 500.)

**Local Modification.** — The following laws are amendments to or modifications of 1933, c. 216, of which the Beverage Control Act of 1939 is a successor: Alamance (Elon College, Sylvan High School, and Cane Creek Church): 1933, cc. 351, 417; Bladen (Frenches Creek Township): 1933, c. 475; Buncombe (Ridgecrest, Montreat, town of Weaverville): 1933, c. 396; Caswell (village of Yanceyville and Pelham M. E. Church, South): 1933, cc. 472, 508; Dare (Stumpy Point voting precinct): 1933, c. 455; Guilford (Guilford College and Oak Ridge Military Institute): 1933, cc. 369, 370, 406; Harnett (Campbell College): 1933, c. 398; Madison (Mars Hill College): 1933, c. 396; Mecklenburg (Davidson College): 1933, c. 313; Mitchell (town of Bakersville): 1933, c. 416; Moore (Quaker Children's Home): 1933, c. 454; Randolph (village of Worthville): 1933, c. 512; Sampson (Pineland Junior College):

1933, c. 358; Union (Wingate Junior College): 1933, c. 454; Wake (Wake Forest College): 1933, c. 564; Warren (village of Macon): 1933, c. 395.

**Editor's Note.**—As to manufacture and possession of wine in Polk County, see Session Laws 1951, c. 750.

**Provisions in Pari Materia.**—The different provisions of Public Laws of 1939, ch. 158, relative to granting license for the sale of beer and wine, are *pari materia* and must be read together as one connected whole. *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149 (1943).

**Sale of Beer.**—Generally speaking, it is unlawful to sell beer in North Carolina. But the sale thereof is not unlawful, provided the seller is duly licensed under, and makes sale in accord with the provisions of this article. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663 (1949). And see §§ 18-126, 18-129 et seq.

§ 18-64. **Definitions.**—The term “beverages” as used in this article shall include:

(a) Beer, lager beer, ale, porter, and other brewed or fermented beverages containing one-half of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America.

(b) Unfortified wines, as used in this article, shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar and having an alcoholic content of not less than five per centum (5%) and not more than fourteen per centum (14%) of absolute alcohol, the per centum of alcohol to be reckoned by volume, which wine has been approved as to identity, quality and purity by the State Board of Alcoholic Control as provided in this chapter.

The term “person” used in this article shall mean any individual, firm, partnership, association, corporation, or other groups or combination acting as a unit.

The term “sale” as used in this article shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever, for a consideration. (1939, c. 158, s. 501; 1941, c. 339, s. 4; 1945, c. 903, s. 3.)

**Editor's Note.**—The 1941 amendment fortified wines. For new definition of fortified wines, see § 18-96. For comment on struck out former subsection (c) defining



the amendment, see 19 N. C. Law Rev. 492.

The 1945 amendment added that part of paragraph (b) beginning with the words

"which wine has been approved."

For subsequent law exempting from its application beverages defined in this section, see § 18-49.4.

**§ 18-65. Regulations; statement required on container; application of other law.**—The beverages enumerated in § 18-64 may be manufactured, transported, or sold in this State in the manner and under the regulations hereinafter set out: Provided, however, that, except as otherwise provided by law, no wines shall be transported or sold in this State unless there be firmly fastened or impressed on the barrel, bottle, or other container in which the same may be a written statement showing that the same are not fortified and that the alcoholic content thereof reckoned by volume, is not more than fourteen per cent.

The possession, transportation, or sale of wines defined in § 18-64, subsection (b) without such statement, and any misrepresentation made in any such statement, shall constitute a misdemeanor and be punished as provided in § 18-91. Except as otherwise provided by law, the manufacture, possession, transportation or sale of wines other than those defined in § 18-64, subsection (b), including fortified wines, shall be subject to all the provisions of chapter one of the Public Laws of one thousand nine hundred and twenty-three, commonly called the Turlington Act, as amended and supplemented, codified as § 18-1 et seq. (1939, c. 158, s. 502; 1941, c. 339, s. 4.)

**Editor's Note.**—The 1941 amendment added the proviso and the second paragraph.

**§ 18-66. Transportation.**—The beverages enumerated in § 18-64 may be transported into, out of or between points in this State by railroad companies, express companies or by steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the Commissioner of Revenue of this State or his authorized agent, and upon condition that such common carrier shall make report of all shipments of such beverages into, out of or between points in this State at such times and in such detail and form as may be required by the Commissioner of Revenue.

The beverages enumerated in § 18-64 may be transported into, out of or between points in this State over the public highways of this State by motor vehicles upon condition that every person intending to make such use of the highways of this State shall as a prerequisite thereto register such intention with the Commissioner of Revenue in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this article, the Commissioner of Revenue shall without charge therefor issue a numbered certificate to each such owner or operator for each motor vehicle intended to be used for such transportation, which numbered certificate shall be prominently displayed on the motor vehicle used in transporting the products named in § 18-64. Every person transporting such products over any of the public highways of this State shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence, showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases or gallons of such shipment, the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any representative of the Commissioner of Revenue, produce and offer for inspection said invoice or bill of sale or record evidence. If said person

fails to produce invoice or bill of sale or record evidence, or if when produced, it fails to clearly and accurately disclose said information, the same shall be prima facie evidence of the violation of this article. Every person engaged in transporting such beverages over the public highways of this State shall keep accurate records of the character and volume of such shipments, the character and number of packages or containers, shall keep records open at all times for inspection by the Commissioner of Revenue of this State, or his authorized agent, and upon condition that such person shall make report of all shipments of such beverages into, out of or between points in this State at such times and in such detail and form as may be required by the Commissioner of Revenue.

The purchase, transportation and possession of beverages enumerated in § 18-64 by individuals for their own use are permitted without restriction or regulation. The provisions of this section as to transportation of beverages enumerated in § 18-64 by motor vehicles over the public highways of this State shall in like manner apply to the owner or operator of any boat using the waters of the State for such transportation, and all of the provisions of this section with respect to permit for such transportation and reports to the Commissioner of Revenue by the operators of motor vehicles on public highways shall in like manner apply to the owner or operator of any boat using the waters of this State. (1939, c. 158, s. 503.)

§ 18-67. **Manufacture.**—The brewing or manufacture of beverages for sale enumerated in § 18-64 shall be permitted in this State upon the payment of an annual license tax to the Commissioner of Revenue in the sum of five hundred dollars (\$500.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter. The license specified in this section shall not be issued for the manufacture of the beverages described in § 18-64 (b) unless the applicant for license exhibits a valid permit from the State Board of Alcoholic Control to engage in the business of selling such beverages for resale, as provided in this chapter. Persons licensed under this section may sell such beverages in barrels, bottles, or other closed containers only to persons licensed under the provisions of this article for resale, and no other license tax shall be levied upon the business taxed in this section. The sale of malt, hops, and other ingredients used in the manufacture of beverages for sale enumerated in § 18-64 is hereby permitted and allowed: Provided, that any person engaged in the business of manufacturing in this State the wines described in § 18-64, subsection (b) shall be required to pay the following tax based on the number of gallons manufactured:

Where not more than one hundred gallons are manufactured for sale . . . .	\$ 5.00
Where one hundred gallons and not more than two hundred gallons are manufactured for sale . . . . .	10.00
Where two hundred gallons and not more than five hundred gallons are manufactured for sale . . . . .	25.00
Where five hundred gallons and not more than one thousand gallons are manufactured for sale . . . . .	50.00
Where one thousand gallons and not more than two thousand five hundred gallons are manufactured for sale . . . . .	200.00
Where two thousand five hundred gallons or more are manufactured for sale . . . . .	250.00

Nothing in this article shall be construed to impose any tax upon any resident citizen of this State who makes native wines for the use of himself, his family and guests from fruits, grapes and berries cultivated or grown wild upon his own land. (1939, c. 158, s. 504; 1945, c. 903, s. 4.)

**Editor's Note.**—The 1945 amendment inserted the second sentence of this section.

§ 18-68. **Bottler's license.**—Any person who shall engage in the business

of receiving shipments of the beverages enumerated in § 18-64, subsection (a) in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars (\$250.00); and any person who shall engage in the business of bottling the beverages described in § 18-64, subsection (b), shall pay an annual license tax of two hundred fifty dollars (\$250.00): Provided, however, that any person engaged in the business of bottling the beverages described in § 18-64, subsection (a) and also the beverages described in § 18-64, subsection (b), or either, shall pay an annual license tax of four hundred dollars (\$400.00); provided further, the license provided by this section for the bottling of the beverages described in § 18-64 (b) shall not be issued to any person who does not have a permit to engage in the business of bottling the beverages described in § 18-64 (b) from the Board of Alcoholic Control as provided in this chapter. No other license tax shall be levied upon the businesses taxed in this section, but licenses under this section shall be liable for the payment of the taxes imposed by § 18-81 in the manner therein set forth. (1939, c. 158, s. 505; 1941, c. 339, s. 4; 1945, c. 903, s. 5.)

**Editor's Note.**—The 1941 amendment struck out references to former subsection (c) of § 18-64. The 1945 amendment inserted the second proviso.

**§ 18-69. Wholesaler's license.**—License to sell at wholesale, which shall authorize licensees to sell beverages described in § 18-64, subsection (a) in barrels, bottles, or other containers, in quantities of not less than one case or container to a customer, shall be issued as a State-wide license by the Commissioner of Revenue. The annual license under this section shall be one hundred and fifty dollars (\$150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the Commissioner of Revenue for failure to comply with any of the conditions of this article with respect to the character of records required to be kept, reports to be made or payment of other taxes hereinafter set out.

Licensees to sell at wholesale the beverages described in § 18-64, subsection (b) shall pay an annual license tax of one hundred fifty dollars (\$150.00): Provided, that a licensee to sell at wholesale the beverages described in § 18-64, subsection (a) and the beverages described in § 18-64, subsection (b) shall pay an annual license tax of two hundred fifty dollars (\$250.00); provided further, the license provided by this paragraph shall not be issued to any person who does not have a permit to engage in the business of selling at wholesale the beverages described in § 18-64 (b) from the Board of Alcoholic Control as provided in this chapter.

If any wholesaler maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed a separate license shall be paid for each separate place of business or warehouse.

The owner or operator of every distributing warehouse selling, distributing or supplying to retail stores beverages enumerated in § 18-64 shall be deemed a wholesale distributor within the meaning of this article and shall be liable for the tax imposed in this section and shall comply with the conditions imposed in this article upon wholesale distributors of beverages with respect to payment of taxes levied in this article and bond for the payment of such taxes.

No county shall levy a tax on any business under the provisions of this section, nor shall any city or town, in which any person, firm, corporation or association taxed hereunder has its principal place of business levy and collect more than one-fourth of the State tax levied under this section; nor shall any tax be levied or collected by any county, city or town on account of delivery of the products, beverages or articles enumerated in § 18-64. (1939, c. 158, s. 506; 1941, c. 339, s. 4; 1945, c. 903, s. 6.)

**Editor's Note.**—The 1941 amendment struck out the reference in the second paragraph to former subsection (c) of § 18-64. The 1945 amendment added the proviso at the end of the second paragraph.

§ 18-69.1. **Prohibition against exclusive outlets.**—It shall be unlawful for any person, firm or corporation engaged in business under this article as a manufacturer, or wholesaler, or bottler of wine or malt beverages directly or indirectly or through an affiliate:

1. To require, by agreement or otherwise, that any retailer engaged in the sale of wine or malt beverages, purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt beverages sold or offered for sale by other persons, firms or corporations in North Carolina, if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer; or

2. To induce through any of the following means any retailer, engaged in the sale of wine or malt beverages, to purchase any such products from such person, firm or corporation to the exclusion in whole or in part of wine or malt beverages sold or offered for sale by other persons, firms, or corporations in North Carolina, if the direct effect of such inducement is to prevent, deter, hinder or restrict other persons, firms or corporations in North Carolina from selling or offering for sale any such products to such retailer: (1) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; (2) by furnishing, giving free goods or deals, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, subject to such exceptions as the Commissioner of Revenue shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection. (1945, c. 708, s. 6.)

§ 18-70. **Sales on railroad trains.**—The sale of beverages enumerated in § 18-64 shall be permitted on railroad trains in this State to be sold only in dining cars, buffet cars, Pullman cars, or club cars, and for consumption on such cars upon payment to the Commissioner of Revenue of one hundred dollars (\$100.00) for each railroad system over which such cars are operated in this State for an annual State-wide license expiring on the next succeeding thirtieth day of April. No other license shall be levied upon licensees under this section, but every licensee under this section shall make a report to the Commissioner of Revenue on or before the tenth day of each calendar month covering sales for the previous month and payment of the tax on such sales at the rate of tax levied in this article. (1939, c. 158, s. 507.)

§ 18-71. **Salesman's license.**—License for salesmen, which shall authorize the licensee to offer for sale within the State or solicit orders for the sale of within the State beverages enumerated in this article, shall be issued by the Commissioner of Revenue upon the payment of an annual license tax of twelve dollars and fifty cents (\$12.50) to the Commissioner of Revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. The license provided by this section shall not be issued to any person for offering for sale or soliciting orders for the beverages described in § 18-64 (b) who does not have a permit to engage in the business of offering for sale or soliciting orders for beverages described in § 18-64 (b) from the Board of Alcoholic Control as provided in this chapter. (1939, c. 158, s. 508; 1945, c. 903, s. 7.)

**Editor's Note.**—The 1945 amendment added the last sentence of this section.

§ 18-72. **Character of license.**—License issued under authority of § 18-64, subsection (a) shall be of two kinds:

(1) "On premises" license which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drug stores, filling stations, grocery stores, cold

drink stands, tea rooms, or incorporated or chartered clubs. Such license shall authorize the licensee to sell at retail beverages for consumption on the premises designated in the license, and to sell the beverages in original packages for consumption off the premises.

(2) "Off premises" license which shall authorize the licensee to sell at retail beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverage was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1939, c. 158, s. 509.)

**Local Modification.**—Swain: 1945, c. 961.

**Compulsory Issuance.**—An "on premises" license to sell beer is not available, as a matter of right, to any citizen who may qualify under the provisions of § 18-75. Compulsory issuance thereof is in any

event limited to the businesses enumerated in this section. *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149 (1943).

**Cited in** *State v. Alverson*, 225 N. C. 29, 33 S. E. (2d) 135 (1945).

§ 18-73. **Retail license issued for sale of wines.**—License issued under authority of § 18-64, subsection (b) shall be of two kinds:

1. "On premises" licenses shall be issued only to bona fide hotels, cafeterias, cafes and restaurants which shall have a Grade A rating from the State Department of Health, and shall authorize the licensees to sell at retail for consumption on the premises designated in the license; provided, no such license shall be issued except to such hotels, cafeterias, cafes and restaurants where prepared food is customarily sold and only to such as are licensed under the provisions of § 105-62; provided further, no such license shall be issued to persons or places which are licensed only under subsection (a) of § 105-62.

2. "Off premises" license shall authorize the licensee to sell said beverages at retail for consumption off the premises designated in the license, and all such sales shall be made in the immediate container in which the beverage was purchased by the licensee, and every such container shall have the tax stamp displayed thereon, as provided in § 18-81. (1939, c. 158, s. 509½; 1941, c. 339, s. 4; 1945, c. 903, s. 8.)

**Editor's Note.**—Prior to the 1941 amendment the introductory paragraph contained a reference to former subsection (c) of § 18-64.

The 1945 amendment rewrote subdivision 1 of this section.

**Cited in** *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149 (1943).

§ 18-74. **Amount of retail license tax.**—The license tax to sell at retail under § 18-64, subsection (a) for municipalities shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, five dollars (\$5.00).

The license tax to sell at retail under § 18-64, subsection (b), shall be:

(1) For "on premises" license, fifteen dollars (\$15.00).

(2) For "off premises" license, ten dollars (\$10.00).

The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten per cent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1839, c. 158, s. 510; 1943, c. 400, s. 6; 1945, c. 708, s. 6.)

**Editor's Note.**—The 1943 amendment reduced the license tax stated in the first paragraph (2) from ten to five dollars.

The 1945 amendment struck out the words "or both" formerly appearing after (b) in the second unnumbered paragraph.

§ 18-75. **Who may sell at retail.**—Every person making application for license to sell at retail or wholesale the beverages enumerated in § 18-64, if the

place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) Name and residence of the applicant and the length of his residence within the State of North Carolina.

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) A statement that the applicant is a citizen and resident of North Carolina and not less than twenty-one years of age; that he has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the last two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either State or federal.

The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of a felony or other crime involving moral turpitude, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the prohibition laws, either State or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the prohibition laws, such license shall not be granted. If it appears that any false statement is knowingly made in any part of the application and license is received thereon, the license shall be revoked and the applicant subjected to the penalty provided by law for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subsections (1), (2), (3), (4), and (5) of this section are true.

Neither the State nor any county or city shall issue a license under this article to any person, or firm, or corporation who has not been a bona fide resident of North Carolina and a citizen of the United States for one year. No resident of the State shall obtain a license under this article and employ or receive aid from a nonresident for the purpose of defeating this requirement. No license shall be issued to a pool room or billiard parlor or any person, firm or corporation operating same for the sale of wine as defined in G. S. § 18-64, subsection (b). Any person violating this paragraph shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not more than thirty days or fined not more than two hundred dollars (\$200.00). (1939, c. 158, s. 511; 1945, c. 708, s. 6; 1947, c. 1098, s. 1.)

**Editor's Note.**—The 1945 amendment inserted in the introductory paragraph the words "or wholesale the." It also inserted in the first sentence of the last paragraph the words "and a citizen of the United

States." The 1947 amendment inserted the third sentence of the last paragraph.

See § 18-72 and note thereto.

**Cited in** *Martin v. Holly Springs*, 230 N. C. 388, 53 S. E. (2d) 161 (1949).

**§ 18-76. County license to sell at retail.**—License to sell at retail shall be issued by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in § 18-75 with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this article.

If the application is for license to sell outside of a municipality within the county, the application shall also show the distance to the nearest church or public or private school from the place at which the applicant purposes to sell at retail. No license shall be granted to sell within three hundred feet of any public or private school buildings or church building outside of incorporated cities and towns: Provided, the restriction set forth in this sentence shall not apply to unincorporated towns and villages having police protection.

The clerk of the board of commissioners of each county shall make prompt report to the Commissioner of Revenue of each license granted by the board of commissioners of such county. The county license fee shall be fixed at (1) twenty-five dollars (\$25.00) for "on premises" license and (2) five dollars (\$5.00) for "off premises" license, for the sale of beverages described in § 18-64, subsection (a), and twenty-five dollars (\$25.00), for the sale of beverages described in § 18-64, subsection (b) and the same shall be placed in the county treasury, for the use of the county. (1939, c. 158, s. 512; 1941, c. 339, s. 4; 1943, c. 400, s. 6.)

**Local Modification.** — Anson: 1941, c. 331; Avery: 1945, c. 794; Currituck (Popular Branch Township): 1937, c. 390; Guilford: 1949, c. 1140; Madison: 1945, c. 794; Swain: 1945, c. 961.

**Editor's Note.**—The 1941 amendment struck out the reference to former subsection (c) of § 18-64 formerly appearing in

the third paragraph.

The 1943 amendment struck out "twenty-five dollars (\$25.00)" from the third paragraph and inserted in lieu thereof "(1) twenty-five dollars (\$25.00) for 'on premises' license and (2) five dollars (\$5.00) for 'off premises' license."

**§ 18-77. Issuance of license mandatory; sales during religious services.**—Except as herein provided it shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article: Provided, the governing board of any county or city which has reason to believe that any applicant for license has, during the preceding license year, committed any act or permitted any condition for which his license was, or might have been revoked under § 18-78 or 18-78.1, said governing board shall be authorized to hold a hearing concerning the issuance of license to said applicant at a designated time and place, of which the applicant shall be given ten days' notice; at said hearing the applicant may appear, offer evidence, and be heard, and said governing body shall make findings of fact based on the evidence at said hearing and shall enter said findings in its minutes; if from said evidence the governing body shall find as a fact that during the preceding license year the applicant committed any act or permitted any condition for which his license was, or might have been, revoked under §§ 18-78 and 18-78.1, the governing body may refuse to issue license to said applicant. Provided further, that the applicant may and shall have the right to appeal from an adverse decision to the superior court of said county where and when the matter shall be heard, as by law now provided for the trial of civil actions; that said notice of appeal may be given at the time of the hearing or within ten days thereafter, and said cause upon appeal shall be docketed at the next ensuing term of civil superior court in said county. Provided, further, no person shall dispense beverages herein authorized to be sold, within fifty feet of a church building in an incorporated city or town, or in a city or town having police protection whether incorporated or not, while religious services are being held in such church, or within three hundred feet of a church building outside the incorporate limits of a city or town while church services are in progress: And provided further that this section shall not apply in any territory where the sale of wine and/or beer is prohibited by special legislative act. And provided further, that such governing bodies in the counties of Alamance, Alexander, Ashe, Avery, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Macon, Madison, McDowell, Montgomery, Nash, Pender,

Randolph, Robeson, Sampson, Transylvania, Vance, Watauga, Wilkes, Yadkin, or any municipality therein, the City of Greensboro in Guilford County and the town of Aulander, shall be authorized in their discretion to decline to issue the "on premises" licenses provided for in subsection one of § 18-73. The governing bodies in the counties of Alamance, Alexander, Ashe, Avery, Bertie, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Madison, McDowell, Montgomery, Nash, Pender, Randolph, Robeson, Sampson, Transylvania, Watauga, Wilkes, Yadkin, or municipalities therein, and the town of Aulander, shall be authorized to prohibit the sale of beer and/or wine between the hours of 12:01 A. M. on Sundays and midnight Sunday night. (1939, c. 158, s. 513; 1939, c. 405; 1945, c. 708, s. 6; 1945, cc. 934, 935, 1037; 1947, c. 932.)

**Local Modification.** — Avery: 1945, c. 794; Bertie: 1949, c. 1059; Madison: 1945, c. 794.

**Cross Reference.**—For other restrictions on the sale of wine and beer, see §§ 18-105 through 18-107.

**Editor's Note.**—The first 1945 amendment inserted at the beginning of this section the words "Except as herein provided." It also inserted the first two provisions. The second 1945 amendment made a portion of the section applicable to the

city of Greensboro. The third and fourth 1945 amendments inserted "Vance" and "Macon" respectively, in the first list of counties appearing in this section.

The 1947 amendment inserted "Bertie" in the list of counties in the last sentence.

For act purporting to extend the provisions of this section to Burke County, see Session Laws 1945, c. 1031.

**Cited in** *McCotter v. Reel*, 223 N. C. 486, 27 S. E. (2d) 149 (1943).

**§ 18-78. Revocation or suspension of license; rule making power of State Board of Alcoholic Control.**—If any licensee violates any of the provisions of this article or any rules and regulations under authority of this article or fails to superintend in person or through a manager, the business for which the license was issued, or allows the premises with respect to which the license was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of beverages any person who has been convicted of a felony involving moral turpitude or adjudged guilty of violating the prohibition laws within two years or otherwise fails to carry out in good faith the purposes of this article, the license of any such person may be revoked by the governing board of the municipality or by the board of county commissioners after the licensee has been given an opportunity to be heard in his defense. Whenever any person, being duly licensed under this article, shall be convicted of the violation of any of the prohibition laws or of any of the provisions of this article or of any rule or regulation of the State Board of Alcoholic Control on the premises herein licensed, it shall be the duty of the court to revoke said license. Whenever any license which has been issued by any municipality, any board of county commissioners, or by the Commissioner of Revenue has been revoked, it shall be unlawful to reissue said license for said premises to any person for a term of six months after the revocation of said license.

The State Board of Alcoholic Control shall have the power to adopt, repeal and amend rules and regulations to carry out the provisions of this article and to revoke or suspend the State permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by said Board. Whenever there shall be filed with the State Board of Alcoholic Control a certified copy of a judgment of a court convicting a licensee of a violation of the prohibition laws, of any provision of this article or of any rule or regulation issued by said Board, said Board shall forthwith revoke the permit of such licensee. The revocation or suspension of a permit issued by the State Board of Alcoholic Control shall automatically revoke or suspend any and all State, county and municipal licenses issued to such licensee under the authority of this article, and the revocation or suspension of either a State, county or municipal license shall automatically revoke or suspend any other licenses issued to the licensee



under the authority of this article. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14.)

**Cross Reference.**—See also § 18-91.

**Editor's Note.** — The 1943 amendment inserted in the second sentence the words "or of any of the provisions of this article or of any rule or regulation of the Commissioner of Revenue." It also added the second paragraph.

The 1949 amendment substituted "State Board of Alcoholic Control" for "Com-

missioner of Revenue," and rewrote the second paragraph. For brief comment on amendment, see 27 N. C. Law Rev. 463.

**As to dismissal of certiorari to review revocation of license** by town authorities for violation of this section, see *Harney v. Mayor & Board of Com'rs*, 229 N. C. 71, 47 S. E. (2d) 535 (1948).

**§ 18-78.1. Prohibited acts under license for sale for consumption on premises.**—No holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, for consumption on the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

(1) Knowingly sell such beverages to any person under eighteen (18) years of age.

(2) Knowingly sell such beverages to any person while such person is in an intoxicated condition.

(3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law.

(4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices.

(5) Sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized under his license. (1943, c. 400, s. 6; 1945, c. 708, s. 6; 1949, c. 974, s. 15.)

**Cross Reference.**—See § 18-91.

suspension of licenses. See 27 N. C. Law Rev. 463.

**Editor's Note.**—The 1949 amendment struck out provisions as to revocation and

**§ 18-79. State license.**—Every person who intends to engage in the business of retail sale of the beverages enumerated in § 18-64, subsection (a) shall also apply for and procure a State license from the Commissioner of Revenue.

For the first license issued to each licensee five dollars (\$5.00), and for each additional license issued to one person an additional tax of ten per cent (10%) of the five dollars base tax shall be charged. That is to say, that for the second license issued the tax shall be five dollars and fifty cents (\$5.50) annually, for third license six dollars (\$6.00) annually, and an additional fifty cents (50c.) per annum for each additional license issued to such person. (1939, c. 158, s. 515.)

**§ 18-80. State license to sell wine at retail.**—Every person who intends to engage in the business of selling wines as defined in § 18-64, subsection (b) shall procure a State license for such business which license shall in all cases be issued under the same restrictions, rules and regulations as set out in this article for the issuance of license for the sale of beverages described in § 18-64, subsection (a) and for which license the following schedule of taxes is hereby levied:

- (1) For "on premises" license twenty-five dollars .....\$25.00
- (2) For "off premises" license five dollars ..... 5.00

Such retail license shall authorize the sale of the beverages described in this section only on the premises described in the license, and if the same person operates more than one place at which said beverages are sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the Commissioner of Revenue to revoke the State license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid.

It shall be unlawful for any wholesale licensee to make any sale or delivery of the beverages described in § 18-64, subsection (b) to any person except persons who have been licensed to sell such beverages at retail, as prescribed in this article.

It shall be unlawful for any retail licensee to purchase any of the beverages described in § 18-64, subsection (b) from any person except wholesale licensees maintaining a place of business within this State and duly licensed under the provisions of this article. (1939, c. 158, s. 516; 1941, c. 339, s. 4.)

**Editor's Note.** — The 1941 amendment struck out the references to former subsection (c) of § 18-64 formerly appearing in the first and last two paragraphs of this section.

**§ 18-81. Additional tax.**—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages enumerated in § 18-64, subsection (a) of seven dollars and fifty cents (\$7.50) per barrel of thirty-one gallons, or the equivalent of such tax in containers of more or less than thirty-one gallons, and in bottles or other containers of not more than twelve ounces, a tax of two and one-half cents per bottle or container, and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents per bottle or container: Provided fruit cider of alcoholic content not exceeding that provided in this article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent per bottle or container.

(b) The payment of the tax imposed by the preceding subsection shall be evidenced as to containers of one quart, or its equivalent, or less, by the affixing of crowns or lids to such containers in which beverages are placed, received, stored, shipped, or handled, and upon which the tax has been paid at the rate prescribed in the preceding subsection.

(c) Except as may be otherwise provided herein, each manufacturer or bottler manufacturing, selling or delivering beverages in this State shall, within twenty-four hours after the beverages are placed in original containers or bottles, and prior to delivery of any container of beverages to any wholesaler, distributor, retailer, jobber, or any other person whatsoever in this State, affix the proper crown or lid to each container.

(d) Except as may be otherwise provided herein, and unless such crowns or lids have been previously affixed, such crowns or lids shall be affixed as herein provided by each distributor or wholesaler in this State within twenty-four hours after such beverages come into the possession of such wholesaler and prior to the delivery of any container thereof to any retailer or other person in this State.

(e) The Commissioner of Revenue shall prescribe, prepare, furnish and sell the crowns or lids provided for in this section under rules and regulations prescribed by him, and all such crowns and lids shall carry the following words: "N. C. Tax Paid," and shall be so designed as to enable the manufacturer or bottler to place his brand or trade mark thereon, and they shall be purchased by the manufacturer or bottler or other person after the payment of the tax imposed by this article, only from such persons, firms or corporations as may be designated as manufacturers of such crowns and lids by the Commissioner of Revenue. The Commissioner of Revenue is authorized to enter into contracts on behalf of the State with one or more manufacturers for the manufacture, sale and distribution of such crowns or lids and shall require of such persons, firms and corporations so manufacturing, selling and distributing such crowns or lids a bond or bonds with a company authorized to do business in this State as surety payable to the State of North Carolina in such penalty and upon such conditions as in the opinion of the Commissioner of Revenue will adequately protect the State. The crowns

and lids shall be manufactured, sold and distributed at the cost of the taxpayer. No manufacturer or bottler will be allowed to purchase the crowns or lids prescribed by this section unless such bottler or manufacturer has a valid permit from the federal government and the State of North Carolina, or the state in which such manufacturer or bottler is located, to manufacture, bottle, or sell the beverages herein described. The crowns and lids shall be sold by the Commissioner of Revenue at a discount of two per cent (2%) as sole compensation for North Carolina tax-paid crown and lid losses sustained in the process of production of malt beverages. No compensation or refund shall be made for tax-paid malt beverages given as free goods, or advertising, and losses, sustained by spoilage and breakage incident to the sale and distribution of malt beverages.

(f) At the time of delivering beverages to any person, firm or corporation in this State, each manufacturer or bottler shall make a true duplicate invoice showing the date of delivery, the amount and value of each shipment of beverages delivered, and the name of the purchaser to whom the delivery is made, and shall retain the same for a period of two years, subject to the use and inspection of the Commissioner of Revenue or his agents.

(g) Persons operating boats, dining cars, buffet cars or club cars upon or in which beverages are sold shall not be required to evidence the payment of the tax herein provided for by affixing crowns or lids as herein provided, but instead shall keep such records of the sales of such beverages in this State as the Commissioner of Revenue shall prescribe and shall submit monthly reports of such sales to the Commissioner of Revenue upon a form prescribed therefor by the Commissioner of Revenue, and shall pay the tax levied under this article at the time such reports are filed.

(h) It is the intent and purpose of this section to require all manufacturers and bottlers and other persons, except as herein provided, to affix the crowns or lids provided for herein to all original containers in which beverages are normally placed, prepared for market, received, sold or handled, before such beverages are sold, offered for sale, or held for sale within this State.

(i) Any person, firm or corporation, except as herein provided, who shall sell the beverages enumerated in § 18-64, subsection (a) to wholesalers, retailers, or consumers which do not have affixed thereto the crowns or lids required by this section, or who shall purchase, receive, transport, store, or possess any beverage in containers to which the crowns or lids required herein are not affixed, shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court, and, in addition thereto, such person shall be liable for double the amount of the tax due under this article and the Commissioner of Revenue shall have authority to assess said tax and penalty and cause the same to be collected in the same manner provided for the collection of other taxes levied in this article.

(j) Manufacturers, bottlers, or vendors of beverages enumerated in § 18-64, subsection (a), from without this State, shall affix the crowns or lids to original containers of such beverages to be sold, offered for sale, held for sale, delivered or transported for delivery in this State.

(k) The Commissioner of Revenue shall promulgate rules and regulations to relieve manufacturers or bottlers of beverages from the liability to affix crowns or lids to such containers of such beverages as are intended to be shipped and are thereafter shipped out of this State by such manufacturers or bottlers for resale out of this State.

(l) Any person who falsely or fraudulently makes, forges, alters, or counterfeits any crowns or lids prescribed by the Commissioner of Revenue under the provisions of this section, or causes or procures to be falsely or fraudulently made, forged, altered, or counterfeited any such crowns or lids, or knowingly or wilfully utters, passes or tenders as true any such false, forged, altered, or counterfeited crowns or lids, or uses more than once any crown or lid provided for and

required by this article, or uses a crown or lid other than that prescribed herein for the purpose of evading the tax imposed under this article, or for the purpose of aiding or abetting others to evade the tax imposed under this article, shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the State's prison for not more than five years, or by a fine of not more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment in the discretion of the court.

(m) Any person, firm or corporation having in his possession a container or containers of beverages not bearing the crowns or lids required to be affixed to such container, or who fails to produce upon demand by the Commissioner of Revenue or his agent, invoices of all beverages purchased or received by him within two years prior to such demand, unless upon satisfactory proof it is shown that such nonproduction is due to providential or other causes beyond his control, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(n) Any person who shall fail, neglect, or refuse to comply with or shall violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the Commissioner of Revenue or his agents to examine his books, papers, invoices and other records, his store of beverages in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned in the discretion of the court.

(o) The Commissioner of Revenue is hereby charged with the enforcement of the provisions of this section and hereby authorized and empowered to prescribe, adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this section, and the collection of taxes, penalties, and interest imposed by this article.

In the event that the Commissioner of Revenue shall find as facts that due to war conditions or other unusual circumstances, a free supply of taxpaid crowns cannot be obtained, and that the beverage tax revenues of the State are being, or will likely be, impaired by the difficulty or impossibility in obtaining said taxpaid crowns, the Commissioner shall be empowered to promulgate a regulation authorizing the use of stamps, labels, or other suitable devices in lieu of or in addition to crowns as evidences of tax payments for the duration of the emergency, but no longer. In the event that stamps, labels, or other devices are authorized by the Commissioner as herein provided, the remaining provisions of this article shall not be affected, and shall be construed by substituting the name of the substituted device for "crown or lid" or "crowns or lids" wherever these words appear, unless the context clearly will not permit such construction.

The action of the Commissioner of Revenue in promulgating a regulation under date of September second, one thousand nine hundred and forty-two, authorizing the use of stamps as an alternative to crowns or lids, is in all respects hereby approved, ratified and confirmed.

(p) The Commissioner of Revenue is hereby authorized to prescribe, adopt, promulgate, and enforce the rules and regulations relating to the transportation of beverages enumerated in § 18-64 through this State, and from points outside of this State to points within this State, and to prescribe, adopt, promulgate and enforce rules and regulations reciprocal to those of, or laws of, any other state or territory affecting the transportation of beverages manufactured in this State.

(q) The Commissioner of Revenue shall have authority at any time after March 24, 1939, to make provisions for the furnishing of crowns or lids required by this section.

(r) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of beverages described in section 18-64, subsection (b) of sixty cents (60 cts.) per gallon. The foregoing tax to apply to naturally fermented wines. The tax on imitation, sub-standard or synthetic wines (as defined in the United

States Treasury Regulations) shall be two dollars and forty cents (\$2.40) per gallon.

Unless the Commissioner of Revenue shall by regulation prescribe a method other than the use of tax stamps, the payment of the tax levied in this subsection shall be evidenced by the affixing to the bottles or containers wherein such beverages are offered for sale North Carolina wine taxpaid stamps, which shall be of such design and of such denomination as shall be prescribed by the Commissioner of Revenue; provided, however, that no stamp evidencing the payment of unfortified wine tax shall be of a smaller denomination than six cents (6c). The Commissioner of Revenue shall make arrangements with some manufacturer to manufacture and release wine taxpaid stamps provided for in this section, and said stamps shall be sold at a discount of two per cent (2%) as sole compensation for North Carolina wine taxpaid stamp losses sustained in the process of production of wines, and no compensation or refund shall be made for taxpaid wines given as free goods or advertising or for losses sustained by spoilage and breakage incident to the sale and distribution of wines. The provisions of subsections (c) through (n), inclusive, of this section shall be applicable with respect to the requirement of affixing wine taxpaid stamps to bottles or containers wherein wine is sold, and the words " taxpaid crowns and lids" or similar words used in such subsections shall be taken to include wine taxpaid stamps. The Commissioner of Revenue shall have authority to promulgate rules and regulations relative to the time and manner of affixing wine taxpaid stamps and such other rules and regulations as may be deemed expedient and proper to carry out and enforce the provisions of this section, and he may require bottlers, jobbers, wholesalers and retailers to render such reports in such form and at such times as in his discretion may be deemed necessary in the proper administration of this section. Any person, firm or corporation violating any of the provisions of this section or any of the rules and regulations issued hereunder shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or by both fine and imprisonment, in the discretion of the court.

The Commissioner of Revenue is hereby authorized and empowered to provide by regulation for the collection of the taxes levied in this subsection by a method other than the use of tax stamps when it appears to the Commissioner that said tax may be more conveniently and efficiently collected in some way other than by the use of tax stamps as provided herein.

(s) If any dealer, either at wholesale or retail shall expose for sale or have in his possession either in storage or on display any nontax-paid beverages enumerated under § 18-64 (a) and (b), the Commissioner of Revenue shall have the authority to revoke any privilege license issued under this article to said dealer and said license shall not be renewed for the balance of the tax year; in addition, the Commissioner may refuse to issue new license to such dealer unless the dealer can satisfactorily show to the Commissioner of Revenue that he will in the future comply with the provisions of this article and the rules and regulations of the Commissioner issued under authority hereof.

(t) From the taxes collected annually under subsection (a) and subsection (r) of this section amounts equivalent to one-half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold under the provisions of this article. The amounts distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein as shown by the latest federal decennial census. Where such beverages may be licensed to be sold in both the county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of popu-

lation; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the State: Provided, further, that if said area within a county is a municipality for which the population is shown by the latest federal decennial census, reduction of such amounts shall be based on such population rather than on area. The Commissioner of Revenue shall determine the amounts distributable to each county and municipality, for the period July 1st, 1947, to September 30th, 1947, inclusive, and shall distribute such amounts within sixty (60) days thereafter; and the Commissioner of Revenue annually thereafter shall determine the amounts distributable to each county and municipality for each twelve-month period ending September 30th and shall distribute such amounts within sixty (60) days thereafter.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act. (1939, c. 158, s. 517; 1939, c. 370, s. 1; 1941, c. 50, s. 7; 1941, c. 339, s. 4; 1943, c. 400, s. 6; 1943, cc. 564, 565; 1945, c. 708, s. 6; 1947, c. 1084, ss. 7-9; 1951, c. 1162, s. 1.)

**Editor's Note.**—The 1941 amendments added the last two sentences in subsection (e) and struck out references to former subsection (c) of § 18-64.

The first 1943 amendment added the second and third paragraphs of subsection (o). The other 1943 amendments made changes in subsection (r).

The 1945 amendment made changes in

subsections (a) and (b). It also made changes in the first paragraph of subsection (r) and inserted subsection (s).

The 1947 amendment made changes in subsections (a) and (r) and inserted subsection (t) immediately before the last paragraph.

The 1951 amendment rewrote subsection (r).

**§ 18-81.1. Use of funds allocated to counties and municipalities.**—The funds allocated to counties and/or municipalities under subsection (t) of § 18-81 may be used by said counties or municipalities as any other general or surplus funds of said unit may be used. (1947, c. 1084, s. 11.)

**§ 18-82. By whom tax payable.**—The tax levied in § 18-81 upon the sale of beverages enumerated in § 18-64, subsection (a) shall be paid to the Commissioner of Revenue by the manufacturer or bottler of such beverages, and the tax levied in § 18-81 upon the sale of the beverages enumerated in § 18-64, subsection (b) shall be paid to the Commissioner of Revenue by the wholesale distributor or bottler of such beverages. As a condition precedent to the granting of license by the Commissioner of Revenue to any wholesale distributor, manufacturer or bottler of beverages under this article, the Commissioner of Revenue shall require each such wholesale distributor, manufacturer, or bottler to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Commissioner of Revenue shall find adequate to cover the tax liability of each such wholesale distributor, manufacturer or bottler, proportioned to the volume of business of each such wholesale distributor, manufacturer or bottler, but in no event to be less than one thousand dollars (\$1,000.00), or to deposit federal, State, county or municipal bonds in required amounts, such county and municipal bonds to be approved by the Commissioner of Revenue. The Commissioner of Revenue may grant such extension of time for compliance with this condition as may be found to be reasonable. (1939, c. 158, s. 518; 1941, c. 339, s. 4.)

**Editor's Note.** — The 1941 amendment struck out the reference to former subsection

(c) of § 18-64, formerly appearing in the first sentence of this section.

**§ 18-83. Nonresident manufacturers and wholesale dealers to be licensed.**—From and after April thirtieth, one thousand nine hundred thirty-

nine, every nonresident desiring to engage in the business of making sales of the beverages described in § 18-64, to wholesale dealers licensed under the provisions of this article, shall first apply to the Commissioner of Revenue for a permit so to do. The Commissioner of Revenue may require of every such applicant that a bond in a sum not to exceed two thousand dollars (\$2,000.00) be executed by such applicant and deposited with the Commissioner, conditioned upon the faithful compliance by such applicant with the provisions of this article, and particularly that such applicant shall not make sales of any of the beverages described in § 18-64 to any person in this State except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars (\$150.00), if the Commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of the beverages defined in § 18-64, he shall then issue a permit to such applicant which shall bear a serial number. The license issued under this section to any person who does not have a permit from the Board of Alcoholic Control as provided in this chapter for the sale for resale of beverages described in § 18-64 (b) shall only permit said licensee to engage in the business of selling for resale the beverages described in § 18-64(a). Every holder of such nonresident permit and license shall thereafter put the number of such permit on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this article, the Commissioner of Revenue may revoke such permit or license.

Any resident manufacturer licensed under § 18-67 shall not be required to post the bond required by this section. (1939, c. 158, s. 518½; 1945, c. 903, s. 9.)

**Editor's Note.**—The 1945 amendment inserted the fourth sentence.

**§ 18-83.1. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.**—It shall be unlawful for any resident wholesale distributor or bottler to purchase any of the beverages described in § 18-64 for resale within this State from any nonresident who has not procured the permit or license required in the preceding section. (1945, c. 708, s. 6.)

**§ 18-84. Payment of tax by retailers.**—The granting of license by any municipality or county under this article to any person to sell at retail the beverages enumerated under § 18-64 shall not be valid license for such sale at retail until such person shall have filed with the Commissioner of Revenue a bond in a surety company licensed by the Insurance Department to do business in this State in such sum as the Commissioner of Revenue may find to be sufficient to cover the tax liability of every such person, but in no event to be less than one thousand dollars (\$1,000.00). The Commissioner of Revenue may waive the requirement of this section for indemnity bond with respect to any such person who may file a satisfactory contract or agreement with the Commissioner of Revenue that such person will purchase and sell beverages enumerated in § 18-64 only from wholesale distributors or bottlers licensed by the Commissioner of Revenue under this article who pay the tax under § 18-81 upon all such beverages sold to retail dealers in this State. The violation of the terms of any such contract or agreement between any such retail dealer and the Commissioner of Revenue by the purchase or sale of any of the beverages enumerated in § 18-64 from any one other than a licensed wholesale distributor or bottler under this article shall automatically cancel the license of any such retail dealer and shall be prima facie evidence of intent to defraud, and any person guilty of violation of any such contract or agreement shall be guilty of a misdemeanor. (1939, c. 158, s. 519.)

**§ 18-85. Tax on spirituous liquors; sale of fortified wines in A. B. C. stores.**—In lieu of taxes levied in Schedule E of the Revenue Act on the sale of spirituous liquors, there is hereby levied a tax of eight and one-half per cent (8½%) on the retail price of spirituous distilled liquors of every kind that is

sold in this State, including liquors sold in county or municipal liquor stores. Provided, however, that in no event shall the amount paid under this section by county or municipal liquor stores exceed one-half of the net profits from liquors sold through such stores in any county or municipality. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Act, and the liability for such tax shall be subject to all the rules, regulations and penalties provided in Schedule E and in other sections of the Revenue Act for the payment or collection of taxes.

Spirituous liquors as referred to in this section shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-four per cent (24%) by volume.

Fortified wines may be sold in county or municipal alcoholic beverage control stores duly established under the authority of article 3 of this chapter or of any other applicable law. (1939, c. 158, s. 519½; 1941, c. 339, s. 4; 1951, c. 1162, s. 2.)

**Editor's Note.** — The 1941 amendment inserted the references to fortified wines in the first sentence of the first paragraph and added the third paragraph. The 1951 amendment rewrote this section.

**§ 18-85.1. Tax on fortified wines.**—In addition to other taxes levied in this article, there is hereby levied a tax upon the sale of fortified wines as defined in sections 18-96 and 18-99 of forty cents (40c) per gallon. Unless the Commissioner of Revenue shall by regulation prescribe a method other than the use of tax stamps, the payment of such tax is to be evidenced by the affixing to the bottles or containers wherein such wine is sold of North Carolina wine tax-paid stamps, which stamps shall be of such design and shall be issued in such denominations as may be prescribed by the Commissioner of Revenue; provided, however, that no stamp shall be issued of a lesser denomination than four cents (4c). All of the provisions of subsection (r) of § 18-81 relative to the tax on unfortified wines shall be applicable to the tax levied in this section. Any person, firm or corporation violating any of the provisions of this section or any of the rules and regulations promulgated by the Commissioner of Revenue relative to the administration of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine or imprisonment or by both fine and imprisonment, in the discretion of the court.

The Commissioner of Revenue is hereby authorized and empowered to provide by regulation for the collection of the taxes levied in this section by a method other than the use of tax stamps when it appears to the Commissioner that said tax may be more conveniently and efficiently collected in some way other than by the use of tax stamps as provided herein. (1951, c. 1162, s. 3.)

**§ 18-86. Books, records, reports.**—Every person licensed under any of the provisions of this article shall keep accurate records of purchase and sale of all beverages taxable under this article, such records to be kept separate from all purchases and sales of merchandise taxable under this article, including a separate file and record of all invoices. The Commissioner of Revenue or any authorized agent, shall at any time during business hours, have access to such records. The Commissioner of Revenue may also require regular or special reports to be made by every such person, at such times and in such form as the Commissioner may require. (1939, c. 158, s. 520.)

**§ 18-87. No license for sales upon school property.**—No license shall be issued for the sale of beverages enumerated in § 18-64 upon the campus or property of any public or private school or college in this State. (1939, c. 158, s. 521.)

**§ 18-88. License shall be posted.**—Each form of license required by this article shall be kept posted in a conspicuous place at each place where the business



taxable under this article is carried on, and a separate license shall be required for each place of business. (1939, c. 158, s. 522.)

**§ 18-88.1. Wine for sacramental purposes exempt from tax.**—The tax levied in this article upon the sale of beverages described in § 18-64 (b) shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of § 18-21. (1945, c. 708, s. 6.)

**§ 18-89. Administrative provisions.**—The Commissioner of Revenue and the authorized agents of the State Department of Revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this article that are enumerated in the Revenue Act in administering taxes levied in Schedule B of that act. Any person, firm or corporation engaging in any activity for which a State, county, or municipal license is required under this article without obtaining said license, or continuing any such activity after the expiration of any State, county, or municipal license, granted under this article, shall be subject to the same liability for criminal prosecution, and for penalties, as is prescribed in § 105-109. (1939, c. 158, s. 523; 1945, c. 708, s. 6.)

**Editor's Note.** — The 1945 amendment added the second sentence.

**§ 18-90. Appropriation for administration.**—For the efficient administration of this article an appropriation is hereby made for the use of the Department of Revenue in addition to the appropriation in the appropriation bill of a sum equal to three per cent (3%) of the total revenue collections under this article to be expended under allotments made by the Budget Bureau of such part of the whole of such appropriation as may be found necessary for the administration of this article. The Budget Bureau may estimate the yield of revenue under this article and make advance apportionment based upon such estimate. (1939, c. 158, s. 524.)

**§ 18-90.1. Sale to minors under eighteen a misdemeanor.**—It shall be unlawful for any person, firm, or corporation to sell or give any of the products authorized to be sold by this article to any minor under eighteen years of age. (1933, c. 216, s. 8.)

**Cross Reference.**—As to sale of liquor to minors under the Alcoholic Beverage Control Act, see § 18-46.

**§ 18-90.2. Revocation of license upon revocation of permit.**—Whenever the State Board of Alcoholic Control shall certify to the Commissioner of Revenue that any permit issued by said Board under the provisions of this chapter has been cancelled or revoked, the Commissioner of Revenue shall thereupon immediately revoke any license which has been issued under this article to the person whose permit has been revoked by said Board, and such revocation by the Commissioner shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1945, c. 903, s. 12.)

**§ 18-91. Violation made misdemeanor; revocation of permits; forfeiture of license.**—Whosoever violates any of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit revoked, and notify the county commissioners accordingly, and no permit shall thereafter be granted to him within a period of three years thereafter. Any licensee who shall sell or permit the sale on his premises or in connection with his business, or otherwise, of any alcoholic bev-

erages not authorized under the terms of this article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1939, c. 158, s. 525.)

§ 18-91.1. **Persons, firms, or corporations engaged in more than one business to pay on each.**—When any person, firm or corporation is engaged in more than one business or trade which is made under the provisions of this article subject to State license taxes, such person, firm, or corporation shall pay the license taxes prescribed in this article for each separate business or trade. (1945, c. 708, s. 6.)

§ 18-92. **Effective date.**—All taxes levied in this article shall be in effect from and after April thirtieth, one thousand nine hundred thirty-nine. (1939, c. 158, s. 528.)

§ 18-93. **Adoption of federal regulations.**—The “Standards of Identity for Wine” and the regulations relating to “Labeling and Advertising of Wine” promulgated by the federal alcohol administration of the United States Treasury Department, and known respectively as Regulation Number Four, Article II, and Regulation Number Four, Articles III and VI, are hereby adopted by North Carolina. (1937, c. 335, s. 2.)

#### ARTICLE 5.

#### *Fortified Wine Control Act of 1941.*

§ 18-94. **Title of article.**—The title of this article shall be the “Fortified Wine Control Act of one thousand nine hundred and forty-one.” (1941, c. 339, s. A.)

**Cross Reference.**—For subsequent law exempting from its application wines defined in this article, see § 18-49.4.

§ 18-95. **Purpose of article.**—The purpose of this article is to prevent and prohibit sales of fortified wines at any places in the State except through county operated alcoholic beverage control stores and to regulate such sales. (1941, c. 339, s. B.)

**Cross Reference.**—As to alcoholic beverage control stores, see §§ 18-36 through 18-62. **Stated** in *State v. Tola*, 222 N. C. 406, 23 S. E. (2d) 321 (1942).

§ 18-96. **Definition of “fortified wines.”**—Fortified wines shall mean any wine or alcoholic beverage made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent of absolute alcohol, reckoned by volume, and which has been approved as to identity, quality and purity by the State Board of Alcoholic Control as provided in this chapter. (1941, c. 339, s. 1; 1945, c. 903, s. 10.)

**Editor’s Note.** — The 1945 amendment added the clause relating to approval by the State Board of Alcoholic Control. **Quoted** in *State v. Tola*, 222 N. C. 406, 23 S. E. (2d) 321 (1942).

§ 18-97. **Certain sales, etc., prohibited; names of persons ordering wines furnished police or sheriff.**—It shall be unlawful for any person, firm or corporation, except alcoholic beverage control stores operated in North Carolina, to sell, or possess for sale, any fortified wines as defined herein. It shall be unlawful for any person to purchase on order and receive by mail or express from any such alcoholic beverage control store fortified wines in quantities in excess of one gallon at any one time. Upon the request of any chief of police or sheriff any alcoholic beverage control system shall furnish the names of any per-

sons ordering such wines, and the dates and amounts of such orders. Nothing herein contained shall be construed to permit any person to order and receive by mail or express any spirituous liquors. (1941, c. 339, s. 2; 1945, c. 635; 1945, c. 708, s. 6.)

**Editor's Note.**—The 1945 amendments appearing after the word “quantities” in the struck out the word “not” formerly ap- second sentence.

§ 18-98. **Violation made misdemeanor.**—The violation of § 18-97 by any person, firm or corporation shall constitute a misdemeanor punishable as provided in § 18-91. (1941, c. 339, s. 5.)

§ 18-99. **Application of other laws; sale of sweet wines; licensing of wholesale distributors.**—The provisions of article 3 of this chapter shall apply to fortified wines: Provided, in any county in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell sweet wines for consumption on the premises in hotels and restaurants which have a Grade A rating from the State Board of Health, and it shall be legal to sell said wines in drug stores and grocery stores for off premises consumption; such sales however shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. For the purpose of this section, sweet wines shall be any wine made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry, which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume, and approved by the State Board of Alcoholic Control as to identity, quality and purity as provided in this chapter: Provided further that the State Alcoholic Control Board shall approve and authorize the licensing of wholesale wine distributors in such counties where alcoholic board control stores are operated. (1941, c. 339, s. 6; 1945, c. 903, s. 11.)

**Local Modification.** — Mitchell: Pub. rewrote the first proviso. Loc. 1937, c. 394; 1941, c. 339, s. 6; Yancey: **Stated in State v. Tola, 222 N. C. 406, 23** Pub. Loc. 1937, c. 579; 1941, c. 339, s. 6. **S. E. (2d) 321 (1942).**

**Editor's Note.** — The 1945 amendment

## ARTICLE 6.

### *Light Domestic Wines; Manufacture and Regulation.*

§ 18-100. **Manufacture of domestic wines permitted.**—It shall be lawful for any person growing crops, either wild or cultivated, of grapes, fruits or berries to make therefrom light domestic wines or wines having only such alcoholic content as natural fermentation may produce, for the use of his family and guests. (1935, c. 393, s. 1.)

**Cross Reference.**—For subsequent law exempting from its application light wines authorized by this article, see § 18-49.4.

§ 18-101. **Manufacture by any person, firm or corporation authorized to do business in State.**—Any person, firm or corporation authorized to do business in the State may, subject to the requirements of the Beverage Control Act, under regulations prescribed by the Commissioner of Agriculture and approved by the Governor, engage in the business of manufacturing and producing wines and ciders by natural fermentation from the juices of fruits, grapes and berries grown within the State, and such wines and ciders shall be classified and recognized as food and distributed as such. (1935, c. 393, s. 3; 1935, c. 466, s. 1.)

§ 18-102. **Rules and regulations of Commissioner of Agriculture.**—The Commissioner of Agriculture shall promulgate and publish such reasonable

rules and regulations, with the approval of the Governor, for the regulation of such wineries as may be established, and such rules and regulations shall have the force and effect of laws, after the same have been approved by the Governor. (1935, c. 393, s. 4.)

**§ 18-103. Information furnished farmers.**—It shall be the duty of the Department of Agriculture to disseminate to the farmers of the State in an economical way the best information it can get of the best methods of cultivation of such crops, and the making of such light domestic wines. (1935, c. 393, s. 7.)

**Cross Reference.**—As to duties of Board of Agriculture with reference to new agricultural industries, especially grapes, etc., see § 106-22, subsec. 6.

**§ 18-104. Fruit ciders included.**—All the provisions of this article shall also apply to the manufacture of fruit ciders. (1935, c. 393, s. 7½.)

ARTICLE 7.

*Beer and Wine; Hours of Sale.*

**§ 18-105. Sale between certain hours unlawful.**—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina to sell, or offer for sale, any beer and/or wine in North Carolina between the hours of eleven-thirty p. m. and seven a. m. every day. (1943, c. 339, s. 1.)

**Editor's Note.**—This section is implicitly repealed as to the sale of beer by § 18-141, providing that beer may not be sold after 11:00 P. M. 27 N. C. Law Rev. 463. For comment on this and the following sections, see 21 N. C. Law Rev. 356.

**§ 18-106. Permitting consumption on premises during certain hours unlawful.**—It shall be unlawful for any person, firm, or corporation, licensed to sell beer and/or wine in North Carolina, to permit or allow the consumption of any beer and/or wine in any place in North Carolina under the control of, or being operated by, said licensee, between the hours of twelve midnight and seven a. m. every day. (1943, c. 339, s. 2.)

**Editor's Note.**—Nothing in article 12 of this chapter purports to change the hours permissible on premises consumption of beer. 27 N. C. Law Rev. 463.

**§ 18-107. Regulation by counties and municipalities.**—In addition to the restrictions on the sale of beer and/or wine set out in §§ 18-105 and 18-106, the county commissioners of the various counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday. The governing bodies of all municipalities in the State shall have, and they are hereby vested with, the full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p. m. on each Saturday until seven a. m. on the following Monday.

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein. (1943, c. 339, s. 3.)

**Local Modification.**—Town of Hamlet in Rockingham in Richmond County: 1945, c. Richmond County: 1945, c. 931; Town of 930.

**§ 18-108. Violation a misdemeanor; revocation of license.**—Any person, firm, or corporation, licensed to sell beer and/or wine, violating the provisions of this article or any person, firm, or corporation, licensed to sell beer and/or wine, violating any regulations which may be made under this article by the county commissioners of the county in which said person, firm, or corporation

is licensed to sell beer and/or wine, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty dollars (\$50.00) and/or imprisoned not less than thirty days, and his or its license to sell beer and/or wine shall automatically be revoked, by the court, or as otherwise provided by law. (1943, c. 339, s. 4.)

§ 18-108.1. **“Beer” defined.**—Wherever used in this article, the word “beer” is defined to include beer, lager beer, ale, porter, and other brewed or fermented beverages containing one-half ( $\frac{1}{2}$ ) of one per cent (1%) of alcohol by volume but not more than five per cent (5%) of alcohol by weight as authorized by the laws of the United States of America. (1945, c. 780.)

#### ARTICLE 8.

##### *Establishment of Standards for Lawful Wine; Permits, etc.*

§ 18-109. **Powers of State Board of Alcoholic Control.**—The State Board of Alcoholic Control shall be referred to herein as “the Board”. The Board is authorized and empowered:

(1) To adopt rules and regulations establishing standards of identity, quality and purity for the wines described in § 18-64 (b) and in article five of this chapter. These standards shall be such as are deemed by said Board to best protect the public against wine containing deleterious, harmful or impure substances or elements, or an improper balance of elements, and against spurious or imitation wines and wines unfit for beverage purposes. Provided, nothing in this or in any other section of this article or act shall authorize said Board to increase the alcoholic content of the wines described in § 18-64 (b) and in article five of this chapter, or to permit the sale or possession of any wines in any county of the State where the same are now or shall hereafter be prohibited by law.

(2) To issue permits to resident or nonresident manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose of resale, or offering wine for sale for the purpose of resale, whether on their own account or for or on behalf of other persons, which permit shall only authorize the possession or sale in this State of wines meeting the standards adopted by the Board; and to revoke any such permit on violation of any of the provisions of this article or of any of the rules and regulations promulgated under the authority of this article.

(3) To test wines possessed or offered for sale, or sold in this State and to make chemical or laboratory analyses of said wines or to determine in any other manner whether said wines meet the standards established by said Board; to confiscate and destroy any wines not meeting said standards; to enter and inspect any premises upon which said wines are possessed or offered for sale; and to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of said wines.

(4) To take all proper steps for the prosecution of persons violating the provisions of this article, and for carrying out the provisions and intent thereof.

(5) To employ such personnel as may be necessary for the efficient administration and enforcement of this article, subject to the provisions of the Executive Budget Act.

(6) To exercise all other powers which may be reasonably implied from the granting of express powers herein, together with such other powers as may be incidental to, or convenient for, the carrying out and performance of the powers and duties herein given to said Board; and to exercise any and all of the powers granted said Board under § 18-39 which are needed for the proper administration and enforcement of this article.

(7) The advertisement and sale of wine in this State shall be subject to all existing laws and the following additional authority and powers hereby expressly granted to the Board:

(a) The Board, in its discretion, may approve or disapprove all forms of advertising of wine, including the type and amount of display material which may be used in the place of business of a retail permit holder;

(b) The Board shall have the sole power, in its discretion, to determine the fitness and qualification of an applicant for a permit to sell wine at retail. The Board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant;

(c) The Board shall have authority, in its discretion, to determine the number of retail permits to be granted in any locality. In addition to the powers herein granted to the State Board of Alcoholic Control, said Board is authorized and empowered to adopt rules and regulations regulating and fixing the hours of sale in the several counties and municipalities therein in which wine is authorized to be sold. The Board shall not issue a permit hereunder for the sale of wine in any pool room or billiard parlor or in any other place of business, of whatsoever kind and character, if in the discretion of the Board, it is not a proper place for the sale of wine;

(d) The Board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner;

(e) Every person intending to apply for any permit to sell wine at retail hereunder shall, not more than thirty (30) days and not less than ten (10) days before applying to the Board for such permit, make application to the county and municipal authority, as provided for in chapter 18, article IV, of the General Statutes of North Carolina, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation in the county, city or town wherein such person proposes to engage in such business;

(f) Every person desiring a permit under the provisions of this subsection shall, after publishing notice of his intention as provided in subsection (e) above, file with the Board an application therefor on forms provided by the Board and a statement in writing and under oath setting forth such information as the Board shall require;

(g) Any objections to the issuance of the permit to an applicant shall be filed in writing with the Board and the Board shall not refuse to grant any such permit except upon a hearing held after ten (10) days' notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to his last known post-office address. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by council;

(h) All persons holding a license to sell wine at retail at the time of the enactment of this law shall be deemed to have complied with all requirements of the Board in filing application for a permit to sell wine at retail, except operators of pool rooms and billiard parlors, but shall be subject to the action of the Board in suspension or revocation of licenses, as provided for herein. All permits shall be for a period of one year unless sooner revoked or suspended and shall be renewable May first of each calendar year;

(i) The Board shall certify to the Department of Revenue the names and addresses of all persons to whom the Board has issued permits and no license issued to an applicant shall be valid until the applicant has obtained the permit, as provided by this subsection;

(j) The Board may suspend or revoke any permit issued by it if in the discretion of the Board it is of the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced;

(k) Before the Board may suspend or revoke any permit issued under the

provisions of this subsection, at least ten (10) days' notice of such proposed or contemplated action by the Board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the Board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post-office address. The Board shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel;

(1) The action of the Board in refusing to issue a permit or in suspending or revoking same pursuant to the provisions of this subsection shall not be subject to review by any court nor shall any mandamus lie in such case;

(m) In case where the Board suspends or revokes a permit, the Board shall grant the permittee a reasonable length of time in which to dispose of his stock.

(8) All licenses shall be issued under the provisions of article IV of chapter 18 of the General Statutes. The granting of a permit hereunder to sell wine shall be required in addition to the requirements of article IV of chapter 18 of the General Statutes as to securing a license to sell wine at retail. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3.)

**Editor's Note.**—The 1947 amendment rewrote the preliminary paragraph and added subsections (7) and (8). Section 3 of the amendatory act provides that the act shall not repeal any special, public-local or private act prohibiting the sale of wine in any county in this State, or any act authorizing the board of commissioners of any county of this State, or the governing board of any municipality, in its discretion,

to prohibit the sale of wine; and shall not repeal any act prohibiting the sale of wine by vote of the people of any county or municipality and any county or municipality in which wine is permitted to be sold hereafter under the provisions of article 11 of this chapter.

For discussion of the amendatory act, see 23 N. C. Law Rev. 350.

**§ 18-110. Duties of persons possessing wine or offering the same for sale.**—All persons possessing or offering for sale or reselling any of the wines described in § 18-64 (b) and in article five of this chapter, shall keep clear, complete and accurate records which will reveal the sources from which said wines were acquired, the date of acquisition, and any other information which may be required to be preserved by rules and regulations of the Board. All such persons shall freely permit representatives of the Board to enter and inspect the premises upon which such wines are possessed or offered for sale, to test and analyze any of such wines, and to examine all books, records, accounts, invoices, or other papers or data relating to such wines. (1945, c. 903, s. 1.)

**§ 18-111. Statement of analysis to be furnished.**—Manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon the request of the Board, furnish a verified statement of a laboratory analysis of any wine sold or offered for sale by such persons. (1945, c. 903, s. 1.)

**§ 18-112. Manufacturers, bottlers, wholesalers, et cetera, to obtain permit for sale from Board.**—All manufacturers of wine, wineries, bottlers of wine, wholesalers of wine, or any other persons selling wine for the purpose of resale, whether on their account or for or on behalf of other persons, whether any of such manufacturers, wineries, bottlers, wholesalers or other persons are residents or nonresidents of this State, shall, as a condition precedent to the sale or the offering for sale of any wine described in § 18-64 (b) and in article five of this chapter, apply for and obtain from the State Board of Alcoholic Control a permit for the sale of wines approved by said Board. The sale of wines without

such a permit, or the sale with such a permit of wines not approved by the Board, shall be unlawful. (1945, c. 903, s. 1.)

**§ 18-113. Violation misdemeanor; permit revoked.**—Any person who violates any of the provisions of this article, or any of the rules and regulations promulgated under the authority of this article, shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. Any permit issued under authority hereof shall be subject to suspension or revocation by the Board when it appears that the permit holder has violated any of the provisions of this article. Provided, however, that when the Board shall determine that any person has violated any of the provisions hereof, before his permit shall be either suspended or revoked, he shall be given five (5) days' written notice, by registered mail, advising the permit holder of the charges against him and fixing a day, hour and place for a hearing, which hearing shall be conducted by the Board. The permit holder shall be entitled to appear in person or be represented by counsel at such hearing. (1945, c. 903, s. 1.)

**§ 18-113.1. Misdemeanor for retailer to sell unapproved wines.**—It shall be unlawful for any person selling at retail any of the wines described in § 18-64 (b) and in article five of this chapter, to sell wines, the brands of which are not on the approved list of wines prepared by the State Board of Alcoholic Control, unless specific authority for the sale of said wines has been obtained from said Board. It shall be the duty of all retailers to secure from the State Board of Alcoholic Control an approved list of wines and it shall be unlawful for retailers to purchase from manufacturers, wholesalers or distributors any wines not on said approved list, unless specific authority for such purchase is obtained from the State Board of Alcoholic Control.

It shall be unlawful for any person other than a manufacturer, distributor or bottler to buy, or to sell at retail to any one person, more than one gallon of wine at any one time, whether in one or more places.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1945, c. 903, s. 1; 1949, c. 1251, s. 3.)

**Editor's Note.**—The 1949 amendment inserted the second paragraph. Section 4½ of the amendatory act provides that its provisions shall apply only to the counties and cities that have established or may establish alcoholic beverage control stores.

**§ 18-113.2. Types of wine included under provisions of article.**—The types of wine included under the provisions of this article shall include all types of wine as defined in G. S. § 18-64 (b) and article 5 of this chapter. (1949, c. 1251, s. 1.)

**Editor's Note.**—Section 4½ of the act from which this section was codified provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores."

**§ 18-114. Funds for administration of article.**—The Governor and the Council of State are authorized to allocate from the contingency and emergency fund such funds for the administration of this article as may be found to be necessary. (1945, c. 903, s. 1.)

**§ 18-115. Definition of "person."**—As used in this article, the word "person" shall include natural persons, partnerships, associations, joint stock companies, corporations, and any other form of organization for the transaction of business. (1945, c. 903, s. 1.)

**§ 18-116. Effective date; disposition of wines on hand.**—This article shall be effective from and after the ratification of this article. Provided, no standards adopted by the State Board of Alcoholic Control shall be effective until thirty days after the adoption of the regulation establishing said standards; and



provided further, that any person affected by the adoption of any standard by the Board shall be granted sixty days after the effective date of the standard within which to dispose of any wines on hand at the effective date of said standard which do not comply with said standard. (1945, c. 903, s. 1.)

**Editor's Note.**—The act inserting this article was ratified on March 19, 1945.

**§ 18-116.1. Additional power of local governing body to suspend or revoke retail wine license.**—In addition to the other grounds provided by law for refusing to grant, or for revoking or suspending wine licenses, the governing body of any county or city may revoke or suspend the license of any retail licensee within its jurisdiction for violating any existing law or regulation of the Board concerning the sale of wine. In any proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him, and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 1251, s. 4.)

**Editor's Note.**—Section 4½ of the act adding §§ 18-116.1 through 18-116.5 provides: "The provisions of this act shall apply only to the counties and cities that have or may establish alcoholic beverage control stores." For comment on this and the four following sections, see 27 N. C. Law Rev. 463.

**§ 18-116.2. Authority of local A. B. C. boards to revoke or suspend permit or limit sales to A. B. C. stores.**—In addition to the authority of the State Board, the local A. B. C. boards may, within their respective counties, suspend or revoke any permit for the sale of wine if in the discretion of the local A. B. C. board it is of the opinion that the permittee is not a suitable person to hold such permit, or that the place occupied by the permittee is not a suitable place, or that the number of permits issued should be reduced; provided, further, that the local A. B. C. boards shall have and retain at all times the discretionary right to limit, within the territory over which they have jurisdiction, the sale of wine to A. B. C. stores exclusively, if in the opinion of a local A. B. C. board conditions warrant such restriction. (1949, c. 1251, s. 4.)

**Cross Reference.**—See note under § 18-116.1.

**§ 18-116.3. Effect of revocation of license or permit by local authority.**—In the event any county or municipality, through its governing body, shall for cause revoke any license, such revocation shall automatically revoke any other wine license or permit held by the licensee; and in all cases where a permit is revoked by the Board or a local A. B. C. board, such revocation shall render void any State, county, or municipal license issued hereunder. (1949, c. 1251, s. 4.)

**Cross Reference.**—See note under § 18-116.1.

**§ 18-116.4. Authority of local boards to restrict days and hours of sale of wine.**—In addition to the authority of the State Board to regulate and fix the days and hours of the sale of wine, the local A. B. C. boards shall have authority, in their discretion, to further restrict the days and hours of the sale of wine within their respective territories. (1949, c. 1251, s. 4.)

**Cross Reference.**—See note under § 18-116.1.

**§ 18-116.5. Investigation of licensed premises; examination of books, etc.; refusal to admit inspector; powers and authority of inspectors; use of A. B. C. officers as inspectors.**—All officers, inspectors and investigators appointed by either the State Board or local A. B. C. boards shall have authority to investigate the operation of the licensed premises of all persons licensed under this article, to examine the books and records of such

licensee, to procure evidence with respect to the violation of this article, or any rules and regulations adopted thereunder, and to perform such other duties as the Board may direct. Such inspectors shall have the right to enter any such licensed premises in the State in the performance of their duty, at any hour of the day or night when wine is being sold or consumed on such licensed premises. Refusal by such permittee or by any employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The officers, inspectors and investigators so appointed shall, after taking the oath prescribed for peace officers, have the same powers and authority, including the right to serve all criminal process and to make arrests, as other peace officers.

All alcoholic beverage control officers now employed, or who may hereafter be employed, may be used by the Board, or the local A. B. C. boards, as inspectors in counties and cities having alcoholic beverage control stores, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 1251, s. 4.)

**Cross Reference.**—See note under § 18-116.1.

#### ARTICLE 9.

##### *Substandard, Imitation and Synthetic Wines.*

§ 18-117. **Possession or sale prohibited.**—It shall be unlawful for any retail wine licensee in the State of North Carolina to have in his possession, to sell, or offer for sale any imitation, substandard, or synthetic wine. (1945, c. 974, s. 1.)

§ 18-118. **Violation a misdemeanor.**—Violation of the provisions of this article shall constitute a misdemeanor and be punishable by a fine or imprisonment in the discretion of the court. (1945, c. 974, s. 2.)

#### ARTICLE 10.

##### *Regulation or Prohibition of Sale of Wine.*

§ 18-119. **Certain counties authorized to regulate or prohibit sale of wine.**—From and after the effective date of this article, the board of county commissioners of Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties shall have full power and authority, by resolution duly adopted, to regulate or prohibit the sale of wine within said respective counties, except that it may not prohibit the sale of wine in any municipality of said counties unless the governing body adopts a resolution prohibiting the sale of wine within the corporate limits of said municipality. (1945, c. 1076, s. 1; 1947, c. 886, s. 1; 1947, c. 918, s. 1.)

**Editor's Note.**—By Session Laws 1945, c. 961, the commissioners of Swain County, and the governing authority of any municipality therein, may decline to issue any license authorized under this chapter for the sale of wine. And by Session Laws 1945,

cc. 927, 1092, the commissioners of Bladen County may do the same.

The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

§ 18-120. **Municipalities in certain counties authorized to regulate or prohibit sale of wine.**—The governing body of any municipality in Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties, from and after the effective date of this article shall have full power and authority, by resolution

adopted, to regulate or prohibit the sale of wine within the corporate limits of its municipality. (1945, c. 1076, s. 2; 1947, c. 886, s. 2; 1947, c. 918, s. 2.)

**Editor's Note.**—The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

**§ 18-121. Rules and regulations.**—The board of county commissioners of Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties and/or the governing body of any municipality of said counties may adopt rules and regulations regulating the sale of wine within the territory specified in §§ 18-119 and 18-120, fixing the hours of sale, the places of business to which license may be issued, the location of places of business which may engage in the sale of wine, and pass upon the qualifications of applicants for license and may in its discretion prescribe the terms and conditions upon which a licensee may engage in the sale of wine. (1945, c. 1076, s. 3; 1947, c. 886, s. 3; 1947, c. 918, s. 3.)

**Editor's Note.**—The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

**§ 18-122. Effective date of resolution prohibiting sale.**—Upon the passage or adoption of any resolution as provided in this article, prohibiting the sale of wine, any person, firm, or corporation theretofore licensed to sell wine and having on hand stocks of wine, shall have thirty (30) days from the date of the passage of such resolution in which to dispose of such stock of wine. (1945, c. 1076, s. 4.)

**§ 18-123. Violation a misdemeanor.**—Any person, firm, or corporation violating the provisions of this article or any resolution adopted by the board of commissioners of either Buncombe, Caswell, Chatham, Cleveland, Duplin, Gates, Hertford, Montgomery, Moore, Richmond, Rockingham and Rutherford counties or the governing body of any municipality therein, pursuant to the authority prescribed herein, shall be guilty of a misdemeanor, and upon conviction or confession of guilt, shall be punished in the discretion of the courts. (1945, c. 1076, s. 5; 1947, c. 886, s. 4; 1947, c. 918, s. 4.)

**Editor's Note.**—The 1947 amendments inserted "Cleveland" and "Rockingham" in the list of counties.

## ARTICLE 11.

### *Elections on Question of Sale of Wine and Beer.*

**§ 18-124. Provision for elections in counties or municipalities.**—  
(a) **Compliance with Article Required.**—For the purpose of determining whether or not wine or beer or both shall be sold in any municipality having a population of one thousand (1,000) or more according to the last federal census or within the area of any county outside the corporate limits of such a municipality, an election shall be called within any such municipality or within the county as a whole when, and only when, the conditions of this article are complied with.

(b) **Petition Requesting Election.**—Upon the presentation to it of a petition signed by fifteen per cent (15%) of the registered voters of the county that voted for Governor in the last election requesting that an election be held for the purpose of submitting to the voters of the county the question of whether or not wine or beer or both shall legally be sold therein, the county board of elections shall call an election for the purpose of submitting said question or questions to the voters of the county.

(c) **Requirements Concerning Petition.**—No petition filed pursuant to the provisions of this article shall be considered by the county board of elections

unless said petition shall state upon its face that at the election requested by those signing the petition there shall be submitted to the voters (1) the question of the legal sale of wine or (2) the question of the legal sale of beer or (3) the question of the legal sale of both wine and beer. Nor shall any petition be considered unless it states that the signers thereof are registered voters of the county in which the election is requested. The signatures on said petition shall be in the genuine handwriting of the signers, and said petition shall show opposite the name of each signer the correct precinct in which petitioner last voted. Failure to comply with any of the provisions herein shall disqualify the name of said petitioner.

(d) **Time of Calling Election.**—The county board of elections shall upon request, prepare and furnish petition forms to any person wishing to circulate a petition calling for an election on beer or wine or both. The board of elections, having had a request for petition forms, shall date such forms and the petition must be completed and returned to the board of elections within ninety (90) days from date of delivery to petitioner. Failure to return such petition in ninety (90) days shall render the same void. It shall also be the duty of the board of elections, upon release of petition forms, to give public notice of the fact that such petition is being circulated. Whenever a petition for an election is presented to the county board of elections, pursuant to the provisions of this article, said board shall within thirty (30) days call the election petitioned for.

(e) **Notice and Conduct of Election.**—Thirty days' public notice shall be given of any election called pursuant to the provisions of this article prior to the opening of the registration books for the same, and such election shall be held under the same law and regulations as are provided for the election of members of the General Assembly, except that no absentee ballots shall be voted in said election.

(f) **Restrictions as to Time of Election.**—No election shall be held pursuant to the provisions of this article in any county within sixty (60) days of the holding of any general election, special election, or primary election in said county or any municipality thereof.

(g) **Time between Elections.**—Whenever an election is held pursuant to the provisions of this article in any county, no other election pursuant to the provisions of this article shall be held in such county within three (3) years of the holding of the preceding election pursuant to the provisions of this article: Provided, that this subsection shall not prevent the holding of a municipal election in such county as hereinafter provided within three (3) years of the holding of said county election. (1947, c. 1084, s. 1; 1951, c. 999, ss. 1, 2.)

**Local Modification.**—Moore, as to subsection (f): 1951, c. 732.

**Editor's Note.**—The 1951 amendment inserted the last two sentences of subsection (c) and rewrote subsection (d).

For brief discussion of act from which this article was codified, see 25 N. C. Law Rev. 382.

**Requisite Signers of Petition.**—The requirement that a petition for an election on the question of prohibiting the sale of beer and wine in a county shall be signed by 15% of the registered voters of the county who voted for Governor in the last general election, was held to refer to the total number of votes cast for Governor in such election and does not require that each signer of the petition should have personally voted for gubernatorial candidate in such election. Weaver v. Morgan, 232 N. C. 642, 61 S. E. (2d) 916 (1950).

**Restriction as to Time of Election.**—A

county may not hold an election on the question of legalizing the sale of beer and wine therein within sixty days from an election in a municipality of the county on the same question, irrespective of the time of making the order calling such election. Ferguson v. Riddle, 233 N. C. 54, 62 S. E. (2d) 525 (1950).

As this section makes no exceptions as to the requirement that an election on the question of legalizing the sale of beer and wine shall not be held within sixty days of the holding of a municipal election it is always within the power of a municipality in the county, if it sees fit, to render ineffectual a county election on the legal sale of beer and wine by calling a municipal election within the sixty-day period. Ferguson v. Riddle, 233 N. C. 54, 62 S. E. (2d) 525 (1950).

**Cited in** State v. Cochran, 230 N. C. 523, 53 S. E. (2d) 663 (1949).

§ 18-125. **Form of ballots.**—If such election is called to determine whether or not wine shall be sold within the county, the ballot shall contain the following:

- For the legal sale of wine
- Against the legal sale of wine

If such election is called to determine whether or not beer shall be sold within the county, the ballot shall contain the following:

- For the legal sale of beer
- Against the legal sale of beer

If such an election is called to determine whether or not wine and/or beer shall be sold within the county, the ballot shall contain the following:

- For the legal sale of wine
- Against the legal sale of wine
- For the legal sale of beer
- Against the legal sale of beer

(1947, c. 1084, s. 2.)

§ 18-126. **Effect of vote for or against sale of beer or wine.**—(a) **Vote on Sale of Beer.**—If a majority of the votes cast in such election shall be for the legal sale of beer, then the governing board of the county and the governing board of each municipality in said county shall issue licenses to sell beer as defined in G. S. § 18-64 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of beer, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any beer of more than one-half of one per cent of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of beer.

(b) **Vote on Sale of Wine.**—If a majority of the votes cast in such election shall be for the legal sale of wine, then the governing board of the county and the governing board of each municipality in said county shall issue to applicants entitled to same licenses to sell wine as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes notwithstanding any public, special, local or private act to the contrary, whether passed before or after the ratification of this article.

If a majority of the votes cast in such election shall be against the legal sale of wine, then after the expiration of sixty (60) days from the day on which the election is held it shall be unlawful to sell or possess for the purpose of sale in the county, either within or without the corporate limits of municipalities therein, any wine of more than three per cent (3%) of alcohol by volume, and such sale or possession for the purpose of sale shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court. This paragraph shall not apply to any municipality in which an election is held as hereinafter provided after the holding of a county election, and at which a majority of the votes cast shall be for the sale of wine. (1947, c. 1084, s. 3.)

**Stay of Judgment.**—Defendant was convicted of the unlawful sale of tax-paid beer in a trial free from error. The solicitor formally admitted that at the time of the sale, defendant possessed and displayed licenses for the sale of beer from the city, county

and State, which “were then in full force and effect,” and this admission was fully supported by the testimony offered. The Supreme Court stayed the judgment, since the judicial admission of the solicitor brought the sale within the protective pro-

visions of the statute and disclosed that no criminal offense had been committed. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663 (1949).

**§ 18-127. Elections in certain municipalities after majority vote in county against sale of wine or beer.**—After the holding of a county election pursuant to the provisions of this article in which a majority of the votes cast is against the legal sale of wine or beer or both, the governing board of any municipality in said county having a population of one thousand (1,000) or more according to the last federal census shall call an election to determine whether or not the beverage or beverages, the legal sale of which has been prohibited as a result of said county election, shall legally be sold within the corporate limits of said municipality notwithstanding the results of the county election. An election authorized by this section shall be called by the governing board of the municipality only upon being presented with a petition signed by fifteen per cent (15%) of the registered voters of said municipality that voted for the governing body of such municipality in the last primary or election in whichever voted the greatest number of votes requesting that such election be held.

The petition shall state whether the election is to be held to determine whether or not wine or beer or both is legally to be sold within said municipality, but no election shall be held in said municipality to determine whether or not any beverage is legally to be sold therein unless the sale of such beverage has been prohibited in the county in which said municipality is located. No petition shall be considered unless it complies with this paragraph nor unless it states that the signers thereof are registered voters of the municipality in which the election is requested.

The provisions of this article, including the laws and regulations adopted by reference, relating to county elections, including the provisions relating to the calling of elections, notice of elections, holding of elections, ballots, and results of elections, are hereby in all respects made applicable to any municipal election held pursuant to the provisions of this section except that the county board of elections shall not conduct any such election.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be against the sale of the beverage or beverages voted on, then the sale or possession for the purpose of sale of such beverage or beverages shall constitute a misdemeanor, the punishment for which shall be in the discretion of the court as hereinbefore provided.

If a majority of the votes cast in any election held pursuant to the provisions of this section shall be for the sale of the beverage or beverages voted on, then the governing board of said municipality shall issue to applicants entitled to same licenses to sell such beverage or beverages as defined in G. S. §§ 18-64 and 18-99 as provided in chapter 18 of the General Statutes, notwithstanding the result of the county election or any public, special, local or private act to the contrary, whether passed before or after the ratification of this article. (1947, c. 1084, s. 4.)

**§ 18-128. Wine for sacramental purposes not prohibited.**—Nothing in this article shall prevent the purchase or possession of wine for sacramental purposes by any organized church or ordained minister of the gospel. (1947, c. 1084, s. 6.)

**Local Modification.**—Dare, Moore and Washington: 1951, c. 257.

**§ 18-128.1. Certain wholesalers excepted.**—Nothing in this article shall prevent bottlers, manufacturers or wholesalers of beer, who have complied with article 12 of chapter 18 of the General Statutes, from bottling, manufacturing, possessing, transporting or selling beer as a wholesaler to any person, firm or corporation who has complied with the provisions of article 12 of chapter 18 of the General Statutes. (1951, c. 998, s. 1.)

## ARTICLE 12.

*Additional Powers of State Board over Malt Beverages.*

§ 18-129. **Power of State Board of Alcoholic Control to regulate distribution and sale of malt beverages; determination of qualifications of applicant for permit, etc.**—The State Board of Alcoholic Control shall be referred to herein as “the Board”, and said Board in addition to all powers now conferred upon it by law is hereby vested with additional powers to regulate the distribution and sale of malt beverages as follows:

The distribution and sale of beer in this State shall be subject to all existing laws and the following additional authority and powers are hereby expressly granted to the Board.

The Board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture or bottle beer. The Board shall inquire into the character of the applicant, the location, general appearance and type of place of business of the applicant. (1949, c. 974, s. 1.)

**Editor’s Note.**—For comment on this article, see 27 N. C. Law Rev. 463.

§ 18-130. **Application for permit; contents.**—All resident bottlers or manufacturers of beer and all resident wholesalers and retailers of beer shall file a written application for a permit with the State Board of Alcoholic Control, and in the application shall state under oath therein:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by a street and number if practicable; if not, by such other apt description as definitely locates it; and if said place is outside a municipality within the county, the distance to the nearest church or public or private school from said place;

(3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises;

(4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;

(5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;

(6) That the applicant has been a bona fide resident of this State for a period of at least one year immediately preceding the date of filing his application and that he is not less than twenty-one years of age;

(7) The place of birth of applicant and that he is a citizen of the United States, and, if a naturalized citizen, when and where naturalized;

(8) That the applicant has never been convicted of a felony or other crime involving moral turpitude; and that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either State or federal;

(9) That the applicant has not during five years next preceding the date of said application had any permit or license issuable hereunder or any license issued to him pursuant to the laws of this State, or any other state, to sell alcoholic beverages of any kind revoked;

(10) That the applicant is not the holder of a federal special tax liquor stamp;

(11) If the applicant is a firm, association or partnership, the application shall state the matters required in subsections (6), (7), (8) and (9), with respect to each of the members thereof, and each of said members must meet all of the requirements in said subsections provided;

(12) If the applicant is a corporation, organized or authorized to do business

in this State, the application shall state the matters required in subsections (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five per cent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation, and each of said persons must meet all the requirements in said subsections provided; provided, however, that the requirement as to residence shall not apply to said officers, directors and stockholders of such corporation, but such requirement shall apply to any such officer, director or stockholder, agent or employee who is also the manager and in charge of the premises for which permit is applied for. (1949, c. 974, s. 1.)

**§ 18-131. Application to be verified; refusal or revocation of permit; penalty for false statement; independent investigation of applicant.**—The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The foregoing provisions and requirements are mandatory prerequisites for the issuance of a permit and in the event any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, permit shall be refused. If a permit is granted on any application, containing a false statement knowingly made, said permit shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor and subject to the penalty provided by law for misdemeanors. In addition to the information furnished in any application, the chief of malt beverage division shall make such additional and independent investigation of each applicant, and of the place to be occupied, as deemed necessary or advisable. (1949, c. 974, s. 2.)

**§ 18-132. Permit revoked if federal special tax liquor stamp procured.**—If an applicant, after obtaining a permit, shall procure a federal special tax liquor stamp, the Board shall revoke his permit forthwith. (1949, c. 974, s. 3.)

**§ 18-133. Notice of intent to apply for permit; posting or publication of notice; objections to issuance of permit and hearing thereon.**—Every person intending to apply for any permit to sell beer at retail hereunder shall, not more than thirty days and not less than ten days before applying to the Board for such permit, give written notice of such intention to the county and municipal authorities in which applicant proposes to maintain his business, and shall post a notice of such intention on the front door of the building, place or room where he proposes to engage in such business, or publish such notice at least once in a newspaper published in or having a general circulation in the county, city or town wherein such persons propose to engage in such business.

Any objections to the issuance of the permit to an applicant shall be filed in writing with the Board and the Board shall not refuse to grant any such permit except upon a hearing, if requested in writing by applicant, held after ten days' notice to the applicant of the time and place of such hearing, which notice shall contain a statement of the objections to granting such permit and shall be served on the applicant by sending same to the applicant by registered mail to the address given in his application. The applicant shall have the right to produce evidence in his behalf at the hearing and be represented in person or by counsel. (1949, c. 974, s. 4.)

**§ 18-134. Status of persons holding license at time of ratification of article.**—All persons holding a license to sell beer at retail at the time of the ratification of this article shall be deemed to have complied with all the requirements of the Board in filing application for a permit to sell beer at retail; provided, however, that such licensee shall make application for a permit in the manner prescribed in this article on or before June 30, 1949, and upon failure to make such application, such license held by such retailer shall be void. (1949, c. 974, s. 5.)



**§ 18-135. Certification to Department of Revenue of permits issued; issuance of license; revocation of permit or license.**—The Board shall certify to the Department of Revenue the names, locations and addresses of all persons to whom the Board has issued permits, and no license issued to an applicant (subject, however, to the provisions of § 18-134) shall be valid until the applicant has obtained the permit as provided by this article.

Provided, however, that when a permit has been issued by the Board the permittee, upon payment of fees now provided by law, shall have license issued to him by the Commissioner of Revenue and by the governing body of any county or municipality wherein said permittee shall conduct his business. In all cases where a permit is revoked by the Board, such revocation shall render void any State, county or municipal license issued hereunder and in the event any county or municipality through its governing body shall for cause revoke any license such revocation shall automatically revoke any other malt beverage license or permit held by the licensee.

Provided, further, however, that the jurisdiction herein conferred upon the Board to revoke or suspend permits shall not preclude the governing body of any county or municipality from revoking or suspending the license of any retail licensee within its jurisdiction for violating any existing law regulating the sale of malt beverages or of the provisions of this article. In any proceeding before such governing body for the revocation or suspension of a retailer's license, the licensee shall be given due notice of the charges against him and be given an opportunity to appear personally and by counsel in his defense. (1949, c. 974, s. 6.)

**§ 18-136. Suspension or revocation of permit upon personal disqualification, etc.**—The Board may suspend or revoke any permit issued by it if in the discretion of the Board it is the opinion that the permittee is not a suitable person to hold such permit or that the place occupied by the permittee is not a suitable place. (1949, c. 974, s. 7.)

**§ 18-137. Hearing upon suspension or revocation of permit.**—Before the Board may suspend or revoke any permit issued under the provisions of this article, at least ten days' notice of such proposed or contemplated action by the Board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the Board, and shall be served on the permittee by sending the same to such permittee by registered mail to his last known post-office address. The Board shall in such notice appoint a time and place when and at which the said permittee shall be heard as to why the said permit shall not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel. (1949, c. 974, s. 8.)

**§ 18-138. Rules and regulations for enforcement of article.**—The Board is hereby vested with power to adopt rules and regulations for carrying out the provisions of this article, but not inconsistent herewith, and to amend or repeal such regulation. Every regulation or amendment thereto adopted by the Board shall become effective on the tenth day after the date of its adoption and the filing of a certified copy thereof in the office of the Secretary of State. (1949, c. 974, s. 9.)

**§ 18-139. Effect of article on existing local regulations as to sale of beer.**—Nothing in this article shall require any county or municipality to issue licenses for any territory where the sale of beer is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of beer is unlawful as a result of local option election, and this article shall not repeal any special, public-local or private act prohibiting the sale of beer in any county in

this State, or any act authorizing the board of commissioners of any county of this State, or the governing body of any municipality, in its discretion, to prohibit the sale of beer. (1949, c. 974, s. 10.)

**§ 18-140. Chief of malt beverage division and assistants; inspectors.**—(a) To more adequately insure the strict enforcement of the regulations of the Board and of the provisions of this article, the Board shall appoint a person to be known and designated as “chief of malt beverage division”, who shall be in charge of the administration of such division. Said Board in addition to said chief of malt beverage division may appoint one or more assistants to the chief of the malt beverage division, all of whom shall have full authority to make investigations, hold hearings and to make findings of fact. Upon the approval of the said Board of the findings and orders of suspension or revocation of the permit of any licensee, such findings of said chief, assistant or assistants shall be deemed to be the findings and the order of the Board. The Board shall employ an adequate number of field men to be designated as “inspectors”, not less than fifteen in number who shall devote their full time to the enforcement of the provisions of this article and such rules and regulations as may be promulgated thereunder by the Board.

(b) Such inspectors shall investigate the operation of the licensed premises of all persons licensed under this article, examine the books and records of such licensee, procure evidence with respect to the violation of this article or any rules and regulations adopted thereunder and perform such other duties as the Board may direct. Such inspectors shall have the right to enter any such licensed premises in the State in the performance of their duty at any hour of the day or night. Refusal by such permittee or by any other employee of a permittee to permit such inspectors to enter the premises shall be cause for revocation or suspension of the permit of such permittee. The inspectors so appointed shall, after taking the oath prescribed for peace officers, have the same power and authority in the enforcement of this article as other peace officers.

(c) All alcoholic beverage control officers now employed or who may hereafter be employed may be used by the Board as inspectors in counties and cities having alcoholic beverage control stores in addition to the other inspectors provided for under this article, and shall be vested with all powers and authority as herein vested in inspectors. (1949, c. 974, s. 11; 1951, c. 1056, s. 1; 1951, c. 1186, ss. 1, 2.)

**Editor’s Note.**—The first 1951 amendment deleted the words “when beer is being sold or consumed on such licensed premises” formerly appearing at the end of the first sentence of subsection (b). The

second 1951 amendment deleted the provisions formerly appearing in subsections (a) and (b) with respect to the compensation of the chief inspector and inspectors.

**§ 18-141. Sale and consumption of beer during certain hours prohibited.**—No beer shall be sold between the hours of 11:45 P. M. and 7:30 A. M., nor shall any beer be consumed in any place where beer is sold between the hours of 12 o’clock midnight and 7:30 A. M. (1949, c. 974, s. 12; 1951, c. 997, s. 1.)

**Editor’s Note.**—The 1951 amendment changed the hour “11:00 P. M.” to “11:45 P. M.” Prior to the amendment this section prohibited sales only.

prohibits the sale of beer and/or wine after 11:30 P. M., was implicitly repealed as to the sale of beer by the former provision in this section that beer may not be sold after 11:00 P. M. 27 N. C. Law Rev. 463.

**Effect on § 18-105.**—Section 18-105, which

**§ 18-142. Keeping places of business clean, etc.**—The Board shall require that all retail permit holders keep their places of business clean, well lighted and in an orderly manner. (1949, c. 974, s. 13.)

**§ 18-143. Appropriation for malt beverage division.**—For the efficient administration and enforcement of this article, an appropriation is here-

by made for the use of the State Board of Alcoholic Control, which appropriation shall be in addition to the appropriation to the State Board of Alcoholic Control in the biennial appropriation acts, of a sum in an amount not less than three per cent (3%) and not more than five per cent (5%) of the total malt beverage taxes collected by the Commissioner of Revenue, the percentage within the limitations herein provided to be determined by the State Board of Alcoholic Control and certified to the Director of the Budget. The appropriation herein provided shall be deducted before the distribution as provided under subsection (t) of § 18-81, G. S., is made. The Director of the Budget shall estimate the amount of the appropriation to be provided by the percentage of collections requested by State Board of Alcoholic Control and shall make advance allocation based upon such estimate, and the enforcement fund provided by such appropriation shall be set up in a special fund to be designated as "the Malt Beverage Control and Enforcement Fund". (1949, c. 974, s. 16.)

§ 18-144. **Application of article.**—This article shall apply to all licenses to be issued for the license tax year 1949-1950 and thereafter. (1949, c. 974, s. 17.)

#### ARTICLE 13.

##### *Wholesale Malt Beverage Salesman's Permit.*

§ 18-145. **Permit required; renewal.**—Every salesman for a wholesale distributor of malt beverages shall apply, by May 1, 1951, to the Board for a wholesale salesman's permit to sell such beverages, and shall renew the permit by May 1 of each succeeding year thereafter. This shall be deemed to include salesmen stationed at the wholesaler's warehouse as well as route salesmen who sell and deliver malt beverages to retailers. All persons entering such employment after May 1, 1951, shall apply to the Board in like manner for a salesman's permit. (1951, c. 378, s. 1.)

§ 18-146. **Qualifications of applicant.**—Such salesman shall be 21 years of age, a citizen of the United States, and no salesman's permit shall be issued to any person who has been convicted within two years preceding the filing of his application of violating the State or federal prohibition laws, or who has been convicted of a felony or of any crime involving moral turpitude. No salesman's permit shall be issued to any person whose permit or license issued to him pursuant to the laws of this State or any other state to sell alcoholic beverages of any kind has been revoked during the two years next preceding the date of application for a permit. (1951, c. 378, s. 2.)

§ 18-147. **Salesmen licensed at time of ratification of article.**—All persons holding a malt beverage salesman's license on March 27, 1951 shall be deemed to have complied with all the requirements of the Board in filing application for a permit to sell malt beverages at wholesale, except in cases where the Board upon investigation finds as a fact that the holder of such a license is an undesirable person to be engaged in the beer business. (1951, c. 378, s. 3.)

§ 18-148. **License invalid until permit obtained.**—The Board shall certify to the Department of Revenue the names, locations, and addresses of all persons to whom the Board has issued wholesale salesmen's permits, and no license issued to an applicant shall be valid until the applicant has obtained a permit as provided by this article. (1951, c. 378, s. 4.)

§ 18-149. **Suspension and revocation; acting without permit a misdemeanor.**—The Board may suspend or revoke any permits issued by it if the salesman holding such permit is adjudged guilty by the Board of violating any of the North Carolina laws or regulations pertaining to the sale of malt beverages; any person who shall engage in the wholesale sale or distribution of malt

beverages as a salesman without a permit from and after May 1, 1951, shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1951, c. 378, s. 5.)

§ 18-150. **Salesman responsible for acts of helper.**—Each route salesman shall be responsible under this article for all sales and deliveries of malt beverages by his helper. (1951, c. 378, s. 6.)

§ 18-151. **Hearing.**—Permit holders cited for violation by the Board shall have the right to a hearing as provided by law in G. S. 18-137. (1951, c. 378, s. 7.)

§ 18-152. **Employing salesman who has no permit.**—No wholesale distributor of malt beverages shall after May 1, 1951, employ as a salesman any person who does not have a salesman's permit, and the permits of wholesale distributors violating the provisions of this section shall be subject to revocation or suspension by the Board. (1951, c. 378, s. 8.)

**Chapter 19.**

**Offenses against Public Morals.**

- Sec. 19-1. What are nuisances under this chapter.
- 19-2. Action for abatement; injunction.
- 19-3. When triable; evidence; dismissal of complaint.
- 19-4. Violation of injunction; punishment.
- 19-5. Order abating nuisance; what it shall contain.

- Sec. 19-6. Application of proceeds of sale.
- 19-7. How order of abatement may be canceled.
- 19-8. Attorney's fees may be taxed as costs.

§ 19-1. **What are nuisances under this chapter.**—Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey, or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C. S., s. 3180; 1949, c. 1164.)

**Cross References.**—As to criminal actions: For prostitution, see § 14-203 et seq.; for gambling, see § 14-289 et seq.; for unlawful sale of whiskey, see § 18-31 et seq.; for lewdness, etc., see § 14-190.

**Editor's Note.**—The 1949 amendment inserted the words "or illegal sale of narcotic drugs as defined in the Uniform Narcotic Drug Act."

**Constitutionality.**—This section, et seq., providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the State. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938). See also, *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610 (1940).

**Nuisance Need Not Be Nucleus of Crime.**—It is not essential to the nuisance defined by this section that the acts of the customers, which impart that quality to the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, the law is not under the necessity of predicating one crime upon another to make valid its denunciation of an act which it denominates a nuisance. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d)

286 (1942).

**Establishment Facilitating Betting on Races.**—The maintenance of an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the State, and through which wagers were paid off to successful betters, constitutes a public nuisance. *State v. Brown*, 221 N. C. 301, 20 S. E. (2d) 286 (1942).

**Authority of Municipalities Concerning Nuisances.**—Under the authority conferred upon a municipal corporation to adopt ordinances for the government of the corporation and to abate nuisances, no power is granted to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame, nor to declare what shall be a bawdy house or a disorderly house. *State v. Webber*, 107 N. C. 962, 12 S. E. 598 (1890).

**Applied in** *State v. Lancaster*, 228 N. C. 157, 44 S. E. (2d) 733 (1947).

**Cited in** *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935) (dis. op.); *State v. Alverson*, 225 N. C. 29, 33 S. E. (2d) 135 (1945); *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414 (1945) (con. op.).

§ 19-2. **Action for abatement; injunction.**—Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the

name of the State of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt, as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 26; 1919, c. 288; C. S., s. 3181.)

**Public Nuisances.**—This and the following sections are not applicable to proceedings brought to abate a public nuisance as defined by § 90-103. *State v. Townsend*, 227 N. C. 642, 44 S. E. (2d) 36 (1947).

**Procedure Cannot Be Invoked against Alcoholic Control Board.**—It was never intended that the procedure here invoked to abate a nuisance should be applied against the alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. *State v. Lancaster*, 228 N. C. 157, 44 S. E. (2d) 733 (1947).

**The proceeding by a citizen in the name of the State for injunction,** the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. *State v. Alverson*, 225 N. C. 29, 33 S. E. (2d) 135 (1945).

**Evidence Supporting Abatement.** — The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that

drunken men and women were seen nightly at the place, and seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, is held amply sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by § 19-1, and to support a judgment for its abatement in accordance with this section in an action brought by the solicitor as relator. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

**Lease Is Made in Contemplation of Section.**—A lease contract will be held to have been made in contemplation of the statute, in effect at the time of the execution of the lease, providing for the abatement of nuisance against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610 (1940).

**Cited in** *Calcutt v. McGeachy*, 213 N. C. 1, 195 S. E. 49 (1938).

**§ 19-3. When triable; evidence; dismissal of complaint.**—The action when brought shall be triable at the first term of court after service of the summons has been made, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the city prosecuting attorney, or solicitor, in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the city prosecuting attorney, or the solicitor, to prosecute said action to judgment; and if the action continued more than one term of court, any citizen of the county, or the county attorney, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause of said action, the costs may be taxed to such citizen. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C. S., s. 3182.)

**Cross Reference.**—As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-188.

**Evidence** of the general reputation of

the place in question is competent in an action to abate a public nuisance. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

§ 19-4. **Violation of injunction; punishment.**—In case of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred or more than one thousand dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C. S., s. 3183.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

§ 19-5. **Order abating nuisance; what it shall contain.**—If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter, or use said building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in the preceding section. For moving and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C. S., s. 3184.)

**Fishing in waters** when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law by a proceeding in the nature of claim and delivery, or by injunction to prevent sale, or by an action to recover the proceeds of sale plus damages. *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992 (1905).

**Proceeding Is In Personam.**—A proceeding to abate a nuisance against the public morals is not a proceeding in rem against the property itself, but is in personam, and the provisions of the statute for padlocking the premises and for the sale of chattels used in connection with the operation of the nuisance, being more than sufficient for the abatement of the nuisance, are penalties prescribed by law for its violation, and therefore innocent lessors of the premises or owners or mortgagees of chattels which do not constitute a nuisance per se may not be deprived of their property rights unless they have actual or constructive notice that

the property is used in the operation of the nuisance, and they have the right to have this issue determined by the verdict of a jury. *Sinclair v. Croom*, 217 N. C. 526, 8 S. E. (2d) 834 (1940).

**Innocent Mortgagee May Recover Property before Sale.**—An innocent mortgagee without knowledge that the property was being used by the mortgagor in operating a nuisance contrary to law and in violation of provisions in the conditional sales contract, may institute action to recover the property after it has been seized by the sheriff but before it has been sold under this section. *Habit v. Stephenson*, 217 N. C. 447, 8 S. E. (2d) 245 (1940).

**Lessors Must Have Knowledge before Personal Judgment Can Be Rendered.**—In an action to abate a nuisance against public morals under this chapter, lessors of the property are entitled to the submission of an issue as to whether they knew the lessee was operating a public nuisance thereon before personal judgment is rendered against lessors taxing them with the cost and padlocking the premises, such personal judgment against them being justified only if

they knew or, by the exercise of due diligence, should have known of the maintenance of the nuisance. *Barker v. Palmer*, 217 N. C. 519, 8 S. E. (2d) 610 (1940).

**As Must Conditional Seller.**—Intervener sold a cash register under a conditional sales contract and same, together with other chattels of the purchaser, was seized for sale upon the determination that the purchaser was using it in the maintenance of a nuisance against public morals. Upon the facts agreed intervener had no actual or constructive knowledge that the cash register was used in the maintenance of a nuisance. Only the equity of the purchaser could be condemned for sale under the statute and the intervener may be charged with no part of the cost. *Sinclair v. Croom*, 217 N. C. 526, 8 S. E. (2d) 834 (1940).

**Restraining Sale of Part of Personalty.**—Where judgment directing the sale of personal property used in the operation of a nuisance is entered in a proceeding instituted by the solicitor, the complaint in an independent action thereafter instituted against the sheriff alone by the defendant in the former proceeding to restrain the sale of certain of the personalty on the ground that it was not used in the operation of the nuisance cannot be treated as

§ 19-6. **Application of proceeds of sale.**—The proceeds of the sale of the personal property as provided in § 19-5 shall be applied in the payment of the costs of action and abatement, and the balance, if any, shall be paid to the defendant. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C. S., s. 3185.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

§ 19-7. **How order of abatement may be canceled.**—If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C. S., s. 3186.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

§ 19-8. **Attorney's fees may be taxed as costs.**—The court shall tax as part of the cost in any action brought hereunder such fee for the attorney prosecuting the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C. S., s. 3187.)

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

a motion in the cause, since the plaintiff in the former action is not a party. *Humphrey v. Churchill*, 217 N. C. 530, 8 S. E. (2d) 810 (1940).

In a proceeding under this chapter, judgment was entered upon determination that the defendant therein was operating a nuisance against public morals, directing that the personal property of defendant used in the operation of the nuisance be sold in accordance with this section. Thereafter the defendant in that proceeding instituted this action against the sheriff to restrain the sale of certain of the personal property upon allegations that the property specified had not been used in the operation of the nuisance and that the sheriff was about to sell it under the prior judgment. There was neither allegation nor contention that the execution was void. The temporary restraining order was properly dissolved, the proper remedy being by motion in the cause and not by independent action to restrain the sheriff from selling the chattels as directed by the prior judgment. *Humphrey v. Churchill*, 217 N. C. 530, 8 S. E. (2d) 810 (1940).

Cited in *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).



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## Chapter 20.

### Motor Vehicles.

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**ARTICLE 1.**

*Department of Motor Vehicles.*

**§ 20-1. Department of Motor Vehicles created; powers and duties.**

—A department of the government of this State, to be known as the Department of Motor Vehicles, is hereby created. It is the intent and purpose of this article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the Department of Motor Vehicles agencies now operated under the Department of Revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the Commissioner of Revenue or by the Motor Vehicle Bureau, the Auto Theft Bureau, the Division of Highway Safety, the major of the State Highway Patrol, the officials handling the Uniform Driver's License Act; and the Department of Motor Vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all powers, duties and functions relating to the collection of motor fuel taxes, and the collection of the gasoline and oil inspection taxes, shall continue to be vested in and exercised by the Commissioner of Revenue, and wherever it is now provided by law that reports shall be filed with the Commissioner or Department of Revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the Department of Revenue and the Commissioner of Motor Vehicles shall make available to the Commissioner of Revenue all information from the files of the Department of Motor Vehicles which the Commissioner of Revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this article shall deprive the Utilities Commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1; 1949, c. 1167.)

**Editor's Note.** — The 1949 amendment made changes rendered necessary by reason of the transfer of the administration of the gasoline and oil inspection law to

the Department of Agriculture.

For comment on the 1941 act, see 19 N. C. Law Rev. 444.

For acts relating to parking meters not



affected by this chapter, see Session Laws 1947, c. 54 (City of Shelby); c. 66 (Town of Leurinburg); c. 675 (City of Statesville); c. 735 (Town of Mooresville); c.

1035 (Cabarrus County). And see Session Laws 1949, c. 573, relating to City of Statesville.

**§ 20-2. Commissioner of Motor Vehicles.**—The Department of Motor Vehicles shall be under control of an executive officer to be designated as the Commissioner of Motor Vehicles, who shall be appointed by the Governor and be responsible directly to the Governor and subject to removal by the Governor at his discretion and without requirement of the assignment of any cause. The Commissioner shall be paid an annual salary to be fixed by the Governor, with the approval of the Advisory Budget Commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business.

In any action, proceeding, or matter of any kind, to which the Commissioner of Motor Vehicles is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the Assistant Commissioner on behalf of the Commissioner. (1941, c. 36, s. 2; 1945, c. 527.)

**Editor's Note.** — The 1945 amendment added the second paragraph.

**§ 20-3. Organization of Department; operating funds.**—The Commissioner shall organize the Department in such manner as he may deem necessary properly to segregate and conduct the work of the Department; but the work of the Department is hereby divided into at least two divisions, to be known respectively as the Division of Registration and the Division of Highway Safety and Patrol. The Commissioner shall, as soon as practicable after appointment, prepare a general plan for the organization of the Department, which plan shall not be put into effect until approved by the Governor and the Advisory Budget Commission, subject to such changes as may be recommended by the Governor and approved by the Advisory Budget Commission. The plan of organization herein provided for may increase or decrease the number of persons now assigned to any of the activities transferred to this Department, and the titles may be changed. (1941, c. 36, s. 3.)

**§ 20-4. Clarification of conflicts as to transfer of functions.**—In the event that there shall arise any conflict as to the transfer of any functions from the Department of Revenue to the Department of Motor Vehicles, the Governor of the State is hereby authorized to issue an executive order clarifying and making certain the issue thus arising. (1941, c. 36, s. 5.)

## ARTICLE 2.

### *Uniform Driver's License Act.*

**§ 20-5. Title of article.**—This article may be cited as the Uniform Driver's License Act. (1935, c. 52, s. 31.)

**§ 20-6. Definitions.**—Terms used in this article shall be construed as follows, unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the legislature.

"Highway" shall include any trunk line highway, State aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the State or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use.

"Motor vehicle" shall mean any rubber-tired vehicle propelled or drawn by any power other than muscular, except aircraft, road rollers, street sprinklers, ambu-

lances owned by municipalities, baggage trucks, and tractors used about railroad stations and yards, agricultural tractors, industrial tractors used in and around warehouses and yards, and such vehicles as run only upon rails or tracks.

"Nonresident" shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country.

"Operator" shall mean any person other than a "chauffeur" who shall operate a motor vehicle or who shall be in the driver's seat of a motor vehicle when the engine is running or who shall steer or direct the course of a motor vehicle which is being towed or pushed by another motor vehicle.

"Chauffeur" shall mean every person who is employed for the principal purpose of operating a passenger motor vehicle, except school busses, and every person who drives any motor vehicle while in use as a public or common carrier for persons or property, and this shall apply to city delivery motor vehicles.

"Person" shall include any individual, corporation, association, co-partnership, company, firm or other aggregation of individuals.

"Vehicle" shall include any device suitable for use on the highways for the conveyance, drawing or other transportation of persons or property, except those propelled or drawn by muscular power or those used exclusively upon tracks.

"Department" shall mean the Department of Motor Vehicles.

As applied to operators' and chauffeurs' licenses issued under this article, the words:

"Suspension" shall mean that the licensee's privilege to drive a vehicle is temporarily withdrawn.

"Revocation" shall mean that the licensee's privilege to drive a vehicle is terminated for the period stated in the order of revocation.

"Canceled" shall mean that a license which was issued through error or fraud has been declared void and terminated. A new license may be obtained only as permitted in this article. (1935, c. 52, s. 1; 1941, c. 36; 1943, c. 787, s. 1; 1951, c. 1202, s. 1.)

**Editor's Note.** — The 1943 amendment added the definitions of "suspension," "revocation" and "canceled."

The 1951 amendment rewrote the defi-

nition of "revocation".

**Quoted in** *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632 (1950).

**§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.**—(a) Except as otherwise provided in § 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Department under the provisions of this article. Except as otherwise provided in § 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Department under the provisions of this article.

(b) Every application for an operator's or chauffeur's license shall be made upon the approved form furnished by the Department.

(c) No person shall hereafter be issued an operator's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the State, the Department shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Department may require.

(d) The Department shall cause each person who has heretofore been issued an operator's license to be examined or re-examined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or re-examination, to be capable of safely operat-

ing motor vehicles over the highways of the State shall be reissued operators' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the State shall not be reissued operators' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Department may require. The Department may once reissue operators' licenses without examination to licensed operators who have passed an operator's examination given by the Department subsequent to July 1st, 1945, and prior to July 1st, 1947.

(e) The Department is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Department may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Department. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Department from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The operators' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within sixty days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this article, the Department shall issue a new license to him. A new license issued within sixty days prior to the expiration of an applicant's old license or within twelve months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

(g) Every chauffeur's license issued under this section shall automatically expire on the birthday of the licensee in the year following the year of issuance, and chauffeurs shall renew their licenses annually after an examination which may include road tests, oral and, in the case of literate applicants, written tests, and tests of vision as the Department may require: Provided, that the Commissioner may, in proper cases, waive the examination required by this subsection: Provided, further, that no chauffeur's license issued hereunder shall expire in less than six months from the date of issuance.

(h) Upon receipt of information that the physical or mental condition of any person has changed since his or her examination for an operator's or chauffeur's license and before a new examination is required by this section, the Department may, after ten (10) days' written notice, require such person to take another examination to determine his or her capability to operate safely motor vehicles over the highways of the State. If such person is found to be capable of safely operating vehicles over the highways of the State, license shall be reissued to him or her and no fee shall be collected by the Department for such examination and reissuance of license. If such person is found to be incapable of safely operating vehicles over the highways of the State, no license shall be issued or reissued to him or her unless such person shall subsequently pass an examination given by the Department.

(i) For the examination and issuance or reissuance of an operator's or chauffeur's license or the reissuance of an operator's or chauffeur's license without an examination, the licensee shall pay to the Department a fee of two dollars (\$2.00).

(j) The fees collected under this section and § 20-14 shall be placed in a special fund to be designated the "Operators' and Chauffeurs' License Fund" and shall

be used under the direction and supervision of the Assistant Director of the Budget for the administration of this section.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(l) Any person who, except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this article, may apply for a temporary learner's permit, and the Department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of thirty (30) days, during daylight hours. Any such learner's permit may be renewed, or a new permit issued for an additional period of thirty (30) days. Such person must, while operating a motor vehicle over the highways, be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

(m) Every operator's or chauffeur's license issued by the Department shall bear thereon the distinguishing number assigned to the licensee and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(n) All operators' licenses issued by the Department of Motor Vehicles prior to July 1, 1947 shall expire as follows and the holders thereof shall not be permitted to operate motor vehicles over the highways of North Carolina unless they secure new operators' licenses as required by law:

(1) A license issued to a person whose last or surname begins with the letter "A" or the letter "B" shall expire April 6, 1949;

(2) A license issued to a person whose last or surname begins with the letter "C" or the letter "D" shall expire April 6, 1949;

(3) A license issued to a person whose last or surname begins with the letters "E", "F" or "G" shall expire April 6, 1949;

(4) A license issued to a person whose last or surname begins with the letters "H", "I", "J" or "K" shall expire at midnight, June 30, 1949;

(5) A license issued to a person whose last or surname begins with the letter "L" or the letter "M" shall expire at midnight, December 31, 1949;

(6) A license issued to a person whose last or surname begins with the letters "N", "O", "P" or "Q" shall expire at midnight, June 30, 1950;

(7) A license issued to a person whose last or surname begins with the letters "R", "S" or "T" shall expire at midnight, December 31, 1950;

(8) A license issued to a person whose last or surname begins with the letters "U", "V", "W", "X", "Y" or "Z" shall expire at midnight, June 30, 1951.

(o) The punishment for a violation of this section shall be a fine of not less than twenty-five dollars (\$25.00) or imprisonment for not less than thirty (30) days, or both such fine and imprisonment, in the discretion of the court: Provided, that no person whose operator's license has expired shall be convicted of operating a motor vehicle without an operator's license if he produces in court a valid new operator's license issued to him within thirty days after the expiration of his prior license. (1935, c. 52, s. 2; 1943, c. 649, s. 1; 1943, c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; 1949, c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; 1951, c. 1196, ss. 1-3.)

**Editor's Note.**—The first 1943 amendment struck out former subsection (f) relating to chauffeur's badge, and designated former subsection (g) as subsection (f).

The second 1943 amendment inserted in the second sentence of subsection (b) the words "the drivers' license examiners, or other designated representatives of the Department of Motor Vehicles." It also added present subsection (g).

The 1947 amendment rewrote this section.

The 1949 amendments inserted present subsections (m) and (n), renumbered former subsection (m) as (o) and deleted the former provision of subsection (a) relating to the operation of a motor vehicle while under instruction of and accompanied by a licensed operator.

The first 1951 amendment rewrote sub-

sections (a) and (g). The second 1951 amendment added the last two sentences to subsection (f), the second proviso to subsection (g) and the proviso to subsection (o).

**Driving without a License Is Negligence Per Se.**—Under this section it is negligence per se for one to drive a motor vehicle without a license, but such negligence must be the proximate cause of injury in order to be actionable. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

**Cited in** *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938).

**§ 20-8. Persons exempt from license.**—The following are exempt from license hereunder:

(a) Any person while operating a motor vehicle the property of, and in the service of the Army, Navy or Marine Corps of the United States. This shall not be construed to exempt any chauffeurs or operators of the United States Civilian Conservation Corps motor vehicles;

(b) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(c) A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this State only as an operator;

(d) A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this State either as an operator or chauffeur except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State;

(e) Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident;

(f) Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of chauffeurs may operate a motor vehicle as a chauffeur for a period of not more than ten days in any calendar year if the motor vehicle so operated is duly registered in the home state or country of such nonresident. (1935, c. 52, s. 3.)

**Editor's Note.**—Acts 1943, c. 346, § 2, in age mentioned therein from sixteen to fifteen years. amended subsection (c) by changing the

**§ 20-9. What persons shall not be licensed.**—(a) An operator's license shall not be issued to any person under the age of sixteen (16) years, and no chauffeur's license shall be issued to any person under the age of eighteen (18) years.

(b) The Department shall not issue an operator's or chauffeur's license to any person whose license, either as operator or chauffeur, has been suspended, during the period for which license was suspended; nor to any person whose license, either as operator or chauffeur, has been revoked under the provisions of this article, until the expiration of one year after such license was revoked.

(c) The Department shall not issue an operator's or chauffeur's license to any person whom it has determined is an habitual drunkard or is addicted to the use of narcotic drugs.

(d) No operator's or chauffeur's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, grand mal epileptic, or feeble-minded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feeble-minded upon a certificate of the superintendent that such person is competent, nor then unless the Department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Department shall not issue an operator's or chauffeur's license to any person when in the opinion of the Department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

(f) The Department shall not issue an operator's or chauffeur's license to any person whose license is in a state of revocation or suspension in any state of which such person was a resident at the time of the suspension or revocation of his license. (1935, c. 52, s. 4; 1951, c. 542, s. 3.)

**Editor's Note.** — The 1951 amendment added subsection (f). Corp., 226 N. C. 692, 40 S. E. (2d) 345 (1946).

**Cited in** Hoke v. Atlantic Greyhound

**§ 20-10. Age limits for drivers of public passenger-carrying vehicles.**—It shall be unlawful for any person, whether licensed under this article or not, who is under the age of twenty-one years to drive a motor vehicle while in use as a public passenger-carrying vehicle.

No person fourteen years of age or under, whether licensed under this article or not, shall operate any road machine, farm tractor or motor driven implement of husbandry on any highway within this State. Provided any person may operate a road machine, farm tractor, or motor driven implement of husbandry upon a highway adjacent to or running in front of the land upon which such person lives when said person is actually engaged in farming operations. (1935, c. 52, s. 5; 1951, c. 764.)

**Editor's Note.** — The 1951 amendment added the second paragraph.

**§ 20-11. Application of minors.**—The Department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator's license unless such application is signed by the father of the applicant, if the father is living and has custody of the applicant, otherwise by the mother or guardian having the custody of such minor, or in the event a minor under the age of eighteen years has no mother, father, or guardian, then the operator's license shall not be granted to the minor unless his application therefor is signed by his employer. (1935, c. 52, s. 6.)

**§ 20-12. Instruction.**—Any licensed operator or chauffeur may instruct a person who is sixteen or more years of age, during daylight hours, in the operation of a motor vehicle. Any person so instructing another shall be seated as to be within reach of the controls of the motor vehicle and shall be responsible for the operation thereof. (1935, c. 52, s. 7.)

**Cross Reference.**—See also, § 20-7, paragraph (a).

**§ 20-13:** Repealed by Session Laws 1947, c. 1067, s. 11.

**§ 20-14. Duplicate certificates.**—In the event that an operator's or chauffeur's license issued under the provisions of this article is lost or destroyed, the person to whom the same was issued may, upon payment of a fee of fifty cents (\$.50), obtain a duplicate, or substitute thereof, upon furnishing proof

satisfactory to the Department that such license has been lost or destroyed. (1935, c. 52, s. 9; 1943, c. 649, s. 2.)

**Editor's Note.** — The 1943 amendment struck out the words "or badge" formerly appearing after the word "license."

§ 20-15. **Authority of Department to cancel license.**—(a) The Department shall have authority to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so cancelled to the Department. (1935, c. 52, s. 10; 1943, c. 649, s. 3.)

**Editor's Note.** — The 1943 amendment struck out in subsection (b) the words, "together with chauffeur's badge, if any," formerly appearing after the word "cancelled."

§ 20-16. **Authority of Department to suspend license.**—(a) The Department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver, and where such property damage has not been compensated for;

3. Is an habitually reckless or negligent driver of a motor vehicle;

4. Is incompetent to drive a motor vehicle;

5. Is an habitual violator of the traffic laws;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

8. Has been convicted of illegal transportation of intoxicating liquors;

9. Has, within one (1) year, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour; or

10. Has been convicted of operating a motor vehicle at a speed in excess of seventy-five (75) miles per hour.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's or chauffeur's license shall be suspended by the Department of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) Upon suspending the license of any person as hereinbefore in this section authorized, the Department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the Department and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the Department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may, except as provided in § 20-231, require a re-examination of the licensee. Upon such hearing the Department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such

license. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; 1947, c. 1067, s. 13; 1949, c. 373, ss. 1, 2; 1949, c. 1032, s. 2.)

**Cross Reference.**—As to period of suspension or revocation, see § 20-19.

**Editor's Note.**—The first 1947 amendment added the last clause of paragraph 2 of subsection (a) and made changes in former subsection (b). The second 1947 amendment added paragraphs 9 and 10 to subsection (a).

The first 1949 amendment inserted the present subsection (b) and redesignated former subsection (b) as subsection (c). The second 1949 amendment inserted in the second sentence of subsection (c) the words "except as provided in § 20-23.1." For brief discussion of these amendments, see 27 N. C. Law Rev. 371, 372.

**Judgment in Excess of Jurisdiction of Court.**—A judgment of the superior court requiring a defendant to surrender his license to drive a motor vehicle and prohibiting him from operating such vehicles for a specified period, is in excess of the jurisdiction of such court and is void. *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18 (1944).

A provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal. *State v. Warren*, 230 N. C. 299, 52 S. E. (2d) 879 (1949).

**Power to suspend or revoke a driver's**

**§ 20-17. Mandatory revocation of license by Department.**—The Department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.
3. Any felony in the commission of which a motor vehicle is used.
4. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.
5. Perjury or the making of a false affidavit or statement under oath to the Department under this article or under any other law relating to the ownership of motor vehicles.
6. Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.
7. Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale. (1935, c. 52, s. 12; 1947, c. 1067, s. 14.)

**Cross References.**—As to power to suspend or revoke license generally, see § 20-16 and note. As to period of suspension

license is exclusively in the Department of Motor Vehicles subject to review by the superior court. *State v. Warren*, 230 N. C. 299, 52 S. E. (2d) 879 (1949).

Discretionary suspensions and revocations of licenses by the Department of Motor Vehicles are reviewable under § 20-25, but mandatory revocations under § 20-17 are not so reviewable. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948). See *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18 (1944).

**Construed with § 20-23.**—This section and § 20-23 are parts of the same statute relating to the same subject matter and must be construed in *pari materia*. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

The language of paragraph (7) of subsection (a) of this section and § 20-23 is almost identical. This section is the real source of authority. The latter section prescribes a rule of evidence and adds the power of revocation, when this section is the basis of action. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**Conviction of Drunken Driving in Another State.**—Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department of Motor Vehicles has the right to suspend the driving license of such person. In *re Wright*, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

or revocation, see § 20-19.

**Editor's Note.**—Prior to the 1947 amendment this section was divided into sub-



sections (a) and (b). The amendment struck out subsection (b) relating to extension of period of suspension or revocation, and deleted the designation (a) which formerly appeared at the beginning of the section.

**Review of Revocation.**—Mandatory revocations under this section are not reviewable under § 20-25. In re Wright, 228 N.

C. 584, 46 S. E. (2d) 696 (1948).

**Evidence** that defendant had been convicted for operating an automobile while under the influence of intoxicants, was competent on the question as to whether a driver's license issued to defendant had been legally revoked. State v. Stewart, 224 N. C. 528, 31 S. E. (2d) 534 (1944).

**§ 20-18. Conviction for failure to dim, etc., lights not ground for suspension or revocation.**—Conviction of the offense of failure to shift, depress, deflect, tilt or dim the beams of the head lamps whenever a motor vehicle meets another vehicle on the highways of this State shall not be cause for the suspension or revocation of the operator's or chauffeur's license under the terms of this article. (1939, c. 351, s. 2.)

**Cited in** State v. McDaniels, 219 N. C. 763, 14 S. E. (2d) 793 (1941).

**§ 20-19. Period of suspension or revocation.**—(a) When a license is suspended under paragraph 9 of § 20-16, the period of suspension shall be not less than sixty (60) days nor more than six (6) months, as may seem just and proper to the Department.

(b) When a license is suspended under paragraph 10 of § 20-16, the period of suspension shall be not less than six months and not more than one year.

(c) When a license is suspended under any other provision of law, the period of suspension shall be not more than one year.

(d) When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, the period of revocation shall be three years.

(e) When a license is revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug, the revocation shall be permanent: Provided, that the Department may, after the expiration of five years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past five years, and that his conduct and attitude is such as to entitle him to favorable consideration.

(f) When a license is revoked for any other reason, the period of revocation shall be one year. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4.)

**Editor's Note.** — The 1947 amendment rewrote this section. The 1951 amendment rewrote subsections (d), (e) and (f).

**§ 20-20. Surrender and return of license.**—The Department upon suspending or revoking a license shall require that such license shall be surrendered to and be retained by the Department except that at the end of a period of suspension such license so surrendered shall be returned to the licensee. (1935, c. 52, s. 14; 1943, c. 649, s. 4.)

**Editor's Note.** — The 1943 amendment struck out the former provision relating to chauffeur's badge.

**§ 20-21. No operation under foreign license during suspension or revocation in this State.**—Any resident or nonresident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this article. (1935, c. 52, s. 15.)

**§ 20-22. Suspending privileges of nonresidents and reporting convictions.**—(a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Department in like manner and for like cause as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The Department is further authorized, upon receiving a record of the conviction in this State of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws of this State, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident. (1935, c. 52, s. 16.)

**§ 20-23. Suspending resident's license upon conviction in another state.**—The Department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another state of any offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. (1935, c. 52, s. 17.)

**Construed with § 20-16.**—See note to § 20-16.

**And § 20-25.**—This section and § 20-25 must be construed in *pari materia*. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**Conviction of Drunken Driving.**—Upon a receipt of notification from the highway department of another state that a resident of this State had there been convicted of drunken driving, the Department of Motor Vehicles has the right to suspend the

driving license of such person. In *re Wright*, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

**Notice May Be from Any Source.**—This section does not limit the notice of conviction in another state, upon which the Department may act, to notice from a judicial tribunal or other official agency. Under the wording of the statute, from whatever source the notice may come, the Department may act. In *re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**§ 20-24. When court to forward license to Department and report convictions.**—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the Department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Department.

(b) Every court having jurisdiction over offenses committed under this article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purpose of this article the term "conviction" shall mean a final conviction. Also, for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) After November 1, 1935, no operator's or chauffeur's license shall be suspended or revoked except in accordance with the provisions of this article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4.)

**Editor's Note.** — The 1949 amendment repealed former subsection (d) and redesignated former subsection (e) as subsection (d).

**Jurisdiction to Revoke.** — A municipal court is without authority to revoke a driver's license, the power to suspend or

revoke drivers' licenses being vested exclusively in the Department of Revenue, subject to the right of review by the superior court, as provided in the following section. *State v. McDaniels*, 219 N. C. 763, 14 S. E. (2d) 793 (1941).

**Meaning of Forfeiture of Bail or Col-**

**lateral.** — “Bail” as here used means security for a defendant’s appearance in court to answer a criminal charge there pending. Ordinarily it is evidenced by a bond or recognizance which becomes a record of the court. The forfeiture thereof is a judicial act. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**§ 20-25. Right of appeal to court.**—Any person denied a license or whose license has been cancelled, suspended or revoked by the Department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon thirty (30) days’ written notice to the Department, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article. (1935, c. 52, s. 19.)

By the 1941 Act, chapter 36, the power to suspend or revoke drivers’ licenses after July 1, 1941, vested exclusively in the newly created Department of Motor Vehicles, subject to the same right of review by the superior court as existed prior to that date. *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18 (1944).

**Construed with § 20-23.** — This section and § 20-23 must be construed *pari materia*. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**The jurisdiction vested by this section is not a delegation of legislative and administrative authority.** The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**And failure of the section to provide standards for the guidance of the courts does not invalidate it or negate the jurisdiction.** *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**Such jurisdiction is not the limited, inherent power of courts to review the discretionary acts of an administrative officer.** The power is conferred by statute, and the statute must be looked to in order to ascertain the nature and extent of the review contemplated by the legislature. *In re Wright*, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

**The Section Imposes Additional Jurisdiction.**—The court has inherent authority to review the discretionary action of an administrative agency, whenever such action affects personal or property rights, upon a *prima facie* showing, by petition

The mere deposit of security with an arresting officer or magistrate pending issuance and service of warrant, which deposit is retained without the semblance of judicial or legal forfeiture is not a forfeiture of “bail” within the meaning of subsection (c) of this section. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

for a writ of certiorari, that such agency has acted arbitrarily, capriciously, or in disregard of law. This section dispenses with the necessity of an application for writ of certiorari, provides for direct approach to the courts and enlarges the scope of the hearing. That the legislature had full authority to impose this additional jurisdiction upon the courts is beyond question. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**But no discretionary power is conferred upon the court in reviewing the suspension or revocation of driving licenses, and the court may determine only if, upon the facts, petitioner’s license is subject to suspension or revocation under the provisions of the statute.** *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**Discretionary suspensions and revocations of driving licenses by the Department of Motor Vehicles are reviewable under this section.** *State v. Cooper*, 224 N. C. 100, 29 S. E. (2d) 18 (1944); *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**By Trial De Novo.** — All suspensions, cancellations and revocations of driving licenses made in the discretion of the Department of Motor Vehicles, whether under §§ 20-16, 20-23 or any other provision of this chapter, are reviewable by trial *de novo*. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

The hearing in the superior court is *de novo*, and the court is not bound by the findings of fact or the conclusion of law made by the Department. *In re Wright*, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

But mandatory revocations under § 20-17 are not reviewable. And no right accrues to a licensee who petitions for a review of the order of the Department when it acts under the terms of § 20-17, for then its action is mandatory. In re Wright, 228 N. C. 584, 46 S. E. (2d) 696 (1948).

**Hearing by Department Is Prerequisite to Court Review.**—Section 20-16(c) provides for a rehearing by the Department of Motor Vehicles upon application of a licensee whose license has been suspended, and this procedure should be followed and should be made to appear in the petition before review by the superior court. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

**Cancellation of Suspension.**—Petitioner was arrested in South Carolina charged

with operating a motor vehicle while under the influence of intoxicants. He gave bond for appearance, but no warrant was served on him and no trial had, and his bond was forfeited. His license was suspended by the Department of Motor Vehicles upon information of the Highway Department of South Carolina that he had been found guilty of driving while intoxicated. Upon review the superior court found, in addition, that the suspension was based upon misinformation and further that petitioner in fact was not guilty. It was held that the findings supported the court's order directing the respondent to cancel the suspension and to restore license to petitioner. In re Wright, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

§ 20-26. **Records.**—The Department shall keep a record of proceedings and orders pertaining to all licenses granted, refused, suspended or revoked by the Department. It shall furnish without charge, for official use only, certified copies of certificates and licenses and documents relating thereto, to officials of the State, counties and municipalities or to any court in this State. A charge not to exceed one dollar (\$1.00) shall be made by the Department for copies furnished for other than official use. (1935, c. 52, s. 20.)

§ 20-27. **Availability of records.**—All records of the Department pertaining to application and to operator's and chauffeur's license, except the confidential medical report referred to in § 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours. (1935, c. 52, s. 21.)

§ 20-28. **Unlawful to drive while license suspended or revoked.**—

(a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this article, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than two hundred dollars (\$200.00) or imprisonment in the discretion of the court, or both such fine and imprisonment. In addition, the defendant's license shall be suspended or revoked, as the case may be, for an additional period of double the period of the suspension or revocation in effect at the time of his or her apprehension for a violation of this section.

(b) Any person whose license has been permanently revoked, as provided in this article, who shall drive any motor vehicle upon the highways of the State while such license is permanently revoked shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16.)

**Editor's Note.**—The 1945 amendment substituted the words "shall be guilty of a misdemeanor" for the words "may be guilty of a misdemeanor", and the 1947 amendment rewrote the section.

**Intent Immaterial.**—The operation of a motor vehicle upon the highways of the

State by a person whose driver's license has been revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. State v. Correll, 232 N. C. 696, 62 S. E. (2d) 82 (1950).

§ 20-29. **Surrender of license.**—Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be in-

volved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the Department, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this article. Pickup notices for operators' or chauffeurs' licenses or revocation or suspension of license notices and orders or demands issued by the Department for the surrender of such licenses may be served and executed by patrolmen or other peace officers, and such patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7.)

**Editor's Note.** — The 1949 amendment added the second sentence.

**§ 20-29.1. Commissioner may require re-examination; issuance of limited or restricted licenses.**—The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a re-examination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions. Refusal or neglect of the licensee to submit to such re-examination shall be grounds for the suspension or revocation of his license. The Commissioner may, in his discretion and upon the written application of any person qualified to receive an operator's or chauffeur's license, issue to such person an operator's or chauffeur's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any chauffeur's or operator's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted operator's or chauffeur's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121.)

**Editor's Note.** — The 1949 amendment added the provisions pertaining to the issuance of limited or restricted licenses.

**§ 20-30. Violations of license provisions.**—It shall be unlawful for any person to commit any of the following acts:

(a) To display or cause to be displayed or to have in possession any operator's or chauffeur's license, knowing the same to be fictitious or to have been cancelled, revoked, suspended or altered.

(b) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license.

(c) To display or to represent as one's own a license not issued to the person so displaying same.

(d) To fail or refuse to surrender to the Department upon demand any license

or the badge of any chauffeur whose license has been suspended, cancelled or revoked as provided by law.

(e) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application. Any license procured as aforesaid shall be void from the issuance thereof, and any monies paid therefor shall be forfeited to the State.

(f) To photostat or otherwise reproduce an operator's or chauffeur's license or to possess an operator's or chauffeur's license which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner. (1935, c. 52, s. 24; 1951, c. 542, s. 4.)

**Editor's Note.** — The 1951 amendment added subsection (f).

§ 20-31. **Making false affidavits perjury.**—Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this article to be sworn to or affirmed shall be guilty of perjury and upon conviction shall be punished by fine or imprisonment as other persons committing perjury are punishable under the laws of this State. (1935, c. 52, s. 25.)

**Cross Reference.**—As to perjury, see § 14-209 et seq.

§ 20-32. **Unlawful to permit unlicensed minor to drive motor vehicle.**—It shall be unlawful for any person to cause or knowingly permit any minor over sixteen and under the age of eighteen years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this article. (1935, c. 52, s. 26.)

**Editor's Note.** — Most of the cases treated below were decided under a corresponding provision of an earlier law, but should be of assistance in the interpretation of the present section.

**Violation of Age Limit as Negligence.**—Where a person within the age prohibited by the statute runs an automobile upon and injures a pedestrian, the violation of the statute is negligence per se, and a charge by the court that it is a circumstance from which the jury could infer negligence is reversible error. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916).

**Same—Liability for Injuries.**—While it is negligence per se for one within the prohibited age to run an automobile, it is necessary that such negligence proximately cause the injury for damages to be recovered on that account, with the burden of proof on the plaintiff to show it by the preponderance of the evidence. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916).

**Same—Jury Question.**—It is for the jury to determine whether a competent and careful chauffeur of maturer years could have avoided the injury under the circumstances, or whether it was due to the fact that a lad within the prohibited age was

running it at the time. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916).

**Same—Liability of Father.**—While ordinarily a father is not held responsible in damages for the negligent acts of his minor son done without his knowledge and consent, such may be inferred, as where the father constantly permitted his 13 year-old son to run his automobile. *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134 (1916).

**Liability of Owner for Torts of Driver.**—See *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096 (1913); *Cates v. Hall*, 171 N. C. 360, 88 S. E. 524 (1916); *Williams v. May*, 173 N. C. 78, 91 S. E. 604 (1917); *Wilson v. Polk*, 175 N. C. 490, 95 S. E. 849 (1918). For a complete treatment, see 2 N. C. Law Rev. 181.

**Same—Where Driver Is Son.**—*Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096 (1913); *Clark v. Sweaney*, 176 N. C. 529, 97 S. E. 474 (1918). See 2 N. C. Law Rev. 181.

**Instruction.** — An instruction to the effect that it would be negligence per se for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held lia-

ble unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, was held

sufficient to cover this aspect of the case. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947).

§ 20-33. **Unlawful to employ unlicensed chauffeur.**—No person shall employ any chauffeur to operate a motor vehicle who is not licensed as provided by this article. (1935, c. 52, s. 27.)

§ 20-34. **Unlawful to permit violations of this article.**—No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this article. (1935, c. 52, s. 28.)

§ 20-34.1. **Unlawful to issue licenses for anything of value except prescribed fees.**—It shall be unlawful for any employee of the Department of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of an operator's or chauffeur's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars (\$5,000.00) or by both such fine and imprisonment. (1951, c. 211.)

**Permitting Violation Is Negligence Per Se.** — Under this section it is negligence per se for the owner of a car or one having it under his control to permit a person under legal age to operate same, but such

negligence must be proximate cause of injury in order to be actionable. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

§ 20-35. **Penalties for misdemeanor.**—(a) It shall be a misdemeanor to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than five hundred (\$500.00) dollars or by imprisonment for not more than six (6) months. (1935, c. 52, s. 29.)

**Cited in** *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

§ 20-36: Repealed by Session Laws 1947, c. 1067, s. 11.

§ 20-37. **Limitations on issuance of licenses.**—There shall be no operator's or chauffeur's license issued within this State other than that provided for in this article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1943, c. 639, s. 2.)

**Editor's Note.** — The 1943 amendment added the proviso. For comment on the amendment, see 21 N. C. Law Rev. 358.

**Authority to License and Regulate Tax**

**icabs.**—In adopting this section the General Assembly delegated the authority to license taxicabs and regulate their use on public streets to the several municipalities.

Suddreth v. Charlotte, 223 N. C. 629, 27 S. E. (2d) 650 (1943).

In the exercise of this delegated power, it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly

shown to be so. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901 (1949).

Under such delegated power a city may require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. State v. Stallings, 230 N. C. 252, 52 S. E. (2d) 901 (1949).

#### ARTICLE 2A.

##### *Operators' Licenses and Registration Plates for Afflicted or Disabled Persons.*

§ 20-37.1. **Motorized wheel chairs or similar vehicles.**—Any afflicted or disabled person who is qualified to operate a motorized wheel chair or other similar vehicle not exceeding one thousand pounds gross weight, may apply to the Department of Motor Vehicles for a special operator's license and permanent registration plates. When it is made to appear to the satisfaction of the Department of Motor Vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said Department shall, upon the payment of a license fee of \$1.00 for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle operator's license, which shall be renewed annually upon the payment of a fee of 50c, and permanent registration plates for such vehicle. The initial \$1.00 fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143.)

#### ARTICLE 3.

##### *Motor Vehicle Act of 1937.*

##### Part 1. General Provisions.

§ 20-38. **Definitions of words and phrases.**—The following words and phrases when used in this article shall, for the purpose of this article, have the meanings respectively prescribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(a) **Business District.**—The territory contiguous to a highway where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is occupied by buildings in use for business purposes.

(b) **Commissioner.**—Commissioner, when herein referred to, shall refer to the Commissioner of Motor Vehicles.

(c) **Department.**—Department herein used shall mean the Department of Motor Vehicles acting directly or through its duly authorized officers and agents.

(d) **Dealer.**—Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers or semi-trailers in this State, having an established place of business in this State and being subject to the tax levied by § 105-89.

(e) **Essential Parts.**—All integral and body parts of a vehicle of any type



required to be registered hereunder, the removal, alteration or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(f) **Established Place of Business.**—Means the place actually occupied by a dealer or manufacturer and at which a permanent business of bargaining, trading and selling motor vehicles is or will be carried on as such in good faith, and at which place of business shall be kept and maintained the books, records and files necessary and incident to the conduct of the business of automobile dealers or manufacturers.

(g) **Explosives.**—Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous presses are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(h) **Farm Tractor.**—Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(i) **Foreign Vehicle.**—Every vehicle of a type required to be registered hereunder brought into this State from another state, territory or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(j) **House Trailer.**—Any trailer or semi-trailer so designed and equipped as to provide living and/or sleeping facilities and drawn by a motor vehicle.

(k) **Implement of Husbandry.**—Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(l) **Intersection.**—The area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

(m) **Local Authorities.**—Every county, municipality, or other territorial district with local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(n) **Manufacturer.**—Every person engaged in the business of manufacturing motor vehicles, trailers or semi-trailers.

(o) **Metal Tire.**—Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, non-resilient material.

(p) **Motor Vehicle.**—Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle.

(q) **Passenger Vehicles.**—(1) Excursion passenger vehicles.

Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.

(2) For hire passenger vehicles.

Passenger motor vehicles engaged in the business of transporting passengers for compensation; but this classification shall not include motor vehicles of seven-passenger capacity or less operated by the owner where the cost of operation is shared by neighbor fellow workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan.

(3) Common carriers of passengers.

Passenger motor vehicles operated under a franchise certificate issued by the

Utilities Commission under §§ 62-121.5 through 62-121.79, for operation on the public highways of this State between fixed termini or over a regular route for the transportation of persons or property for compensation.

(4) Motorcycle.

Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor.

(5) U-Drive-It passenger vehicles.

Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee; provided, this shall not include passenger motor vehicles of nine passenger capacity or less which are leased for a term of one year or more to the same person, firm, or corporation.

(6) Private passenger vehicles.

All other passenger vehicles not included in the above definitions.

(r) Property-Hauling Vehicles.—(1) Contract carrier vehicles.

Motor vehicles used for the transportation of property for hire, but not licensed as common carrier of property vehicles under the provisions of §§ 62-121.5 through 62-121.79: Provided, it shall not be construed to include the transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forests to the first or primary market, nor to perishable foods which are still owned by the grower while being delivered to the first or primary market, by an operator of not more than one truck or trailer for hire, nor to merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets. Provided further, that the term "for hire" as used herein shall include every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the exemptions aforesaid. Provided, however, that the term "for hire" shall not include motor vehicles whose sole operation in carrying the property of others is limited to the transportation of T. V. A. or A. A. A. phosphate, and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States agricultural adjustment administration or fuel for the exclusive use of the public schools of the State. Provided, further, that, for the duration of any contract for carrying the United States mail in force at the time this proviso becomes effective, the term "for hire" shall not include any motor vehicle whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to such a contract.

(2) Common carrier of property vehicles.

Every motor vehicle used for the transportation of property between fixed termini, or over a regular route, with the right to make occasional trips off said route as provided in §§ 62-121.5 through 62-121.79: Provided, only such vehicles shall be so classified as the Utilities Commission shall determine to be reasonably necessary for the proper handling of the business on said route, and the determination so arrived at shall be duly certified by the Utilities Commissioner to the Motor Vehicle Bureau; provided further, that vehicles operating as interstate common carriers under authority of the Interstate Commerce Commission shall be included herein unless they do contract hauling in North Carolina in which event they shall be licensed as contract carriers.

(3) Private hauler vehicles.

All motor vehicles used for the transportation of property not falling within one of the above defined classifications.

(4) Semi-trailer.

Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.

(5) Trailers.

Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.

(s) Nonresident.—Every person who is not a resident of this State.

(t) Owner.—A person who holds the legal title of a vehicle or, in the event a vehicle is subject to an agreement for conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the original vendee or lessee; or, in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article; except that in all such instances when the rent paid by the lessee includes charges for services of any nature and/or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle, and said vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

When a vehicle is leased to a common carrier of property or a common carrier of passengers and is actually used by said franchise carrier in the operation of his business, such lessee, at his election, may be deemed the owner of the vehicle for the purposes of this article.

Provided that any lessee who fails to transfer the title to any vehicle which is under lease back to the lessor and surrender or have transferred any license issued to him pursuant to this article within 20 days after the termination of the lease shall be subject to an additional license tax of \$100.00 on each vehicle.

For the purposes of this article, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(u) Person.—Every natural person, firm, co-partnership, association, corporation, or governmental agency.

(v) Pneumatic Tire.—Every tire in which compressed air is designed to support the load.

(w) Private Road or Driveway.—Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(w)1. Residential District.—The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business purposes.

(x) Reconstructed Vehicle.—Every vehicle of a type required to be registered hereunder materially altered from its original construction by the removal, addition, or substitution of essential parts, new or used.

(y) Road Tractor.—Every motor vehicle designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(z) Safety Zone.—The area or space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(aa) Specially Constructed Vehicles.—Every vehicle of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from its original construction.

(bb) Special Mobile Equipment.—Every vehicle not designed or used primarily for the transportation of persons or property, but incidentally operated or moved over the highways, such as farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers. The foregoing enumeration shall be deemed partial and shall not operate to exclude other vehicles which are within the general terms of this section.

(cc) Street and Highway.—The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic.

(dd) Solid Tire.—Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(ee) Truck Tractor.—Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(ff) Vehicle.—Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this article bicycles shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle except those which by their nature can have no application.

(gg) Resident.—As to individuals, every person who is a resident of this State and the fact that such person leaves the State temporarily shall not be sufficient to terminate his residence here. Any person who leaves this State shall be presumed to continue to be a resident of this State if his family continues to reside in this State or his children continue to attend school in this State, or if his dwelling in this State is maintained by him as a place of occupancy which is not used by parties other than members of his family. (1937, c. 407, s. 2; 1939, c. 275; 1941, cc. 22, 36, 196; 1943, cc. 201, 202; 1945, c. 414, s. 1; 1945, cc. 653, 838; 1947, c. 220, s. 1; 1949, cc. 814, 1287; 1951, c. 571; 1951, c. 705, s. 1; 1951, c. 770; 1951, c. 819, ss. 1, 2; 1951, c. 1023, s. 1.)

**Editor's Note.** — The 1939 amendment changed subsection (a), added the second proviso to subsection (r) (1), added the proviso to subsection (ff) and inserted subsection (w)1.

The second 1941 amendment changed subdivision (1) of subsection (r) as it appeared in the original act. It ignored the second proviso which had been added by the 1939 amendment and the last proviso which was added by the first 1941 amendment. For comment on the 1941 amendments, see 19 N. C. Law Rev. 514.

The first 1943 amendment inserted in subsection (r) (1) that part of the first proviso beginning with the words "nor to merchandise." The second 1943 amendment added at the end of subsection (q) (2) the clause relating to "share the expense" plans. For comment on the 1943 amendments, see 21 N. C. Law Rev. 356.

The first 1945 amendment, effective Jan. 1, 1946, added the exception clause to subsection (t). The second 1945 amendment added at the end of paragraph (1) of subsection (r) the words "or fuel for the exclusive use of the public schools of the State." The third 1945 amendment added the second proviso to paragraph (2) of subsection (r).

The 1947 amendment rewrote subsection (f).

The 1949 amendments rewrote subsection (q) (5) and the first proviso of sub-

section (r) (1).

The 1951 amendments substituted "common carriers of passengers" for "franchise bus carriers," "contract carrier" for "contract hauler" and "common carrier of property" for "franchise hauler"; changed the reference "§§62-103 to 62-121" to "§§ 62-121.5 through 62-121.79"; added the last proviso to the first paragraph of subsection (r) and the last three paragraphs of subsection (t); and added subsection (gg) at the end of the section.

**Handcart Not Vehicle.**—A handcart, being moved solely by human power, is excluded from the category of vehicles defined in subsection (ff) of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**"Auto Truck" Defined as Automobile.**—See *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693 (1919).

**Motorcycle.**—Statutory definition cited in *Anderson v. Life, etc., Ins. Co.*, 197 N. C. 72, 147 S. E. 693 (1929), holding that the expression "motor driven car" in an insurance policy excludes a motorcycle.

**Intersection.**—Under this section where one public highway joins another, but does not cross it, the point where they join is an intersection of public highways. *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928), citing *Vartanian, Law of Automobiles*, Part II, chapter 1, p. 414, note.

**Bicycle.**—Under this section a bicycle is

deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. *Van Dyke v. Atlantic Greyhound Corp.*, 218 N. C. 283, 10 S. E. (2d) 727 (1940).

A bicycle is a vehicle and is subject to provisions of the motor vehicle act except those which by their nature can have no application. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565 (1942).

**Portion of Sidewalks as Highways.**—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a “highway” within the meaning of § 20-138 prohibiting drunken driving. *State v. Perry*, 230 N. C. 361, 53 S. E. (2d) 288 (1949).

**Residential District.**—A charge defining a “residential district” as being “the territory contiguous to a highway, not comprising a business district, when the frontage on the highway for a distance of 300 feet or more is mainly occupied by dwellings and buildings in use for business” is held without error, the definition of a residential district in chapter 148, Public Laws of 1927, Art. 1, § 1(s), not having been repealed by this section. *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140 (1939). But note 1939 amendment adding subsection (w)1.

Where the evidence established that the scene of the accident was not in a business district, and there was no evidence that defendant’s vehicle was being

driven in excess of 20 miles an hour, whether the accident occurred in a residential district as defined by subsection (w)1 of this section, was held immaterial, since such speed did not violate the statutory restriction. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406 (1942).

That part of a highway comprising an intersection may not properly be considered in applying subsection (w)1 of this section to any given locality. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406 (1942).

**Business District.**—Uncontradicted testimony that only two business buildings front on the street in the block in which the accident occurred and that both of them together comprise not more than 40 feet frontage, establishes as a matter of law that the locus in quo is not a business district as defined by subsection (a) of this section. *Mitchell v. Melts*, 220 N. C. 793, 18 S. E. (2d) 406 (1942).

**Applied** in *State v. Brooks*, 210 N. C. 273, 186 S. E. 237 (1936); *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664 (1937); *Wooten v. Smith*, 215 N. C. 48, 200 S. E. 921 (1939); *Sparks v. Willis*, 228 N. C. 25, 44 S. E. (2d) 343 (1947) (as to subsections (a) and (w)).

**Cited** in *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928); *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372 (1938); *Bass v. Houghton*, 221 N. C. 218, 19 S. E. (2d) 871 (1942); *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361 (1950).

## Part 2. Authority and Duties of Commissioner and Department.

**§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.**—(a) The Commissioner is hereby vested with the power and is charged with the duty of administering and enforcing the provisions of this article and of all laws regulating the operation of vehicles or the use of the highways, the enforcement or administration of which is now or hereafter vested in the Department.

(b) The Commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this article and any other laws the enforcement and administration of which are vested in the Department.

(c) The Commissioner is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this article.

(d) The Commissioner shall adopt an official seal for the use of the Department. (1937, c. 407, s. 4.)

**Cross Reference.**—As to Commissioner and organization of Department, see §§ 20-2, 20-3.

**§ 20-40. Offices of Department.**—The Commissioner shall maintain an

office in Raleigh, North Carolina, and in such places in the State as he shall deem necessary to properly carry out the provisions of this article. (1937, c. 407, s. 5.)

**§ 20-41. Commissioner to provide forms required.**—The Commissioner shall provide suitable forms for applications, certificates of title and registration cards, registration number plates and all other forms requisite for the purpose of this article, and shall prepay all transportation charges thereon. (1937, c. 407, s. 6.)

**§ 20-42. Authority to administer oaths and certify copies of records.**—(a) Officers and employees of the Department designated by the Commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall do so without fee.

(b) The Commissioner and such officers of the Department as he may designate are hereby authorized to prepare under the seal of the Department and deliver upon request a certified copy of any record of the Department, charging a fee of fifty cents (50¢) for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof. (1937, c. 407, s. 7.)

**Cross Reference.**—As to copy of record kept by Commissioner, etc., certified by Commissioner, as evidence, see § 8-37.

**§ 20-43. Records of Department.**—(a) All records of the Department, other than those declared by law to be confidential for the use of the Department, shall be open to public inspection during office hours.

(b) The Commissioner may destroy any registration records of the Department which have been maintained on file for three years which he may deem obsolete and of no further service in carrying out the powers and duties of the Department.

(c) The Commissioner, upon receipt of notification from another state or foreign country that a certificate of title issued by the Department has been surrendered by the owner in conformity with the laws of such other state or foreign country, may cancel and destroy such record of certificate of title. (1937, c. 407, s. 8; 1947, c. 219, s. 1.)

**Editor's Note.** — The 1947 amendment added subsection (c) to this section.

**§ 20-44. Authority to grant or refuse applications.**—The Department shall examine and determine the genuineness, regularity and legality of every application for registration of a vehicle and for a certificate of title therefor, and of any other application lawfully made in the Department, and may in all cases make investigation as may be deemed necessary or require additional information, and shall reject any such application if not satisfied of the genuineness, regularity, or legality thereof or the truth of any statement contained therein, or for any other reason, when authorized by law. (1937, c. 407, s. 9.)

**§ 20-45. Seizure of documents and plates.**—The Department is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used. (1937, c. 407, s. 10.)

**§ 20-46. Distribution of synopsis of laws.**—The Department may publish a synopsis or summary of the laws of this State regulating the operation of vehicles, and deliver to any person on request a copy thereof without charge (1937, c. 407, s. 11.)

**§ 20-47. Department may summon witnesses and take testimony.**—

(a) The Commissioner and officers of the Department designated by him shall have authority to summon witnesses to give testimony under oath or to give written deposition upon any matter under the jurisdiction of the Department. Such summons may require the production of relevant books, papers, or records.

(b) Every such summons shall be served at least five days before the return date, either by personal service made by any person over eighteen years of age or by registered mail, but return acknowledgment is required to prove such latter service. Failure to obey such a summons so served shall constitute a misdemeanor. The fees for the attendance and travel of witnesses shall be the same as for witnesses before the superior court.

(c) The superior court shall have jurisdiction, upon application by the Commissioner, to enforce all lawful orders of the Commissioner under this section. (1937, c. 407, s. 12.)

**Cross References.**—As to misdemeanors described, see § 14-3. As to fees of witnesses for which no specific punishment is prescribed, see § 2-52.

**§ 20-48. Giving of notice.**—Whenever the Department is authorized or required to give any notice under this article or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. (1937, c. 407, s. 13.)

**§ 20-49. Police authority of Department.**—The Commissioner and such officers and inspectors of the Department as he shall designate and all members of the Highway Patrol shall have the power:

(a) Of peace officers for the purpose of enforcing the provisions of this article and of any other law regulating the operation of vehicles or the use of the highways.

(b) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this article or other laws regulating the operation of vehicles or the use of the highways.

(c) At all times to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions may require, notwithstanding the provisions of law.

(d) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver's license and the registration card issued for the vehicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.

(e) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

(f) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.

(g) To investigate traffic accidents and secure testimony of witnesses or of persons involved.

(h) To investigate reported thefts of motor vehicles, trailers and semi-trailers. (1937, c. 407, s. 14.)

### Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. **Owner to secure registration and certificate of title.**—Every owner of a vehicle intended to be operated upon any highway of this State and required by this article to be registered shall, before the same is so operated, apply to the Department for and obtain the registration thereof, the registration plates therefor, and a certificate of title therefor, and attach the registration plates to the vehicle, except when an owner is permitted to operate a vehicle under the registration provisions relating to manufacturers, dealers and non-residents contained in § 20-79: Provided, that nothing herein contained shall require the application for or the issuance of a certificate of title for a trailer having not more than two wheels with a gross weight of vehicle and load of twenty-five hundred (2500) pounds or less, and towed by a vehicle licensed by the Commissioner for not more than four thousand (4,000) pounds gross weight or a passenger car but before operating a trailer as described above upon the highways of the State, the owner thereof must obtain the registration thereof and pay the registration fees as now provided by Part 7 of this article; provided that the Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant a special one-way trip permit to move a vehicle without license upon good cause being shown. (1937, c. 407, s. 15; 1943, c. 648; 1945, c. 956, s. 3; 1947, c. 219, s. 2.)

**Editor's Note.** — The 1943 amendment rewrote the proviso.

The 1945 amendment inserted in the proviso the words "a vehicle licensed by the Commissioner for not more than four thousand (4,000) pounds gross weight or."

The 1947 amendment added the provision at the end of the section relating to special one-way trip permit.

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

**Purpose as Compared with Mortgage Registration Statute.**—This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, §§ 47-20 and 47-23, specifically protects mortgagees. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).

§ 20-51. **Exempt from registration.**—The following shall be exempt from the requirement of registration and certificate of title: (a) Any such vehicle driven or moved upon a highway in conformance with the provisions of this article relating to manufacturers, dealers, or nonresidents.

(b) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

(c) Any implement of husbandry, whether of a type otherwise subject to registration hereunder or not, which is only incidentally operated or moved upon a highway.

(d) Any special mobile equipment as herein defined.

(e) Any vehicle owned and operated by the government of the United States.

(f) Farm tractors equipped with rubber tires and trailers or semi-trailers when attached thereto and when used by a farmer, his tenant, agent, or employee

**Effect upon Mortgage Registration Statute.**—The provisions of §§ 47-20 and 47-23 are not affected or repealed by this article as amended. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).

**Necessity of Registering Conditional Sale Contracts.** — All chattel mortgages and conditional sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the State, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and purchasers for value, from the mortgagor. The conditional sale contract, purchased by the plaintiff, never having been registered, is invalid as against the defendant, a purchaser for full value. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).



in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor and trailer or semi-trailer while on any trip within a radius of ten miles from the point of loading. This section shall not be construed as granting any exemption to farm tractors and trailers or semi-trailers which are operated on a for-hire basis, whether money or some other thing of value is paid or given for the use of such tractors and trailers or semi-trailers. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2.)

**Cross References.**—As to manufacturers and dealers, see § 20-79. As to nonresidents, see § 20-83.

added paragraph (f), which was rewritten by the 1949 amendment. The 1951 amendment rewrote paragraph (e).

**Editor's Note.** — The 1943 amendment

**§ 20-52. Application for registration and certificate of title.**—(a) Every owner of a vehicle subject to registration hereunder shall make application to the Department for the registration thereof and issuance of a certificate of title for such vehicle upon the appropriate form or forms furnished by the Department, and every such application shall bear the signature of the owner written with pen and ink, and said signature shall be acknowledged by the owner before a person authorized to administer oaths, and said application shall contain:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

2. A description of the vehicle, including, in so far as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the serial number of the vehicle, the engine and other identifying numbers of the vehicle and whether new or used, and if a new vehicle, the date of sale and actual date of delivery of vehicle by the manufacturer or dealer to the person intending to operate such vehicle;

3. A statement of the applicant's title and of all liens or encumbrances upon said vehicle and the names and addresses of all persons having any interest therein and the nature of every such interest;

4. Such further information as may reasonably be required by the Department to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new or foreign vehicle purchased from a dealer, the application shall be accompanied by an application for certificate of title in the name of the dealer containing the description of vehicle, statement of dealer's title and all liens or encumbrances upon said vehicle, the name and address of person to whom sold, date of sale, actual date vehicle was delivered to purchaser, and such other information as may be required by the Department. (1937, c. 407, s. 17.)

**§ 20-53. Application for specially constructed, reconstructed, or foreign vehicle; inspection of foreign vehicles before registration.**—(a) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application, and with reference to every foreign vehicle which has been registered outside of this State, the owner shall surrender to the Department all registration cards and certificates of title or other evidence of such foreign registration as may be in his possession or under his control, except as provided in subdivision (b) hereof.

(b) Where, in the course of interstate operation of a vehicle registered in another state, it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender, but shall submit for inspection said evidence of such foreign registration, and the Department in its discretion, and upon a proper showing, shall register said vehicle in this State but shall not issue a certificate of title for such vehicle.

(c) Before any motor vehicle, which has been registered or licensed for use in any other state or foreign country, can be registered for use upon the highways of this State, as required by the motor vehicle laws, the person applying for said license shall be required to file with the Motor Vehicle Department a certificate signed by a member of the State Highway Patrol showing that the motor vehicle has been inspected by said official, and that the same is in such mechanical condition as to meet the requirements and laws of this State as to motor vehicles which may be lawfully operated upon the streets and highways of this State. The members of the State Highway Patrol shall be required to make the necessary inspections of such motor vehicles and when, from such inspections, it is found that such motor vehicles desired to be registered in this State are in such mechanical condition as to meet the requirements of the laws of the State, furnish the certificate herein provided for to the applicant without any charge being made for such services. (1937, c. 407, s. 18; 1949, c. 675.)

**Editor's Note.** — The 1949 amendment added subsection (c) to this section.

The necessity for subsection (c) of this section arose out of the repeal of the 1947 Motor Vehicle Inspection Law, §§ 20-

183.2 through 20-183.8. It is intended to prevent the State from becoming a dumping ground for vehicles that cannot pass the vehicle inspection laws of other states. 27 N. C. Law Rev. 471.

**§ 20-54. Authority for refusing registration or certificate of title.**

—The Department shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:

(a) That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the Department or that the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this article;

(b) That the vehicle is mechanically unfit or unsafe to be operated or moved upon the highways;

(c) That the Department has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having valid lien upon such vehicle;

(d) That the registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this State;

(e) That the required fee has not been paid. (1937, c. 407, s. 19.)

**Cross Reference.** — As to fees, see § 20-85.

**§ 20-55. Examination of registration records and index of stolen and recovered vehicles.**—The Department, upon receiving application for any transfer of registration or for original registration of a vehicle, other than a new vehicle sold by a North Carolina dealer, shall first check the engine and serial numbers shown in the application against the indexes of registered motor vehicles, and against the index of stolen and recovered motor vehicles required to be maintained by this article. (1937, c. 407, s. 20.)

**§ 20-56. Registration indexes.**—The Department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described and keep a record thereof in suitable books or on index cards as follows:

(a) Under a distinctive registration number assigned to the vehicle;

(b) Alphabetically, under the name of the owner;

(c) Under the motor number or any other identifying number of the vehicle; and

(d) In the discretion of the Department, in any other manner it may deem advisable. (1937, c. 407, s. 20½; 1949, c. 583, s. 5.)

**Editor's Note.** — The 1949 amendment rewrote subsection (c).

**§ 20-57. The Department to issue certificate of title and registration card.**—(a) The Department upon registering a vehicle shall issue a registration card and a certificate of title as separate documents.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the Commissioner, and upon the reverse side a form for endorsement of notice to the Department upon transfer of the vehicle.

(c) Every owner, upon receipt of a registration card, shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers, or shall be carried by the person operating or in control of such vehicle, who shall display the same upon demand of any peace officer or any officer of the Department: Provided, however, no person charged with failing to so carry such registration card shall be convicted if he produces in court a registration card theretofore issued to him and valid at the time of his arrest.

(d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card, and in addition thereto the date of issuance and a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described, and whether possession is held by the owner under a lease, contract or conditional sale, or other like agreement.

(e) The certificate of title shall also contain upon the reverse side form of assignment of title or interest and warranty thereof, with space for notation of liens and encumbrances upon such vehicle at the time of a transfer.

(f) Certificates of title upon which liens or encumbrances are shown shall be delivered or mailed by the Department to the holder of the first lien or encumbrance.

(g) Certificates of title shall bear thereon the seal of the Department.

(h) Certificates of title need not be renewed annually, but shall remain valid until canceled by the Department for cause or upon a transfer of any interest shown therein. (1937, c. 407, s. 21; 1943, c. 715.)

**Editor's Note.** — The 1943 amendment added the proviso to paragraph (c).

**§ 20-58. Release by lien holder to owner.**—(a) A person holding a lien or encumbrance as shown upon a certificate of title upon a vehicle may release such lien or encumbrance or assign his interest to the owner without affecting the registration of said vehicle. The Department, upon receiving a certificate of title upon which a lien holder has released or assigned his interest to the owner or upon receipt of a certificate of title not so endorsed, but accompanied by a legal release from a lien holder of his interest in or to a vehicle, shall issue a new certificate of title as upon an application for duplicate certificate of title.

(b) Any lien in favor of any person, firm or corporation which, since notice of such lien to the Department has dissolved, ceased to do business, or gone out of business for any reason whatsoever, and which shall remain of record in the Department as a notice of lien of such person, firm or corporation for a period of more than three years from the date of notice, shall become null and void and of no further force and effect as it relates to the issuance or transfer of title by the Department. (1937, c. 407, s. 22.)

**§ 20-59. Unlawful for lienor who holds certificate of title not to surrender same when lien satisfied.**—It shall be unlawful and constitute a misdemeanor for a lienor who holds a certificate of title as provided in this article

to refuse or fail to surrender such certificate of title to the person legally entitled thereto, when called upon by such person, within ten days after his lien shall have been paid and satisfied, and any person convicted under this section shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1937, c. 407, s. 23.)

**§ 20-60. Owner after transfer not liable for negligent operation.**—The owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest, and who has delivered possession of such vehicle and the certificate of title thereto properly endorsed to the purchaser or transferee, shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another. (1937, c. 407, s. 24.)

**§ 20-61. Owner dismantling or wrecking vehicle to return evidence of registration.**—Any owner dismantling or wrecking any vehicle shall forward to the Department the certificate of title, registration card and/or other proof of ownership, and the registration plate or plates last issued for such vehicle. No person, firm or corporation shall dismantle or wreck any motor vehicle without first complying with the requirements of this section. The Commissioner upon receipt of certificate of title and notice from the owner thereof that a vehicle has been junked or dismantled may cancel and destroy such record of certificate of title. (1937, c. 407, s. 25; 1947, c. 219, s. 3.)

**Editor's Note.** — The 1947 amendment added the last sentence.

**§ 20-62. Sale of motor vehicles to be dismantled.**—Any owner who sells a motor vehicle as scrap or to be dismantled or destroyed shall assign the certificate of title thereto to the purchaser, and shall deliver such certificate so assigned to the Department with an application for a permit to dismantle such vehicle. The Department shall thereupon issue to the purchaser a permit to dismantle the same, which shall authorize such person to possess or transport such vehicle or to transfer ownership thereto by endorsement upon such permit. A certificate of title shall not again be issued for such motor vehicle in the event it is scrapped, dismantled, or destroyed. In any case, where the owner for any reason fails to send in title for a junked or dismantled vehicle, the Department shall have authority to take possession of such title for cancellation. (1937, c. 407, s. 26.)

**§ 20-63. Registration plates to be furnished by the Department.**—(a) The Department upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semi-trailer and two registration plates for every other motor vehicle: Provided, that whenever the Commissioner determines that there is an actual or threatened shortage of metal, he may provide for the issuance of only one registration plate for each motor vehicle. Registration plates issued by the Department under this article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Department. When said registration plate or plates are so surrendered to the Department, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plates or plates on which the numbers are

not readily distinguishable and who wilfully refuses to surrender said plates to the Department shall be guilty of a misdemeanor.

(b) Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration thereof.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer or semi-trailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a motorcycle, trailer or semi-trailer, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a motorcycle, trailer or semi-trailer shall be attached to the rear thereof.

(e) Preservation and Cleaning of Registration Plates.—It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding thirty days.

(f) Operating with False Numbers.—Any person who shall wilfully operate a motor vehicle with a registration plate which has been repainted or altered or forged, or which was issued by the Commissioner for a motor vehicle other than the one on which used, shall be guilty of a misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers.—Any operator of a motor vehicle who shall wilfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3.)

**Editor's Note.** — The 1943 amendment struck out the words "and with intent to defraud the State of registration fees" formerly appearing after the word "wilfully" in paragraph (f). The amendment also struck out the words "and with intent to conceal the identity of such motor vehicle or the identity of the registered

owner thereof" formerly appearing after the word "wilfully" in line two of paragraph (g).

The 1951 amendment added the proviso to the first sentence of subsection (a) and the last three sentences of the subsection. It also added the proviso at the end of the first sentence of subsection (d).

**§ 20-64. Transfer of registration plates.**—(a) Registration plates issued by the Department for vehicles privately owned and operated shall not be transferred from one vehicle to another, but shall be assigned and transferred from one owner to another, upon the assignment of title as required by this article, and shall remain on the vehicle for which originally issued.

(b) Registration plates issued by the Department for vehicles owned and operated by the State or any department thereof, or by any county, city or town, school district or other political subdivision of the State, shall not be assigned and

transferred from one owner to another, but shall be retained by the owner to whom originally issued, and may be used by the owner on another vehicle: Provided, that the owner shall make application to the Department for said transfer and comply with the requirements of this article relative to certificate of title for vehicle the registration plates are to be transferred to.

(c) Registration plates issued by the Department for vehicles operated for hire may be retained by the owner for transfer to another vehicle belonging to the same owner; or, at the option of the owner to whom issued, by written consent of the owner, may be transferred and assigned with the same vehicle to the new owner upon payment of a fee of one dollar (\$1.00) as otherwise provided for a transfer; except that registration plates issued for common carriers of property and franchise bus vehicles may not be transferred and assigned from one owner to another but shall be retained by the owner to whom originally issued; provided, however, if the owner of common carrier of property or franchise bus plates sells out his entire fleet and rights to another who licenses all the vehicles in North Carolina in his name for the same license year, such owner of the common carrier of property or franchise bus plates may secure a refund for the unexpired portion of such plates on a monthly basis beginning the first day of the month following such sale if there is any credit remaining over and above any 6% gross receipts tax due: Provided, further, that common carrier flat rate registration plates may be transferred at the option of the owner to whom issued by the written consent of such owner. (1937, c. 407, s. 28; 1945, c. 576, s. 1; 1947, c. 914, s. 1; 1951, c. 188; 1951, c. 819, s. 1.)

**Editor's Note.** — The 1945 amendment rewrote subsection (c) and the 1947 amendment added the first proviso thereto. The first 1951 amendment added the second proviso to subsection (c) and the second 1951 amendment substituted "common carrier of property" for "franchise hauler" in said subsection.

**§ 20-64.1. Revocation of license plates by Utilities Commission.**—The license plates of any carrier of persons or property by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of either the North Carolina Truck Act of 1947 or the Bus Act of 1949, or for the wilful violation of any lawful rule or regulation made and promulgated by the North Carolina Utilities Commission under said acts. To that end said Commission shall have power upon complaint or upon its own motion, after notice and hearing under the rules of evidence prescribed in G. S. 62-18, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding thirty (30) days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the North Carolina Utilities Commission upon receipt of a certified copy of the same.

This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120.)

**Editor's Note.**—The Truck Act referred to in this section is codified as §§ 62-121.5 through 62-121.42, and the Bus Act is codified as §§ 62-121.43 through 62-121.79.

**§ 20-65. Expiration of registration.**—Every vehicle registration under this article and every registration card and registration plate issued hereunder shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the thirty-first day of January, inclusive. (1937, c. 407, s. 29; 1943, c. 592, s. 1.)

**Editor's Note.** — The 1943 amendment added the proviso.

**§ 20-66. Application for renewal of registration.**—(a) Application for

renewal of a vehicle registration shall be made by the owner upon proper application and by payment of the registration fee for such vehicle, as provided by law.

(b) The Department may receive applications for renewal of registration and grant the same, and issue new registration cards and plates at any time prior to expiration of registration, but no person shall display upon a vehicle the new registration plates prior to December first. (1937, c. 407, s. 30.)

§ 20-67. **Notice of change of address or name.**—(a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within ten days thereafter notify the Department in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle or a certificate of title is thereafter changed by marriage or otherwise, such person shall within ten days notify the Department of such former and new names. (1937, c. 407, s. 31.)

§ 20-68. **Replacement of lost or damaged certificates, cards and plates.**—(a) In the event any registration card or registration plate is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the Department, shall immediately make application for and may obtain a duplicate or a substitute or a new registration under a new registration number, as determined to be most advisable by the Department, upon the applicant's furnishing under oath information satisfactory to the Department and payment of required fee.

(b) When a dealer acquires a motor vehicle which has been previously licensed, he should advise the party from whom he acquires the vehicle as to the provisions of the law which require that party to report to the Motor Vehicle Bureau the sale or disposal of the vehicle. If the dealer wishes to have the license transferred to his name he may do so, but this is optional with him. However, should the license plate or plates be lost or destroyed while the vehicle is in the possession of the dealer, no replacement may be issued unless and until license and title has been transferred to the dealer. Nor shall any subsequent owner secure replacement plates until application for transfer of title and license has been made.

(c) In the event any certificate of title is lost, mutilated, or becomes illegible, the owner or legal representative of the owner of the vehicle for which the same was issued, as shown by the records of the Department, shall immediately make application for and may obtain a duplicate upon the applicant furnishing under oath information satisfactory to the Department and payment of required fee. Upon issuance of any duplicate certificate of title the previous certificate last issued shall be void. (1937, c. 407, s. 32.)

**Cross Reference.**—As to fees for duplicate certificate, see § 20-85.

§ 20-69. **Department authorized to assign new engine number.**—The owner of a motor vehicle upon which the engine number or serial number has become illegible or has been removed or obliterated shall immediately make application to the Department for a new engine or serial number for such motor vehicle. The Department, when satisfied that the applicant is the lawful owner of the vehicle referred to in such application is hereby authorized to assign a new engine or serial number thereto, and shall require that such number, together with the name of this State, or a symbol indicating this State, be stamped upon the engine, or in the event such number is a serial number, then upon such portion of the motor vehicle as shall be designated by the Department. (1937, c. 407, s. 33.)

**§ 20-70. Department to be notified when another engine is installed or body changed.**—(a) Whenever a motor vehicle registered hereunder is altered by the installation of another engine in place of an engine, the number of which is shown in the registration records, or the installation of another body in place of a body, the owner of such motor vehicle shall immediately give notice to the Department in writing on a form prepared by it, which shall state the number of the former engine and the number of the newly installed engine, the registration number of the motor vehicle, the name of the owner and any other information which the Department may require. Whenever another engine has been substituted as provided in this section, and the notice given as required hereunder, the Department shall insert the number of the newly installed engine upon the registration card and certificate of title issued for such motor vehicle.

(b) Whenever a new engine or serial number has been assigned to and stamped upon a motor vehicle as provided in § 20-69, or whenever a new engine has been installed or body changed as provided in this section, the Department shall require the owner to surrender to the Department the registration card and certificate of title previously issued for said vehicle. The Department shall also require the owner to make application for a duplicate registration card and a duplicate certificate of title showing the new motor or serial number thereon or new style of body, and upon receipt of such application and fee, as for any other duplicate title, the Department shall issue to said owner a duplicate registration and a duplicate certificate of title showing thereon the new number in place of the original number or the new style of body. (1937, c. 407, s. 34; 1943, c. 726.)

**Cross Reference.**—As to fee for duplicate registration card and certificate of title, see § 20-85.

**Editor's Note.** — The 1943 amendment made this section applicable to change of body of motor vehicle.

**§ 20-71. Altering or forging certificate of title a felony.**—Any person who shall alter with fraudulent intent any certificate of title or registration card issued by the Department, or forge or counterfeit any certificate of title or registration card purporting to have been issued by the Department under the provisions of this article, or who shall alter or falsify with fraudulent intent or forge any assignment thereof, or who shall hold or use any such certificate, registration card or assignment knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished in the discretion of the court. (1937, c. 407, s. 35.)

**Cross Reference.**—As to punishment of felonies for which no specific punishment is prescribed, see § 14-2.

**§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.**—(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose. (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment; Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his cause of action shall have accrued. (1951, c. 494.)



## Part 4. Transfer of Title or Interest.

§ 20-72. **Transfer by owner.**—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interest thereto, he shall endorse upon the reverse side of the registration card issued for such vehicle the name and address of the transferee and the date of transfer, and shall immediately deliver such card and registration plates to the transferee if such plates are subject to transfer with the vehicle as set out in § 20-64. If the registration plates are not subject to transfer the registration card and plates may be retained by the transferor of the vehicle and no endorsement would be necessary.

(b) The owner of any vehicle registered under the foregoing provisions of this article, transferring or assigning his title or interest thereto, shall also endorse an assignment and warranty of title in form approved by the Department upon the reverse side of the certificate of title or execute an assignment and warranty of title of such vehicle and a statement of all liens or encumbrances thereon, which statement shall be verified under oath by the owner, who shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle, except that where a deed of trust, mortgage, conditional sale or title retaining contract is obtained from purchaser or transferee in payment of purchase price or otherwise, the lien holder shall forward such certificate of title papers to the Department within twenty days together with necessary fees, or deliver such papers to the purchaser at the time of delivering the vehicle, as he may elect, but in either event the penalty provided in § 20-74 shall apply if application for transfer is not made within twenty days. Any owner selling or transferring his interest to a motor vehicle who willfully fails or refuses to endorse an assignment of title shall be guilty of a misdemeanor. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5.)

**Cross Reference.** — As to fees, see § 20-85.

**Editor's Note.** — The 1947 amendment rewrote subsection (a) and added the last sentence of subsection (b).

The case cited below was decided under the corresponding provisions of the former law.

**Transfer of Certificate as Prerequisite to Passing of Title.**—A careful perusal of this article fails to disclose any provision prohibiting a sale or transfer of the title of a motor vehicle without a transfer and delivery of a certificate of registration of title, and there is no provision that a sale so made is either fraudulent or void. Its provisions operate upon the parties who make a sale or a purchase without com-

plying with its terms. Its penal provisions are clear. They are directed against those who violate after the sale, or transfer, has been made. *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).

**Necessity for Writing to Pass Title.** — “A sale of personal property is not required to be evidenced by any written instrument in order to be valid. This rule had been of such long standing prior to the enactment of the Motor Vehicle Registration Act, we cannot assume that the legislature intended to change this rule, unless it says so.” *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).

§ 20-73. **New owner to secure transfer of registration and new certificate of title.**—The transferee within twenty days after the purchase shall apply to the Department for a transfer of registration of the vehicle and shall present the certificate of title endorsed and assigned as hereinbefore provided to the Department, and make application for and obtain a new certificate of title for such vehicle except as otherwise permitted in §§ 20-75 and 20-76. Any transferee willfully failing or refusing to make application for title shall be guilty of a misdemeanor. (1937, c. 407, s. 37; 1939, c. 275; 1947, c. 219, s. 6.)

**Editor's Note.** — The 1939 amendment substituted “fifteen” for “fifteen” with reference to number of days. The 1947 amendment added the second sentence.

§ 20-74. **Penalty for failure to make application for transfer within the time specified by law.**—It is the intent and purpose of this article that

every new owner or purchaser of a vehicle previously registered shall make application for transfer of title and registration within twenty days after acquiring same, or see that such application is sent in by the lien holder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of two dollars (\$2.00) in addition to the fees otherwise provided in this article. It is further provided that any dealer or owner who shall knowingly make any false statement in any application required by this Department as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. All moneys collected under this section shall go to the State highway fund. (1937, c. 407, s. 38; 1939, c. 275.)

**Editor's Note.** — The 1939 amendment substituted "twenty" for "fifteen" with reference to number of days.

**§ 20-75. When transferee is a dealer.**—When the transferee of a vehicle is a dealer who holds the same for resale and operates the same only for purposes of demonstration under a dealer's number plate such transferee shall not be required to register such vehicle nor forward the certificate of title to the Department as provided in § 20-73, but such transferee, upon transferring his title or interest to another person, shall give notice of such transfer to the Department and shall execute and acknowledge an assignment and warranty of title in form approved by the Department, and deliver the same to the person to whom such transfer is made at the same time the vehicle is delivered, except as provided in § 20-72, subsection (b). (1937, c. 407, s. 39.)

**§ 20-76. Title lost or unlawfully detained.**—Whenever the applicant for the registration of a vehicle or a new certificate of title thereto is unable to present a certificate of title thereto by reason of the same being lost or unlawfully detained by one in possession, or the same is otherwise not available, the Department is hereby authorized to receive such application and to examine into the circumstances of the case, and may require the filing of affidavits or other information; and when the Department is satisfied that the applicant is entitled thereto and that § 20-72 has been complied with it is hereby authorized to register such vehicle and issue a new registration card, registration plate or plates and certificates of title to the person entitled thereto, upon payment of proper fee for duplicate title and/or replacement. (1937, c. 407, s. 40; 1947, c. 219, s. 7.)

**Cross Reference.**—As to proper fee, see § 20-85.

**Editor's Note.** — The 1947 amendment inserted the reference to § 20-72.

**§ 20-77. Transfer by operation of law; liens.**—(a) Whenever the title or interest of an owner in or to a vehicle shall pass to another by operation of law, as upon order in bankruptcy, execution sale, repossession upon default in performing the terms of a lease or executory sales contract, or otherwise than by voluntary transfer, the transferee shall secure a transfer of registration to himself and a new certificate of title upon proper application, payment of the fees provided by law, and presentation of the last certificate of title, if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of interest in or to chattels in such cases: Provided, however, transfers of registration shall only be made as provided for in § 20-64, subsections (a), (b) and (c).

(b) In the event of transfer as upon inheritance, devise or bequest, the Department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. However, if no administrator has qualified or the

clerk of the superior court refuses to issue a certificate, the Department may upon affidavit showing satisfactory reasons therefor effect such transfer; provided, that if a decedent dies intestate leaving surviving a spouse and a minor child or children, or a spouse and a child or children mentally incompetent, whether of age or not, and no guardian has been appointed for said child or children, the surviving spouse shall be authorized to transfer the interest of the child or children in said motor vehicle, as provided in this subsection, to a purchaser thereof, but the new title so issued shall not affect the validity nor be in prejudice of any creditor's lien.

(c) Mechanic's or Storage Lien.—In any case where a vehicle is sold under a mechanic's or storage lien, the Department shall be given a twenty-day notice as provided in § 20-114.

(d) The owner of a garage, storage lot or other place of storage shall have a lien for his lawful and reasonable storage charges on any motor vehicle deposited in his place of storage by the owner or any other person having lawful authority to make such storage, and may retain possession of the motor vehicle until such storage charges are paid. If the storage charges are not paid when due, the garage owner or other storage keeper may satisfy said lien as follows:

1. The garage owner or storage keeper shall give written notice to the person who made the storage, to the registered owner, if known, and to any other persons known to claim any lien on or other interest in the motor vehicle. Such notice shall be given by delivery to the person, or by registered letter addressed to the last known place of business or abode of the person to be notified.

2. The notice shall contain a description of the motor vehicle; an itemized statement of the claim for storage charges; a demand that the storage charges be paid on or before a day specified, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and a statement that unless the storage claim is paid on or before the day specified, the motor vehicle will be advertised for sale and sold at auction at a specified time and place.

3. If payment is not made by the day specified in the notice, a sale of the motor vehicle may be had to satisfy the lien. The sale shall be held at the place where the vehicle was stored, or if such place is manifestly unsuitable for the purpose, at the courthouse in the county where vehicle was stored. The advertisement of such sale shall contain the name and address of the registered owner of the vehicle, if known or ascertainable; the name and address of the person who made the storage; a description of the motor vehicle, including the make, year of make, model, motor number, serial number and license number, if any; a statement of the amount of storage charges; and the place, date and hour of sale. The advertisement shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The license shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than three conspicuous public places in such place. A copy of said advertisement shall be sent to the Commissioner of Motor Vehicles at least twenty days prior to the sale. From the proceeds of the sale the garage owner or storage keeper shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, shall be held by the garage owner or storage keeper and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the motor vehicle. If no claim is made for said balance within ten days the garage owner or storage keeper shall immediately pay such balance into the office of the clerk of the superior court of the county wherein the sale was held, and the clerk shall hold said money for twelve months for delivery on demand to person entitled thereto, and if no claim is made within said period, said balance shall escheat to the University of North Carolina.

4. At any time before the motor vehicle is so sold any person claiming a right of property or possession therein may pay the garage owner or storage keeper the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment, and upon receiving such payment, the garage owner or storage keeper shall deliver the motor vehicle to the person making such payment if he is a person entitled to the possession thereof.

Where no specific agreement is made at the time of storage regarding the time when storage charges shall be due, such charges shall be due ninety days after the storage commenced. (1937, c. 407, s. 41; 1943, c. 726; 1945, cc. 289, 714.)

**Cross Reference.**—As to fees required, see § 20-85. The first 1945 amendment inserted the proviso in the second sentence of subsection (b). The second 1945 amendment added subsection (d).

**Editor's Note.** — The 1943 amendment substituted the word "twenty-day" for the word "thirty-day" in subsection (c).

**§ 20-78. When Department to transfer registration and issue new certificate; recordation.**—(a) The Department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, shall transfer the registration thereof under its registration number to the new owner, and shall issue a new registration card and certificate of title as upon an original registration.

(b) The Department shall maintain a record of certificates of title issued and may, after three (3) years from year of issue, at its discretion, destroy such records, maintaining at all times the records of the last two owners.

The Commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of certificate of title records in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in tracing of titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions and proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726; 1947, c. 219, s. 8.)

**Cross Reference.**—As to required fees, see § 20-85. subsection (b), and the 1947 amendment rewrote the first and second sentence of the subsection.

**Editor's Note.** — The 1943 amendment added the second and third sentences of

Part 5. Issuance of Special Plates.

**§ 20-79. Registration by manufacturers and dealers.** — (a) Every manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall apply to the Motor Vehicle Department for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the Department shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this State, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the calendar year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer. The license and plates issued under this section shall be in lieu of the registration of such vehicle.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the Department license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semi-trailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00).

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the Department to such manufacturer or dealer of each vehicle, owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required or issued for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semi-trailer, the property of the dealer, for the purpose of furthering the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semi-trailers, of collecting accounts, contacting prospective customers and generally carrying on routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business; Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the Commissioner from the dealer, which shall be valid for not more than forty-eight hours: Provided further, that motor vehicles, trailers and semi-trailers sold by dealers may be operated for a period not exceeding ten days from the date of sale by the purchaser thereof with dealer's demonstration plates, provided the purchasers have in their possession receipts from the dealers upon which the dealer has certified that the necessary amount of money to pay for titles and licenses has been paid by the purchasers to the dealers to be forwarded to the Motor Vehicle Bureau, either direct or through one of its branch offices, on such form as approved by the Commissioner.

(c) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person to be operated or moved upon a public highway without there being displayed upon such vehicle a number plate or plates issued to such person, either under § 20-63 or under this section.

(d) No manufacturer of or dealer in motor vehicles, trailers or semi-trailers shall cause or permit any such vehicle owned by such person or by any person in his employ, which is in the personal use of such person or employee, to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle.

(e) **Transfer of Dealer Registration.**—No change in the name of a firm, partnership or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered a new business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing and the dealers' plates originally issued may continue to be used. (1937, c. 407, s. 43; 1947, c. 220, s. 2; 1949, c. 583, s. 3; 1951, c. 985, s. 2.)

**Editor's Note.** — The 1947 amendment of subsection (a). It also substituted the last paragraph of the subsection the next to last paragraph words "any provision" for the words "the

provisions," and made said paragraph applicable to "firm or corporation." The 1951 amendment inserted the words "or issued" in the first clause of subsection (b). The words "or

**§ 20-80. National guard plates.**—The Commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each officer of the North Carolina national guard with a set thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following words, "National Guard." The said license plates shall be issued only to officers of the North Carolina national guard, and for which license plates the Commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The Adjutant General of North Carolina shall furnish to the Commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina national guard, which said list shall contain the rank of each officer listed in the order of his seniority in the service, and the said license plates shall be numbered, beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number eleven hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Upon transfer of the ownership of a private passenger vehicle upon which there is a license plate bearing the words national guard, said plates shall be removed and the authority to use the same shall thereby be canceled; however, upon application to the Commissioner, he shall reissue said plate to the officer of the national guard to whom the same were originally issued, and upon said reissue the Commissioner shall collect fees in an amount equal to the fees collected for the original licensing and registering of said private passenger vehicle as is now or may be prescribed by law. (1937, c. 407, s. 44; 1941, c. 36; 1949, c. 1130, s. 7.)

**Editor's Note.** — The 1949 amendment substituted "eleven hundred" for "five hundred" in the third sentence of this section.

**§ 20-81. Official license plates.**—Official license plates issued as a matter of courtesy to State officials shall be subject to the same transfer provisions as provided in § 20-80: (1937 c. 407, s. 45.)

**§ 20-81.1. Special plates for operators of amateur radio stations.**—Every owner of a motor vehicle who holds an unrevoked and unexpired official amateur radio station license, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees, as provided by G. S. 20-87, and an additional fee of one dollar (\$1.00) be issued registration plates upon which shall be inscribed the official amateur radio call letters of such person as assigned by the Federal Communications Commission. Such registration plates shall be in addition to the regular registration plates.

No such special registration plates shall be issued unless the amateur radio operator who is eligible to receive them shall make application to the Department of Motor Vehicles before the 30th day of April of the year preceding that for which plates are to be issued. This application shall be made on forms which shall be provided by the Department of Motor Vehicles and shall contain satisfactory proof that the applicant holds an unrevoked and unexpired official amateur radio station license and shall state the call letters which have been assigned to the applicant.

Special registration plates issued pursuant to this section shall not be replaced annually but shall be permanent plates. These plates shall be valid so long as the amateur radio operator to whom they are issued shall hold an unrevoked and unexpired official amateur radio station license. (1951, c. 1099.)

§ 20-82. **Manufacturer or dealer to give notice of sale or transfer.**—Every manufacturer or dealer, upon transferring a motor vehicle, trailer or semi-trailer, whether by sale, lease or otherwise, to any person other than the manufacturer or dealer shall, on or before the tenth of each month, give written report of all such transfers made during the preceding calendar month to the Department upon the official form provided by the Department. Every such report shall contain the date of such transfer, the names and addresses of the transferer and transferee and such description of the vehicle as may be called for in such official form. Every manufacturer or dealer shall keep a record of all vehicles received or sold containing such information regarding same as the Department may require. (1937, c. 407, s. 46.)

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-83. **Registration by nonresidents.**—(a) Nonresidents of this State, except as otherwise provided in this article, will be exempt from the provisions of this article as to the registration of motor vehicles for the same time and to the same extent as like exemptions are granted residents of this State under laws of another state, district or territory: Provided, that they shall have complied with the provisions of the law of the state, district or territory of their residence relative to the registration and equipment of their motor vehicles, and shall conspicuously display the registration plates as required thereby, and have in their possession the registration certificates issued for such motor vehicles, and that nothing herein contained shall be construed to permit a bona fide resident of this State to use any registration plate or plates from a foreign state, district or territory, under the provisions of this section. The Commissioner shall determine what exemptions the nonresident vehicle operators of the several states, districts or territories, are entitled to under the provisions of this section, and ordain and publish rules and regulations for making effective the provisions of this section, which rules and regulations shall be observed and enforced by all the officers of this State whose duties require the enforcement of the automobile registration laws, and any violations of such rules and regulations shall constitute a misdemeanor.

(b) Motor vehicles duly registered in a state or territory which are not allowed exemptions by the Commissioner, as provided for in the preceding paragraph, desiring to make occasional trips into or through the State of North Carolina, or operate in this State for a period not exceeding thirty days, may be permitted the same use and privileges of the highways of this State as provided for similar vehicles regularly licensed in this State, by procuring from the Commissioner trip licenses upon forms and under rules and regulations to be adopted by the Commissioner, good for use for a period of thirty days upon the payment of a fee in compensation for said privilege equivalent to one-tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this State: Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this State to vehicles of other states under the reciprocity provisions provided by law: Provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the State of North Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this State.

(c) Every nonresident, including any foreign corporation carrying on business within this State and owning and operating in such business any motor vehicle, trailer or semi-trailer within this State, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State. (1937, c. 407, s. 47; 1941, cc. 99, 365.)

**Local Modification.** — Buncombe, Ca- son, Wake: 1941, c. 99, s. 2.  
 tawba, Lee, New Hanover, Pender, Samp- **Editor's Note.**—Public Laws 1941, c. 99,

amended by c. 365, inserted in subsection (b) the words "or operate in this State for a period not exceeding thirty days." For comment on the 1941 amendment, see 19 N. C. Law Rev. 514.

**§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.**—The Department, upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage, shall collect one dollar for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof, or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose.

In lieu of the annual one dollar (\$1.00) registration provided for in this section, the Department may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the Department shall collect a fee of one dollar (\$1.00) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 151, c. 388.)

**Cross Reference.**—As to school trucks, etc., exempt, see § 115-101.

**Editor's Note.** — The 1939 amendment added the second proviso at the end of the

first paragraph. The 1949 amendment added the second paragraph, and the 1951 amendment added the third paragraph.

**§ 20-84.1. Permanent plates for city busses.**—The Department may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city busses and trackless trolleys when such busses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates as provided for in this section, the Department shall collect a fee of one dollar for each vehicle so registered and licensed. (1949, c. 583, s. 6.)

#### Part 7. Title and Registration Fees.

**§ 20-85. Schedule of fees.**—There shall be paid to the Department for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:



- (a) Each application for certificate of title ..... \$ .50
- (b) Each application for duplicate certificate of title ..... .50
- (c) Each application of reposessor for certificate of title ..... .50
- (d) Each transfer of registration ..... 1.00
- (e) Each set of replacement registration plates ..... 1.00

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9.)

**Editor's Note.** — The 1947 amendment to duplicate registration card, which had struck out former subsection (f) relating to duplicate registration card, has been added by the 1943 amendment.

**§ 20-86. Penalty for engaging in a "for hire" business without proper license plates.**—Any person, firm or corporation engaged in the business of transporting persons or property for compensation, except as otherwise provided in this article, shall, before engaging in such business, pay the license fees prescribed by this article and secure the license plates provided for vehicles operated for hire. Any person, firm or corporation operating vehicles for hire without having paid the tax prescribed or using private plates on such vehicles shall be liable for an additional tax of twenty-five dollars (\$25.00) for each vehicle in addition to the normal fees provided in this article. (1937, c. 407, s. 50.)

**§ 20-87. Passenger vehicle registration fees.**—There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(a) **Common Carriers of Passengers.**—Common carriers of passengers shall pay an annual license tax of ninety cents per hundred pounds weight of each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operation: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of ninety cents per hundred pounds: Provided further, that common carriers of passengers operating from a point or points in this State to another point or other points in this State shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Common carriers of passengers operating between a point or points within this State and a point or points without this State shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of passengers operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of passengers be less than ninety cents per hundred pounds weight for each vehicle. The tax prescribed in this subsection is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of passengers by this State.

(b) **U-Drive-It Passenger Vehicles.**—U-drive-it passenger vehicles shall pay the following tax:

- Motorcycles: 1-passenger capacity ..... \$12.00
- 2-passenger capacity ..... 15.00
- 3-passenger capacity ..... 18.00

Automobiles: \$60.00 per year for each vehicle of nine passenger capacity or less, and vehicles of over nine passenger capacity shall be classified as busses and shall pay \$1.90 per hundred pounds empty weight of each vehicle.

(c) For Hire Passenger Vehicles.—For hire passenger vehicles shall be taxed at the rate of \$60.00 per year for each vehicle of nine passenger capacity or less and vehicles of over nine passenger capacity shall be classified as busses and shall be taxed at a rate of \$1.90 per hundred pounds of empty weight per year for each vehicle; provided, however, no license shall issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing (1) that the operator of such taxicab has provided liability insurance or other form of indemnity for injury to persons or damage to property resulting from the operation of such taxicab, in such amount as required by the city or town, and (2) that the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January first, one thousand nine hundred and forty-five shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Edgecombe, Lee, Nash and Union counties on January first, one thousand nine hundred and forty-five shall be entitled to certificates of necessity and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in §§ 62-121.5 through 62-121.79. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

(d) Excursion Passenger Vehicles.—Excursion passenger vehicles shall be taxed at the rate of \$8.00 per passenger capacity, with a minimum charge of \$25.00, but such vehicles operating under a certificate as a restricted common carrier under §§ 62-121.5 through 62-121.79, shall also be liable to the gross revenue six per cent tax to the extent it exceeds the tax herein levied under the same provisions provided for common carriers of passengers.

(e) Private Passenger Vehicles.—There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Vehicles weighing 3500 pounds or less .....	\$10.00
Vehicles weighing 3501 pounds to 4500 pounds .....	12.00
Vehicles weighing 4501 pounds and over .....	15.00

provided, where there are models of the same make automobiles that fall within two or more of the above classes, the average weight based on the 1946 and immediate four prior years models shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. In event there are any make automobiles in operation with models falling into two or more of the above classes that did not manufacture any models in 1946, the average weight based on the last five years in which said automobile was manufactured, shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average falls. Provided further, where new make automobiles are produced after 1946 which has models falling into two or more of the above classes, the average weight shall be ascertained and all models of that make automobile shall be taxed according to the schedule provided above in which the average weight falls. Provided, that a fee of only one dollar shall be charged for any vehicle

given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(f) Private Motorcycles.—The tax on private passenger motorcycles shall be five dollars (\$5.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the tax shall be ten dollars (\$10.00).

(g) Manufacturers and Motor Vehicle Dealers.—Manufacturers and dealers in motor vehicles, trailers and semi-trailers for license and for one set of dealer's plates shall pay the sum of twenty-five dollars (\$25.00), and for each additional set of dealer's plates the sum of one dollar (\$1.00).

(h) Driveaway Companies.—Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this State for compensation shall pay as a registration fee and for one set of plates one hundred dollars (\$100.00) and for each additional set of plates five dollars (\$5.00). (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; 1945, c. 576, s. 2; 1947, c. 220, s. 3; 1947, c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2.)

**Editor's Note.** — The 1939 and 1943 amendments made changes in subsection (a). The 1945 amendments added that part of subsection (c) beginning with the proviso, and rewrote subsection (f). The 1947 amendments made changes in subsections (b), (c), (e) and (g). And the 1949 amendment added the last proviso to subsection (e).

The 1951 amendment substituted "common carriers of passengers" for "franchise

bus carriers" throughout the section; changed the reference in subsection (d) from "§§ 62-103 to 62-121" to "§§ 62-121.5 through 62-121.79"; and substituted "§§ 62-121.5 through 62-121.79" for "subsection (k) of § 62-103" in the third paragraph of subsection (c).

For case citing corresponding provisions of former law, see *Safe Bus v. Maxwell*, 214 N. C. 12, 197 S. E. 567 (1938).

**§ 20-88. Property hauling vehicles.**—(a) Determination of Weight.—For the purpose of licensing, the weight of the several classes of motor vehicles used for transportation of property shall be the gross weight and load, to be determined by the manufacturer's gross weight capacity as shown in an authorized national publication, such as "Commercial Car Journal" or the statistical issue of "Automotive Industries," all such weights subject to verification by the Commissioner or his authorized deputy, and if no such gross weight on any vehicle is available in such publication, then the gross weight shall be determined by the Commissioner or his authorized agent: Provided, that any determination of weight shall be made only in units of one thousand pounds or major fraction thereof, weights of over five hundred pounds being counted as one thousand and weights of five hundred pounds or less being disregarded. Semi-trailers licensed for use in connection with a truck or truck-tractor shall in no case be licensed for less gross weight capacity than the truck or truck-tractor with which it is to be operated. The gross weight of a single unit equipped with three or more axles may be computed for license fee at a rate not in excess of the rate on trucks and semi-trailers of the same gross weight.

In licensing truck-tractors to be used in connection with a trailer or semi-trailer, the license on the truck-tractor may be limited to twenty thousand pounds gross weight and any weight in excess of twenty thousand pounds may be licensed on the trailer or semi-trailer.

(b) There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of trucks, truck-tractors, trailers and semi-trailers, fees according to the following classifications and schedules:

Schedule of Weights and Rates  
Rates per hundred pounds gross weight:

	Private Hauler	Contract Carrier	Common Carrier of Property (Deposit)
Gross weight not over 4,500 pounds .....	\$0.30	\$0.75	\$0.60
4,501 pounds to 8,500 inclusive .....	.40	.75	.60
8,501 pounds to 12,500 pounds inclusive .....	.50	1.00	.60
12,501 pounds to 16,500 inclusive .....	.70	1.15	.60
Over 16,500 pounds .....	.80	1.40	.60

(c) The minimum rate for any vehicle licensed under this section shall be twelve dollars (\$12.00), except that the license fee for a trailer having not more than two wheels with a gross weight of vehicle and load not exceeding twenty-five hundred (2500) pounds and towed by a vehicle licensed by the Commissioner for not more than four thousand (4000) pounds gross weight or a passenger car shall be three dollars (\$3.00) for any part of the license year for which said license is issued: Provided, however, that any such trailers operated for hire shall be taxed at the same rate as contract carrier vehicles: Provided, further, that in addition to the motor vehicle licenses authorized to be issued pursuant to the provisions of this chapter, the Department shall issue, upon application therefor, a license plate for trucks marked "farmer," which shall be issued upon evidence satisfactory to the Department that the applicant is a farmer and is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section shall be placed upon motor trucks engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire: Provided, further, that the Department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" license plates issued hereunder when trucks bearing such shall be sold and/or transferred. Applicants for license plates herein authorized shall pay therefor at a rate equal to one-half the present registration fee provided for trucks by this chapter; provided that the minimum rate for any vehicle licensed under this proviso shall be ten dollars (\$10.00): and provided, further, persons applying for "farmer" license under the provisions of this section shall not be entitled to the benefits of § 20-95. The term "farmer" as used in this section means any person engaged in the raising, growing and producing of farm products on a farm not less than ten acres in area, and who does not engage in the business of buying farm products for resale; and the term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes. Provided, such "farmer" license may be transferred if the new owner executes a statement on a form prescribed by the Motor Vehicle Department showing that he is entitled to a "farmer" license; otherwise the same shall be surrendered and the new owner must pay the difference in the fee for a "farmer" license and the type of license required for the new operation as of the date of such transfer.

(d) Rates on trucks, trailers and semi-trailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Common Carriers of Property.—Common carriers of property shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto six per cent of the gross revenue derived from such operations: Provided, said additional six per cent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit

per the above schedule: Provided, further, common carriers of property operating from a point or points in this State to another point or points in this State shall be liable for a tax of six per cent on the gross revenue earned in such intrastate hauls. Common carriers of property operating between a point or points within this State and a point or points without this State shall be liable for a six per cent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a six per cent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of property be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the Utilities Commission for service over a route within the State which is not now served by any common carrier of property the six per cent gross revenue tax may be reduced to four per cent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of property by this State. Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.

In lieu of the six per cent gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, common carriers of property may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract carriers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license year and after the election herein provided for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a common carrier of property to make an election under this paragraph shall render such common carrier of property liable for the deposit required by subsection (b) of this section and the six per cent gross revenue tax levied by this subsection.

(f) Nonresident motor vehicle carriers which do not operate in intrastate commerce in this State, and the title to whose vehicles are not required to be registered under the provisions of this article, shall be taxed for the use of the roads in this State and shall pay the same fees therefor as are required with reference to like vehicles owned by residents of this State: Provided, that if any such fees as applied to nonresidents shall at any time become inoperative, such carriers shall be taxed for the use of the roads of this State as common carriers of property as provided above: Provided, further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(g) Contract carriers under the definitions of this article who receive and operate under a certificate or permit or other authority from the Utilities Commissioner as restricted common carriers under the provisions of §§ 62-121.5 through 62-121.79, shall, in addition to the rate of tax for contract carriers provided above, be subject to the gross six per cent tax to the extent that it exceeds the rate for contract carriers to be levied and collected in the same manner provided

for common carriers of property, and the tax in the schedule provided for contract carriers shall be deemed a deposit only.

(h) Every person operating a motor vehicle upon the highways of the State equipped with motors of the Diesel type shall make a report to the Commissioner upon forms to be prescribed and furnished by the Commissioner at least four times a year on dates to be designated by the Commissioner; and such reports shall show, among other things, the purchases of motor fuel for use in said Diesel type motor and whether or not the tax levied upon motor fuels has been paid or assumed by the person from whom bought; and it shall be unlawful to operate any such motor equipment upon the highways of this State except with fuel upon which the tax has been paid. It shall be unlawful for any person, firm, or corporation operating such Diesel type motor to fail, refuse, or neglect to make returns in accordance with the forms prescribed by the Commissioner; and any person knowingly making false returns shall be guilty of a felony. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648; 1945, c. 569, s. 1; 1945, c. 575, s. 1; 1945, c. 576, s. 3; 1945, c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; 1951, c. 819, ss. 1, 2.)

**Editor's Note.** — The 1939 amendment added subsection (h).

The 1941 amendment added that part of subsection (c) relating to "farmer" license plates. For comment on amendment, see 19 N. C. Law Rev. 514.

The 1943 amendment added the last sentence of the first paragraph of subsection (a) and made changes in subsection (e).

The first 1945 amendment added the second paragraph of subsection (a). The second 1945 amendment, effective Jan. 1, 1946, struck out a former exception provision in subsection (e). The third 1945 amendment, effective Jan. 1, 1945, added the proviso at the end of subsection (c) and the fourth 1945 amendment, effective April 1, 1945, inserted in the first sentence of sub-

section (c) the words "a vehicle licensed by the Commissioner for not more than four thousand (4,000) pounds gross weight or."

The first 1949 amendment rewrote the first sentence of subsection (c). The second 1949 amendment added the second paragraph of subsection (e).

The first 1951 amendment added the last sentence of the first paragraph of subsection (e). The second 1951 amendment substituted "common carrier of property" for "franchise hauler" and "contract carrier" for "contract hauler" at several places in the section, and changed the reference in subsection (g) from "§§ 62-103 to 62-121" to "§§ 62-121.5 through 62-121.79."

### § 20-89. Method of computing gross revenue of common carriers of passengers and property.

—In computing the gross revenue of common carriers of passengers and common carriers of property, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this State from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at six percent (6%) of the gross charges authorized by the Utilities Commission or Interstate Commerce Commission on such operation if it had been for hire; and common carriers of property shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

When vehicles are leased from other operators who are licensed in this State as contract carriers, for hire passenger or common carriers of property any amounts paid to such operators under said lease may be deducted by the lessees

from gross revenue on which tax is based in the event a copy of the lease and adequate records and receipts are maintained so as to clearly reflect such payments. Any revenue earned by a common carrier of property under a lease or rental shall be included in the gross revenue upon which said tax is based but revenue earned by a common carrier of passengers from coach rentals shall not be included in gross revenue on which tax is based. (1937, c. 407, s. 53; 1943, c. 726; 1945, c. 414, s. 2; 1945, c. 575, s. 2; 1951, c. 819, ss. 1, 2½.)

**Editor's Note.** — The 1943 amendment struck out the word "collected" formerly appearing after the word "provided" near the beginning of the second sentence of the first paragraph.

The first 1945 amendment added the second paragraph. The second 1945 amendment, effective Jan. 1, 1946, added the proviso at the end of the first para-

graph.

The 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers," "common carrier of property" for "franchise hauler" and "contract carriers" for "contract haulers" throughout the section, and rewrote the second paragraph.

**§ 20-90. Due date of franchise tax.**—The six per cent additional tax on common carriers of passengers and common carriers of property shall become due and payable on or before the twentieth day of the month following the month in which it accrues.

Whenever a contract carrier or a flat rate common carrier of property becomes a regular common carrier of property subject to the six per cent (6%) gross revenue tax under this chapter during the license renewal period, December 1 to January 31, said carrier's gross revenue for the six per cent (6%) tax purpose shall be all the revenue earned from operations on and after the January 1 following the carrier's change to a regular common carrier if such change is made in December and shall be all the revenue earned from operations on and after the January 1 preceding the carrier's change to a regular common carrier if such change is made in January.

Whenever a regular common carrier of property subject to the six per cent (6%) gross revenue tax under this chapter becomes a flat rate common carrier of property or a contract carrier during the license renewal period, December 1 to January 31, said carrier's gross revenue for the six per cent (6%) tax purposes shall be all the revenue earned from operations up to and including operations on the December 31 following the carrier's change to a flat rate common carrier or a contract carrier if such change is made in December and shall be all the revenue earned from operations up to and including operations on the December 31 preceding the carrier's change to a flat rate common carrier of property or a contract carrier if such change is made in January. (1937, c. 407, s. 54; 1951, c. 729; 1951, c. 819, s. 1.)

**Editor's Note.** — The first 1951 amendment added the second and third paragraphs. The second 1951 amendment substituted "common carriers of passengers"

for "franchise bus carriers" and "common carriers of property" for "franchise haulers."

**§ 20-91. Records and reports required of franchise carriers.**—(a) Every common carrier of passengers and common carrier of property shall keep a record of all business transacted and all revenue received on such forms as may be prescribed by or satisfactory to the Commissioner, and such records shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the Commissioner or his deputies or such other agents as may be duly authorized by the Commissioner. Any operator of such a franchise line failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

(b) All common carriers of passengers and common carriers of property shall, on or before the twentieth day of each month, make a report to the Department

of gross revenue earned and gross mileage operated during the month previous, in such manner as the Department may require and on such forms as the Department shall furnish.

(c) It shall be the duty of the Commissioner, by competent auditors, to have the books and records of every common carrier of passengers and common carrier of property examined at least once each year to determine if such operators are keeping complete records as provided by this section of this article, and to determine if correct reports have been made to the State Department of Motor Vehicles covering the total amount of tax liability of such operators.

(d) If any common carrier of passengers or common carrier of property shall fail, neglect, or refuse to keep such records or to make such reports or pay tax due as required, and within the time provided in this article, the Commissioner shall immediately inform himself as best he may as to all matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent operator for the period covering the delinquency, adding to the tax so determined and as a part thereof an amount equal to five per cent (5%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional five per cent (5%). Any such common carrier of property or common carrier of passengers, having no records on the basis of which the Commissioner can determine the amount of the tax due by such carrier, shall be assessed on each vehicle at the rate applicable for contract carriers, and any bonds or deposits theretofore made shall be applied on such assessment and any further amount shall be collected as provided by law.

(e) Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Motor Vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of gross revenue or tax paid by any common carrier of passengers or common carrier of property as set forth or disclosed in any report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, Utilities Commission, or their or its duly authorized representatives; or the inspection by a legal representative of the State of the report or return of any common carrier of passengers or common carrier of property which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. Nothing in this subsection or in any other law shall prevent the exchange of information between the Department of Motor Vehicles and the Department of Revenue when such information is needed by either or both of said departments for the purposes of properly enforcing the laws with the administration of which either or both of said departments is charged. (1937, c. 407, s. 55; 1939, c. 275; 1941, c. 36; 1943, c. 726; 1945, c. 575, s. 3; 1947, c. 914, s. 2; 1951, c. 190, s. 1; 1951, c. 819, s. 1.)

**Editor's Note.**—The 1939 amendment struck out the word “wilfully” formerly appearing after the word “shall” in subsection (d).

The 1943 amendment added subsection (e). The 1945 amendment added the last sentence of subsection (d), and the 1947 amendment inserted the words “or pay tax due” near the beginning of subsection (d). The first 1951 amendment added the last sentence of subsection (e). The second 1951 amendment substituted “common carriers of passengers” for “franchise bus carriers”, “common carriers of property” for “franchise hauler” and “contract carriers” for “contract haulers” throughout the section.

§ 20-91.1. **Taxes to be paid; suits for recovery of taxes.**—No court



of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this article. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commissioner of Motor Vehicles; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides. (1951, c. 1011, s. 1.)

**§ 20-91.2. Overpayment of taxes to be refunded with interest.**—If the Commissioner of Motor Vehicles discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs, if any), such overpayment shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer. Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the report, whichever is later. (1951, c. 1011, s. 1.)

**§ 20-92. Revocation of franchise registration.**—The failure of any common carrier of passengers or any common carrier of property to pay any tax levied under this article, and/or to make reports as is required, shall constitute cause for revocation of registration and franchise, and the Commissioner is hereby authorized to seize the registration plates of any such delinquent carrier and require the cessation of the operation of such vehicles, and the Utilities Commission may revoke any franchise or permit issued such carrier. (1937, c. 407, s. 56; 1945, c. 575, s. 4; 1951, c. 819, s. 1.)

**Editor's Note.**—The 1945 amendment added at the end of this section the words "and the Utilities Commission may revoke any franchise or permit issued such carrier."

The 1951 amendment substituted "common carrier of passengers" for "franchise bus carrier" and "common carrier of property" for "franchise hauler."

**§ 20-93. Bond or deposit required.**—The Commissioner, before issuing any registration plates to a common carrier of passengers or a common carrier of property, shall either satisfy himself of the financial responsibility of such carrier or require a bond or deposit in such amount as he may deem necessary to insure the collection of the tax imposed by this section. (1937, c. 407, s. 57; 1951, c. 819, s. 1.)

**Editor's Note.**—The 1951 amendment substituted "common carrier of passengers"

for "franchise bus carrier" and "common carrier of property" for "franchise hauler."

**§ 20-94. Partial payments.**—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars (\$400.00), half of such payment may, if the Commissioner is satisfied of the financial responsibility of such owner, be deferred until June first in any calendar year upon the execution to the Commissioner of a draft upon any bank or trust company upon forms to be provided by the Commissioner in an amount equivalent to one-half of such tax, plus a carrying charge of one-half of one per cent ( $\frac{1}{2}$  of 1%): Provided, that any person using any tag so purchased after the first day of June in any such year, without having first provided for the payment of such draft, shall be guilty of a misdemeanor. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the Commissioner to his duly authorized

agents and/or the State Highway Patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the Department until the draft has been paid. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10.)

**Editor's Note.**—The 1943 amendment inserted near the beginning of the section the words "if the Commissioner is satisfied of the financial responsibility of such owner." It also inserted in the next to last sentence the following: "shall be subject to the penalties prescribed in § 20-178 and."

The 1945 amendment substituted "June" for "April" in the first sentence and in the proviso thereto. It also reduced the carrying charge from two per cent to one-half of one per cent.

The 1947 amendment added the last sentence.

**§ 20-95. Licenses for less than a year.**—Licenses issued on or after April first of each year and before July first for all vehicles, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be three-fourths of the annual fee. Licenses issued on or after July first and before October first, except two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-half the annual fee. Licenses issued on or after October first, except on two-wheel trailers under one thousand five hundred pounds weight pulled by passenger cars, shall be one-fourth of the annual fee. (1937, c. 407, s. 59; 1947, c. 914, s. 3.)

**Editor's Note.**—The 1947 amendment and" formerly appearing after the word struck out the words "franchise haulers" "except" in the first sentence.

**§ 20-96. Overloading.**—The Commissioner, or his authorized agent, may allow any owner of a motor vehicle for transportation of property to overload said vehicle by paying the fee at the rate per hundred pounds which would be assessed against such vehicle if its gross weight capacity provided for such load; but such calculation shall be made only in units of one thousand pounds or major fraction thereof, excessive weights of five hundred pounds or less being disregarded and weights of more than five hundred pounds and not more than one thousand pounds being counted as one thousand. It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover any overload which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highways over the weight for which such vehicle is licensed, shall pay the penalties prescribed in § 20-118. Nonresidents operating under the provisions of § 20-83 shall be subject to the additional tax provided in this section when their vehicles are operated in excess of the licensed weight or, regardless of the licensed weight, in excess of the maximum weight provided for in § 20-118. Any resident or nonresident owner of a vehicle that is found in operation on a highway designated by the State Highway and Public Works Commission as a light traffic highway and along which signs are posted showing the maximum legal weight on said highway with a load in excess of the weight posted for said highway, shall be subject to the penalties provided in § 20-118. Any person who shall wilfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed.

Any peace officer who discovers a property hauling vehicle being operated on the highways with an overload as described in this section or which is equipped with improper registration plates is hereby authorized to seize said property hauling vehicle and hold the same until the overload has been removed or proper registration plates therefor have been secured and attached thereto. Any peace officer seizing a property hauling vehicle under this provision, may, when necessary, store said vehicle and the owner thereof shall be responsible for all reasonable storage charges thereon. When any property hauling vehicle is unloaded or partially unloaded under this provision, the removed load shall be cared for by

the owner or operator of the vehicle without any liability on the part of the officer or of the State or any municipality because of damage to or loss of such removed load. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; 1949, c. 1207, s. 4½; 1949, c. 1253; 1951, c. 1013, ss. 1-3.)

**Editor's Note.**—The 1943 amendment added the last sentence of the first paragraph.

The 1951 amendment rewrote this sec-

tion and added the second paragraph. Section 8 of the amendatory act provided that "nothing in this act shall conflict with or repeal G. S. 20-119."

**§ 20-97. Taxes compensatory; no additional tax.**—(a) All taxes levied under the provisions of this article are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State highway fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns may levy not more than one dollar (\$1.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the one dollar (\$1.00) per year, herein set forth, a sum not to exceed fifteen dollars (\$15.00) per year upon each vehicle operated in such city or town as a taxicab.

(b) No additional franchise tax, license tax, or other fee shall be imposed by the State against any franchise motor vehicle carrier taxed under this article nor shall any county, city or town impose a franchise tax or other fee upon them, except that cities and towns may levy a license tax not in excess of fifteen dollars (\$15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof.

(c) In addition to the appropriation carried in the Appropriations Act there shall be appropriated to the Motor Vehicle Department the additional sum of fifteen thousand dollars (\$15,000.00) from the State highway fund: Provided, that such additional sum shall be made available only in the event that the regular appropriation is insufficient and it shall be determined by the Director of the Budget that such additional amount is necessary to carry out the provisions of this article. (1937, c. 407, s. 61; 1941, c. 36; 1943, c. 639, ss. 3, 4.)

**Editor's Note.**—The 1943 amendment added the proviso to subsection (a), and the exception clause to subsection (b).

For comment on the 1943 amendment, see 21 N. C. Law Rev. 358.

**Municipalities** are prohibited by this section from levying a license or privilege tax for use of its streets by motor trucks. *Kenny Co. v. Brevard*, 217 N. C. 269, 7 S. E. (2d) 542 (1940).

**May Not Impose Additional License Tax on Vehicles for Hire.**—This section expressly prohibits a municipality from levying a license or privilege tax in excess of \$1.00 upon the use of any motor vehicle licensed by the State, and must be construed with and operates as an exception to, and limitation upon the general power to levy license and privilege taxes upon businesses, trades and professions granted

by charter and § 160-56, and provisions of a municipal ordinance imposing a license tax upon the operation of passenger vehicles for hire in addition to the \$1.00 theretofore imposed by it upon motor vehicles generally, is void, nor may the additional municipal tax be sustained upon the theory that it is a tax upon the business of operating a motor vehicle for hire rather than ownership of the vehicle, since the word "business" and the word "use" as used in the sections mean the same thing. *Cox v. Brown*, 218 N. C. 350, 11 S. E. (2d) 152 (1940).

**For cases decided** under the corresponding provisions of the former law, see *State v. Fink*, 179 N. C. 712, 103 S. E. 16 (1920); *Southeastern Exp. Co. v. Charlotte*, 186 N. C. 668, 120 S. E. 475 (1923); *State v. Jones*, 191 N. C. 371, 131 S. E. 734 (1926).

**§ 20-98. Tax lien.**—In the distribution of assets in case of receivership or insolvency of the owner against whom the tax herein provided is levied and in the order of payment thereof, the State shall have priority over all other debts or claims except prior recorded liens or liens given by statute an express priority. (1937, c. 407, s. 62.)

§ 20-99. Remedies for the collection of taxes.—1. If any tax imposed by this chapter, or any other tax levied by the State and payable to the Commissioner of Motor Vehicles, or any portion of such tax, be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Motor Vehicles shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Motor Vehicles the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner. Upon the issuance of said order to the sheriff, in the event the delinquent taxpayer shall be the operator of any common carrier of passengers or common carrier of property vehicle, the franchise certificate issued to such operator shall become null and void and shall be cancelled by the Utilities Commissioner, and it shall be unlawful for any such common carrier of passengers or the operator of any common carrier of property vehicle to continue the operation under said franchise.

2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this chapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Motor Vehicles shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Motor Vehicles or by any officer having authority to serve summonses. Said notice shall show:

- (1) The name of the taxpayer and his address, if known:
- (2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and
- (3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set-off against the taxpayer, he shall, within ten days after service of said notice, answer the same by sending to the Commissioner of Motor Vehicles by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or set-off, he shall so advise the garnishee in writing within ten days after receipt of such statement and

the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set-off, and any amount attached or garnished hereunder which is not affected by such defense or set-off shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or set-off, and with like effect. If the Commissioner shall not admit the defense or set-off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Motor Vehicles by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or set-off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Motor Vehicles or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in § 105-267, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within twelve months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407 and if such payment is denied, said party may appeal from the determination of the Commissioner to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars (\$200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

3. In addition to the remedy herein provided, the Commissioner of Motor Vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the

date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

4. The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1937, c. 407, s. 63; 1945, c. 576, s. 4; 1951, c. 819, s. 1.)

**Cross Reference.**—As to fees of sheriffs, see § 162-6.

**Editor's Note.**—The 1945 amendment rewrote this section. The 1951 amendment

substituted "common carrier of passengers" for "franchise bus carrier" and "common carrier of property" for "franchise hauler" in subsection 1.

**§ 20-100. Vehicles junked or destroyed by fire or collision.**—Upon satisfactory proof to the Commissioner that any motor vehicle, duly licensed, has been completely destroyed by fire or collision, or has been junked and completely dismantled so that the same can no longer be operated as a motor vehicle, the owner of such vehicle may be allowed on the purchase of a new license for another vehicle a credit equivalent to the unexpired proportion of the cost of the original license, dating from the first day of the next month after the date of such destruction. (1937, c. 407, s. 64; 1939, c. 369, s. 1.)

**Editor's Note.**—The 1939 amendment inserted the provision relating to junked vehicle.

**§ 20-101. Vehicles to be marked.**—All motor vehicles licensed as common carriers of passengers, common carriers of property vehicles and contract carrier vehicles, shall have printed on the side thereof in letters not less than three inches in height the name and home address of the owner, or such other identification as the Utilities Commissioner may approve. (1937, c. 407, s. 65; 1951, c. 819, s. 1.)

**Editor's Note.**—The 1951 amendment substituted "common carriers of passengers" for "franchise bus carriers," "com-

mon carriers of property" for "franchise hauler" and "contract carrier" for "contract hauler."

#### Part 8. Anti-Theft and Enforcement Provisions.

**§ 20-102. Report of stolen and recovered motor vehicles.**—Every sheriff, chief of police, or peace officer upon receiving reliable information that any vehicle registered hereunder has been stolen shall immediately report such theft to the Department. Any said officer upon receiving information that any vehicle, which he has previously reported as stolen, has been recovered, shall immediately report the fact of such recovery to the Department. (1937, c. 407, s. 66.)

**§ 20-103. Reports by owners of stolen and recovered vehicles.**—The owner, or person having a lien or encumbrance upon a registered vehicle which has been stolen or embezzled, may notify the Department of such theft or embezzlement, but in the event of an embezzlement may make such report only after having procured the issuance of a warrant for the arrest of the person charged with such embezzlement. Every owner or other person who has given any such notice must notify the Department of the recovery of such vehicle. (1937, c. 407, s. 67.)

**§ 20-104. Action by Department on report of stolen or embezzled vehicles.**—(a) The Department, upon receiving a report of a stolen or embezzled vehicle as hereinbefore provided, shall file and appropriately index the same and shall immediately suspend the registration of the vehicle so reported, and shall not transfer the registration of the same until such time as it is notified in writing that such vehicle has been recovered.

(b) The Department shall at least once each month compile and maintain at its headquarters office a list of all vehicles which have been stolen or embezzled or recovered as reported to it during the preceding month, and such lists shall be open to inspection by any peace officer or other persons interested in any such vehicle. (1937, c. 407, s. 68.)

**§ 20-105. Unlawful taking of a vehicle.**—Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor. (1937, c. 407, s. 69; 1943, c. 543.)

**Cross Reference.**—As to misdemeanors for which no specific punishment is prescribed, see § 14-3.

**Editor's Note.**—The 1943 amendment inserted after the word "drives" near the beginning of the section the words "or otherwise takes and carries away."

The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

**Civil Liability of Owner for Injuries.**—The owner is not liable for an injury caused by his automobile while it is operated by

another without his consent. This applies to parent and child and where the father forbade his child from taking his car he is not liable. *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096 (1913).

**An indictment** charging larceny and receiving does not include a charge of driving a motor vehicle without the knowledge or consent of the owner, and a defendant charged in the indictment only with larceny and receiving may not be convicted under this section. *State v. Stinnett*, 203 N. C. 829, 167 S. E. 63 (1933).

**§ 20-106. Receiving or transferring stolen vehicles.**—Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony. (1937, c. 407, s. 70.)

**Cross Reference.**—As to felonies for which no specific punishment is prescribed, see § 14-2.

**§ 20-107. Injuring or tampering with vehicle.**—(a) Any person who either individually or in association with one or more other persons wilfully injures or tampers with any vehicles or breaks or removes any part or parts of or from a vehicle without the consent of the owner is guilty of a misdemeanor.

(b) Any person who with intent to steal, commit any malicious mischief, injury or other crime, climbs into or upon a vehicle, whether it is in motion or at rest, or with like intent attempts to manipulate any of the levers, starting mechanism, brakes, or other mechanism or device of a vehicle while the same is at rest and unattended or with like intent sets in motion any vehicle while the same is at rest and unattended, is guilty of a misdemeanor. (1937, c. 407, s. 71.)

§ 20-108. **Vehicles without manufacturer's numbers.**—Any person who knowingly buys, receives, disposes of, sells, offers for sale, conceals, or has in his possession any motor vehicle, or engine removed from a motor vehicle, from which the manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the Department has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor. (1937, c. 407, s. 72.)

§ 20-109. **Altering or changing engine or other numbers.**—No person shall wilfully deface, destroy, or alter the manufacturer's serial or engine number or other distinguishing number or identification mark of a motor vehicle, nor shall any person place or stamp any serial, engine, or other number or mark upon a motor vehicle, except one assigned thereto by the Department. Any violation of this provision is a misdemeanor. (1937, c. 407, s. 73; 1943, c. 726.)

The 1943 amendment substituted the word "wilfully" in line one for the words "with fraudulent intent."

§ 20-110. **When registration shall be rescinded.**—(a) The Department shall rescind and cancel the registration of any vehicle which the Department shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The Department shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) The Department shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes except as provided by § 20-79, fails to carry out the provisions of § 20-79 and § 20-82, or is convicted of a felony.

(d) The Department shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) The Department shall rescind and cancel the license and dealer plates issued to any person when it is found that false or fraudulent statements have been made in the application for the same, and when and if it is found that the applicant does not have a bona fide place of business as provided by this article.

(f) The Department shall rescind and cancel the dealer's license and dealer's license plates issued to any person who knowingly delivers a certificate of title to a vehicle purchased from him which does not show a proper or correct transfer of ownership or who wilfully fails to deliver proper certificate of title to a motor vehicle sold by him. (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4; 1951, c. 985, s. 1.)

**Editor's Note.**—The 1945 amendment added subsection (e) and the 1951 amendment added subsection (d), the 1947 amendment added subsection (f).

§ 20-111. **Violation of registration provisions.**—It shall be unlawful for any person to commit any of the following acts:

(a) To operate or for the owner thereof knowingly to permit the operation upon a highway of any motor vehicle, trailer, or semi-trailer which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration number plate or plates assigned thereto by the Department for the current registration year, subject to the exemption mentioned in §§ 20-65 and 20-79.

(b) To display or cause or permit to be displayed or to have in possession any



registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to wilfully display an expired license or registration plate on a vehicle knowing the same to be expired.

(c) The giving, lending, or borrowing of a license plate for the purpose of using same on some motor vehicle other than that for which issued shall make the giver, lender, or borrower guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars (\$50.00), or imprisoned not more than thirty days. Where license plate is found being improperly used, such plate or plates shall be revoked or canceled, and new license plates must be purchased before further operation of the motor vehicles.

(d) To fail or refuse to surrender to the Department, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this article provided.

(e) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. A violation of this subsection shall constitute a misdemeanor punishable in the discretion of the court not to exceed two years. (1937, c. 407, s. 75; 1943, c. 592, s. 2; 1945, c. 576, s. 6; 1945, c. 635; 1949, c. 360.)

**Editor's Note.**—The 1943 amendment inserted the reference to § 20-65 near the end of subsection (a).

The first 1945 amendment added at the end of subsection (b) the words "or to wilfully display an expired license or registra-

tion plate on a vehicle knowing the same to be expired." The second 1945 amendment inserted a comma after the word "certificate" in subsection (d).

The 1949 amendment rewrote subsection (e).

**§ 20-112. Making false affidavit perjury.**—Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this article to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable. (1937, c. 407, s. 76.)

**Cross References.**—As to punishment for perjury, see § 14-209. As to revocation of license in event of conviction of perjury or

the making of false affidavits, etc., see § 20-17.

**§ 20-113. Licenses protected.**—No person, partnership, association or corporation shall maintain an office or place of business in which or through which persons desiring transportation for themselves or their baggage are brought into contact by advertisement or otherwise with persons owning or operating motor vehicles and willing to transport other persons, or baggage, for compensation, or on a division of expense basis, unless the owner or operator of such motor vehicles furnishing the transportation has qualified under the tax provisions of this article for the class of service he holds himself out to perform. (1937, c. 407, s. 77.)

**§ 20-114. Duty of officer; manner of enforcement.**—(a) For the purpose of enforcing the provisions of this article, it is hereby made the duty of every police officer, every marshal, deputy marshal, or watchman of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county, and every constable of any township, to arrest within the limits of their jurisdiction any person known personally to any such officer, or upon the sworn information of a creditable witness, to have violated any of the provisions of this article, and to immediately bring such offender before any justice of the peace or officer having jurisdiction, and any such person so arrested shall have the right of immediate trial, and all other rights given to any

person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

(b) It shall be the duty of all sheriffs, police officers, deputy sheriffs, deputy police officers, and all other officers within the State to co-operate with and render all assistance in their power to the officers herein provided for, and nothing in this article shall be construed as relieving said sheriffs, police officers, deputy sheriffs, deputy police officers, and other officers of the duties imposed on them by this chapter.

(c) It shall also be the duty of every sheriff of every county of the State and of every police or peace officer of the State to make immediate report to the Commissioner of all motor vehicles reported to him as abandoned or that are seized by him for being used for illegal transportation of intoxicating liquors or other unlawful purposes, and no motor vehicle shall be sold by any sheriff, police or peace officer, or by any person, firm or corporation claiming a mechanic's or storage lien, or under judicial proceedings, until notice shall have been given the Commissioner at least twenty days before the date of such sale. (1937, c. 407, s. 78; 1943, c. 726.)

**Editor's Note.**—The 1943 amendment substituted "twenty" for "thirty" near the end of subsection (c).

#### Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115. **Scope and effect of regulations in this title.**—It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the Commission adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this State, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this article. (1937, c. 407, s. 79.)

§ 20-116. **Size of vehicles and loads.**—(a) The total outside width of any vehicle or the load thereon shall not exceed ninety-six inches, except as otherwise provided in this section.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.

(d) No vehicle shall exceed a length of thirty-five feet extreme over-all dimension, inclusive of front and rear bumpers: Provided, that a passenger bus having three (3) axles shall not exceed forty (40) feet in length. A truck-tractor and semi-trailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of forty-eight feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night trans-

portation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided, that the State Highway and Public Works Commission shall have authority to designate any highways upon the State system as light-traffic roads when, in the opinion of the Commission, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or busses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than eighteen feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty per cent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty per cent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle, if it is equipped with such a bumper.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

(h) Wherever there exist two highways of the primary State Highway System of approximately the same distance between two or more points, the State Highway and Public Works Commission shall have authority, when in the opinion of the Commission, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served thereby, to designate one of said highways the "truck route" between said points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways so selected for heavy vehicle traffic shall be so designated as "truck routes" by signs conspicuously posted thereon, and the highways upon which heavy vehicle traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum gross vehicle weight or axle load limits authorized for said highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on such signs over the highway thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for such highways from using such highway when the destination of such vehicle is located solely upon said highway, road or street: Provided, further, that nothing herein shall prohibit passenger vehicles or other light vehicles from using any highways so designated for heavy truck traffic.

(i) The total width of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed one hundred and two inches, and the total length, inclusive of front and rear bumpers, of any such vehicle shall not exceed thirty-six feet, and the

height of any such vehicle, exclusive of trolley pole for operating same, shall not exceed twelve feet, six inches. (1937, c. 246; 1937, c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; 1951, c. 733.)

**Editor's Note.**—The 1943 amendment added subsection (i).

The 1945 amendment substituted "forty-eight feet" for "forty-five feet" near the beginning of subsection (e), and the 1947 amendment added the proviso at the end of the subsection.

The first 1951 amendment added the proviso to the first sentence of subsection (d) and the second 1951 amendment rewrote subsection (h).

**This section prohibiting the extension of any part of the load of a passenger vehicle**

beyond the line of the fenders on the left side of such vehicle imposes a duty for the safety of other vehicles on the highway, and is not conclusive on the question of contributory negligence of a passenger riding on the running board, with none of his body extending beyond the line of the fenders, who is injured by the negligent operation of another vehicle. *Roberson v. Carolina Taxi Service*, 214 N. C. 624, 200 S. E. 363 (1939).

**Cited in** *Hobbs v. Drew*, 226 N. C. 146, 37 S. E. (2d) 121 (1946).

**§ 20-117. Flag or light at end of load.**—Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1937, c. 407, s. 81.)

**The former law** was cited in *Williams v. Frederickson Motor Exp. Lines*, 198 N. C. 193, 151 S. E. 197 (1930).

**§ 20-117.1. Equipment required on all semi-trailers operated by contract carriers or common carriers of property.**—(a) On every semi-trailer having a gross weight in excess of 3,000 pounds there shall be at least the following lighting devices and reflectors:

- (1) On the front, two amber clearance lamps, one at each side.
  - (2) On the rear, one red tail lamp; one red or amber stop light; two red clearance lamps, one at each side; two red reflectors, one at each side.
  - (3) On each side, one amber side-marker lamp, located at or near the front; one red side-marker lamp, located at or near the rear; one amber reflector, located at or near the front; one red reflector, located at or near the rear.
- (b) Side-marker lamps may be combined with clearance lamps. Side-marker lamps may be in combination with clearance lamps and may use the same light source.

(c) Clearance, side-marker and tail lamps shall when lighted be capable of being seen at a distance of 500 feet under normal atmospheric conditions during the time when lights are required.

(d) Stop lights shall be actuated by application of the service (foot) brakes and shall be capable of being seen and distinguished from a distance of 100 feet to the rear of the motor vehicle in normal daylight; but shall not project a glaring or dazzling light. The stop light may be incorporated with the tail lamp.

(e) Every reflector mounted on a motor vehicle shall be of such size and characteristics as to be readily visible at night from all distances within 500 feet to 50 feet from the motor vehicle when directly in front of a normal headlight beam. Whether or not the rear reflectors are incorporated in tail lamps, they shall be located on the rear of the motor vehicle at opposite sides and shall also meet the requirements as to visibility as set forth in this paragraph.

(f) **Rear-Vision Mirror.**—Every tractor shall be equipped with at least one rear-vision mirror, firmly attached to the motor vehicle and so located as to reflect to the driver a view of the highway to the rear.

(g) Fuel Container Not to Project.—No part of any fuel tank or container or intake pipe shall project beyond the sides of the motor vehicle.

(h) Flag or Light at End of Load.—Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle. (1949, c. 1207, s. 1; 1951, c. 819, s. 1.)

**Editor's Note.**—The 1951 amendment carriers of property" for "contract or franchise substituted "contract carriers or common chise haulers" in the catchline.

**§ 20-118. Weight of vehicles and load.**—No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(a) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, eight thousand pounds.

(b) When the wheel is equipped with low-pressure pneumatic tire, nine thousand pounds.

(c) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, sixteen thousand pounds.

(d) When the wheels attached to said axle are equipped with low-pressure pneumatic tires, eighteen thousand pounds.

(e) For the purposes of this section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than forty-eight inches apart.

(f) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than one hundred pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to one hundred pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(g) The gross weight of any vehicle having two axles shall not exceed thirty thousand pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger busses to be operated upon the highways of this State, the Commissioner of Motor Vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. No license shall be issued to any passenger bus with two (2) axles having a weight, when fully equipped for operation on the highways, of more than twenty-two thousand, five hundred (22,500) lbs., and no license shall be issued for any passenger bus with three (3) axles having a weight, when fully equipped for operation on the highways, of more than thirty thousand (30,000) lbs. unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the 1st day of February, 1949. No special permits shall be issued for any passenger buses exceeding the foregoing specified weights for each group.

(h) The gross weight of any vehicle or combination of vehicles having three axles shall not exceed forty-four thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(i) The gross weight of any vehicle or combination of vehicles having four or more axles shall not exceed fifty-six thousand pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes.

(j) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, com-

monly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the city of Greensboro and vicinity, shall not exceed thirty thousand pounds.

(k) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds six hundred pounds upon any inch of tire roller or other support.

(1) Provided, however, that no vehicle or combination of vehicles which has an axle load in excess of eighteen thousand (18,000) pounds shall be allowed on any highway or portion of highway that has not been designated by the State Highway and Public Works Commission as a heavy duty highway.

Any vehicle or combination of vehicles may exceed the weight limitations hereinbefore set out by not more than five per centum (5%), except that the gross weight on any one axle of any vehicle when the wheels attached to said axle are equipped with high-pressure, solid rubber or cushion tires shall not exceed 16,000 pounds and the gross weight on any one axle of a vehicle when the wheels attached to said axle are equipped with low-pressure pneumatic tires shall not exceed 18,000 pounds. Vehicles or combinations of vehicles having a gross weight in excess of forty thousand (40,000) pounds shall not be licensed or allowed to use the highways of the State, unless the engine furnishing the motive power of such vehicle or combination of vehicles shall have a piston displacement of three hundred (300) cubic inches, or more.

For each violation of this section, the owner of the vehicle shall pay to the Department a penalty for each pound of weight of such vehicle and load in excess of the weight (including the 5%) fixed by this section for such vehicle and its load, in accordance with the following schedule: For the first 2,000 pounds or any part thereof 1¢ per pound. For the next 3,000 pounds or any part thereof 2¢ per pound. For each pound in excess of 5,000 pounds 5¢ per pound. (1937, c. 407, s. 82; 1943, c. 213, s. 2; 1943, cc. 726, 784; 1945, c. 242, s. 2; 1945, c. 569, s. 2; 1945, c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; 1951, c. 942, s. 1; 1951, c. 1013, ss. 5, 6, 8.)

**Editor's Note.**—The 1949 amendment rewrote this section as changed by the 1943, 1945 and 1947 amendments.

The first 1951 amendment made changes in subsection (g), and the second 1951 amendment deleted the former last sentence of the section relating to the required piston displacement of vehicles or combinations thereof having a gross weight in excess of 50,000 pounds. The third 1951 amendment rewrote the first sentence of the next to the last paragraph, and added the last paragraph. Section 8 of the third 1951 amendment purports to repeal "subdivision (1)" of this section. There is no such subdivision or subsection,

however there is a subsection (1), which consists of the paragraph beginning with "Provided" and ending with "highway", the last two paragraphs of the section not being parts of such subsection. Because of the great similarity between the typewritten or printed figure "1" and the letter "el" it is quite probable that the legislature intended to repeal subsection (1). A consideration of the legislative history of the amendatory act gives weight to this probability. The said section 8 of the third 1951 amendment further provides that "nothing in this act shall conflict with or repeal G. S. 20-119."

**§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing.**—Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive

said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4.)

**Editor's Note.**—The 1949 amendment added the next to the last sentence and the 1951 amendment added the last sentence.

**§ 20-118.2. Authority to fix higher weight limitations at reduced speeds for certain vehicles.**—The State Highway and Public Works Commission is hereby authorized and empowered to fix higher weight limitations at reduced speeds for vehicles used in transporting property when the point of origin or destination of the motor vehicles is located upon any light traffic highway, county road, farm to market road, or any other roads of the secondary system only and/or to the extent only that the motor vehicle is necessarily using said highway in transporting the property from the bona fide point of origin of the property being transported or to the bona fide point of destination of said property and such weights may be different from the weight of those vehicles otherwise using such roads. (1951, c. 1013, s. 7A.)

**Editor's Note.**—Section 8 of chapter 1013, was codified, provided “nothing in this act Session Laws 1951, from which this section shall conflict with or repeal G. S. 20-119.”

**§ 20-119. Special permits for vehicles of excessive size or weight.**—The State Highway and Public Works Commission may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant for seasonal operations to operate or move a vehicle of a size or weight exceeding a maximum specified in this article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this article. (1937, c. 407, s. 83.)

**§ 20-120. Operation of flat trucks on State highways regulated; trucks hauling leaf tobacco in barrels or hogsheads.**—It shall be unlawful for any person, firm or corporation to operate, or have operated on any public highway in the State any open, flat truck loaded with logs, cotton bales, boxes or other load piled on said truck, without having the said load securely fastened on said truck. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

It shall be unlawful for any firm, person or corporation to operate or permit to be operated on any highway of this State a truck or trucks on which leaf tobacco in barrels or hogsheads is carried unless such barrels or hogsheads are reasonably securely fastened to such truck or trucks by metal chains or wire cables or tarpaulin, or manila or hemp ropes of not less than one-half inch in diameter, to hold said barrels or hogsheads in place under any ordinary traffic or road condition. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty (30) days: Provided that the provisions of this paragraph shall not apply to any truck or trucks on which the hogsheads or barrels of tobacco are arranged in a single layer, tier, or plane, it being the intent of this paragraph to require the use of metal chains or wire cables only when barrels or hogsheads of tobacco are stacked or piled one upon the other on a truck or trucks. Nothing in this paragraph shall apply to trucks

engaged in transporting hogsheads or barrels of tobacco between factories and storage houses of the same company unless such hogsheads or barrels are placed upon the truck in tiers. In the event the hogsheads or barrels of tobacco are placed upon the truck in tiers same shall be securely fastened to the said truck as hereinbefore provided in this paragraph. (1939, c. 114; 1947, c. 1094.)

**Editor's Note.**—The 1947 amendment added the second paragraph.

§ 20-121. **When authorities may restrict right to use highways.**—The State Highway and Public Works Commission or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period not to exceed ninety days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance at each end of that portion of any highway to which the ordinance is applicable, and the ordinance shall not be effective until or unless such signs are erected and maintained. (1937, c. 407, s. 84.)

**Cross Reference.**—As to powers of municipal corporations as to streets, see § 160-200, subsections 11, 31.

§ 20-122. **Restrictions as to tire equipment.**—(a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one and a half inches thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat or spike or any other protuberance of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway and except, also, that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The State Highway and Public Works Commission or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors of other farm machinery.

(d) It shall not be unlawful to drive farm tractors on dirt roads from farm to farm: Provided, in doing so they do not damage said dirt roads or interfere with traffic. (1937, c. 407, s. 85; 1939, c. 266.)

**Editor's Note.**—The 1939 amendment added subsection (d).

§ 20-123. **Trailers and towed vehicles.**—(a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semi-trailer.

(b) No trailer or semi-trailer shall be operated over the highways of the State unless such trailer or semi-trailer be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not shake, but will travel in the path of the wheels of the vehicle drawing such trailer or semi-trailer, which equipment shall at all times be kept in good condition. (1937, c. 407, s. 86.)

§ 20-124. **Brakes.**—(a) Every motor vehicle when operated upon a high-



way shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

(b) No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the hand brake thereon, stopping the motor and turning the front wheels into the curb or side of the highway.

(c) On a dry, hard, approximately level stretch of highway free from loose material, the service (foot) brake shall be capable of stopping the motor vehicle at a speed of twenty miles per hour within a distance of twenty-five feet with four wheel brakes or forty-five feet with two wheel brakes. The hand brake shall be capable of stopping the vehicle under like conditions of this section within a distance of not more than seventy-five feet.

(d) Motor trucks and tractor-trucks with semi-trailers attached shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within the following distances: thirty feet with both hand and service brake applied simultaneously and fifty feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other state or district prior to August, nineteen hundred and twenty-nine, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within a distance of fifty feet with both hand and service brake applied simultaneously, and within a distance of seventy-five feet when either applied separately.

(e) Every semi-trailer, or trailer, or separate vehicle, attached by a drawbar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of one thousand pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (d) of this section and shall be of a type approved by the Commissioner. (1937, c. 407, s. 87.)

**Violation Negligence Per Se.**—Violation of this section is negligence per se, but such violation must be proximate cause of injury to become actionable. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945).

**Harmless Instruction.**—A charge as to proper brakes on motor vehicles, in compliance with this section, where the evi-

dence shows no mention of brakes, is a harmless inadvertence. *Hopkins v. Colonial Stores*, 224 N. C. 137, 29 S. E. (2d) 455 (1944).

**Quoted in** *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939).

**Cited in** *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209 (1944) (dis. op.).

**§ 20-125. Horns and warning devices.**—(a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, and it shall be unlawful, except as otherwise provided in this section, for any vehicle to be equipped with or for any person to use upon a vehicle any siren, compression or spark plug whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonable loud or harsh sound by means of a horn or other warning device. All such horns and warning devices shall be maintained in good working order and shall conform to regulation not inconsistent with this section to be promulgated by the Commissioner.

(b) Every vehicle owned and operated by a police department or by a fire department, either municipal or rural, or by a fire patrol, whether such fire department or patrol be a paid organization or a voluntary association, and every ambulance used for answering emergency calls, shall be equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

The operators of all such vehicles so equipped are hereby authorized to use such equipment at all times while engaged in the performance of their duties and services, both within their respective corporate limits and beyond.

In addition to the use of special equipment authorized and required by this subsection, the chief and one assistant chief of any police department or of any fire department, whether the same be municipal or rural, paid or voluntary, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in the performance of their official or semi-official duties or services either within or beyond their respective corporate limits.

And vehicles driven by inspectors in the employ of the North Carolina Utilities Commission shall be equipped with a bell, siren, or exhaust whistle of a type approved by the Commissioner. (1937, c. 407, s. 88; 1951, cc. 392, 1161.)

**Editor's Note.**—The first 1951 amendment rewrote subsection (b) and the second 1951 amendment added the last paragraph thereto.

§ 20-126. **Mirrors.**—No person shall drive a motor vehicle on a highway which motor vehicle is so constructed or loaded as to prevent the driver from obtaining a view of the highway to the rear by looking backward from the driver's position, unless such vehicle is equipped with a mirror of a type to be approved by the Commissioner so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle. (1937, c. 407, s. 89.)

**Cited in** *Bechtler v. Bracken*, 218 N. C. 515, 11 S. E. (2d) 721 (1940).

§ 20-127. **Windshields must be unobstructed.**—(a) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other nontransparent material upon the front windshield, side wings, side or rear window of such motor vehicle other than a certificate or other paper required to be so displayed by law.

(b) Every permanent windshield on a motor vehicle shall be equipped with a device for cleaning snow, rain, moisture or other matter from the windshield directly in front of the operator, which device shall be so constructed as to be controlled or operated by the operator of the vehicle. The device required by this subsection shall be of a type approved by the Commissioner. (1937, c. 407, s. 90.)

§ 20-128. **Prevention of noise, smoke, etc.; muffler cut-outs regulated.**—(a) No person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens.

(b) It shall be unlawful to use a "muffler cut-out" on any motor vehicle upon a highway. (1937, c. 407, s. 91.)

§ 20-129. **Required lighting equipment of vehicles.**—(a) **When Vehicles Must Be Equipped.**—Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in § 20-134.

(b) **Head Lamps on Motor Vehicles.**—Every motor vehicle other than a motorcycle, road roller, road machinery, or farm tractor shall be equipped with two head lamps, no more and no less, at the front of and on opposite sides of

the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in §§ 20-131 or 20-132.

(c) **Head Lamps on Motorcycles.**—Every motorcycle shall be equipped with at least one and not more than two head lamps which shall comply with the requirements and limitations set forth in §§ 20-131 or 20-132.

(d) **Rear Lamps.**—Every motor vehicle and every trailer or semi-trailer which is being drawn at the end of a train of vehicles shall carry at the rear a lamp of a type which has been approved by the Commissioner and which exhibits a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle, and so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be so illuminated by a white light as to be read from a distance of fifty feet to the rear of such vehicle, and every trailer or semi-trailer shall carry at the rear, in addition to a rear lamp as above specified, a red reflector of a type which has been approved by the Commissioner and which is so designed, located as to a height and maintained as to be visible for at least five hundred feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. Such reflector shall be placed at the extreme end of the load.

Notwithstanding the provision of the first paragraph of this subsection, it shall not be necessary for a trailer, licensed for not more than 2500 pounds, to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors, each not less than four inches in diameter, and to be of a type approved by the Commissioner, and which are so designed, located as to height and maintained as for each reflector to be visible for at least five hundred feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway, such reflectors to be placed at the extreme end of the load.

(e) **Clearance Lamps.**—Every motor vehicle having a width at any part in excess of eighty inches shall carry two clearance lamps at the front, one at each side reflecting an amber light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the front of said vehicle and two clearance lamps at the rear, one on each side and reflecting a red light visible under like conditions from a distance of five hundred feet to the rear of the vehicle. As relates to truck-trailer or tractor-trailer combinations, such lights shall be required only at the front and rear of the overall dimensions.

(f) **Lamps on Bicycles.**—Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle, when used at night.

(g) **Lights on Other Vehicles.**—All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than five hundred feet to the front of such vehicle and visible under like conditions from a distance of not less than five hundred feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the Commissioner. (1937, c. 407, s. 92; 1939, c. 275; 1947, c. 526.)

**Editor's Note.**—The 1939 amendment changed subsection (e), and the 1947 amendment added the second paragraph of subsection (d).

Some of the cases noted below were de-

cided under the corresponding provisions of the prior law.

**Purpose of Section.**—This section was enacted to minimize the hazards incident to the movement of motor vehicles upon the

public roads during the nighttime. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377 (1949).

**Violation as Negligence Per Se.**—The operation of a tractor-trailer on the highways at night without the rear and clearance lights burning as required by this section is negligence per se. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377 (1949).

**Negligence in not having a light on the rear of a truck** will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. *Hughes v. Luther*, 189 N. C. 841, 128 S. E. 145 (1925).

**Absence of Rear Lights on Smoke Covered Road.**—Where plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights in violation of this section it was held that conceding negligence on the part of defendant, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so. *Sibbitt v. R. & W. Transit Co.*, 220 N. C. 702, 18 S. E. (2d) 203 (1942).

**Bicycle Being Carried by Pedestrian.**—Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to a repair shop, and that he was hit by a vehicle entering the intersection against the stop light at a high rate of speed. The court held that the refusal to give defendant's requested instruction that the failure to have a light on the bicycle was a violation of subsection (f) of this section was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist. *Holmes v. Blue Bird Cab*, 227 N. C. 581, 43 S. E. (2d) 71 (1947).

**Disabled Vehicle.**—A tractor-trailer standing on the paved portion of a highway

at nighttime is required to have the rear and clearance lights burning as provided by this section, regardless of whether or not the vehicle is disabled within the meaning of § 20-161(c). *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377 (1949).

**Whether Obstruction Should Have Been Seen Is Jury Question.**—Generally speaking, where the statutes, as this section, or the decisions of the courts, require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights. *Morris v. Sells-Floto Circus*, 65 F. (2d) 782 (1933).

**Evidence Sufficient for Jury.**—Evidence tending to show that the headlights on defendant's car were defective and that he was driving at a speed of 60 to 65 miles an hour and, in a sudden effort to avoid colliding with another automobile which had been backed into the highway and which was apparently not in motion at the time, defendant drove off the road, causing the car to overturn, inflicting serious injury to plaintiff, a guest in the car, require the submission of the case to the jury. *Stewart v. Stewart*, 221 N. C. 147, 19 S. E. (2d) 242 (1942).

Evidence that the car in which plaintiff was riding as a guest struck defendant's trailer which was standing across the highway in the car's lane of traffic, and that the trailer did not have burning the lights required by this section, is sufficient to overrule defendant's motion to nonsuit and motion for a directed verdict in its favor on the issue of negligence, since the question of proximate cause under the evidence is for the jury. *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377 (1949).

**Applied in** *McKinnon v. Howard Motor Lines*, 228 N. C. 132, 44 S. E. (2d) 735 (1947); *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 534 (1948).

**Cited in** *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939); *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884 (1942).

**§ 20-130. Additional permissible light on vehicle.**—(a) Spot Lamps.—Any motor vehicle may be equipped with not to exceed two spot lamps, except that a motorcycle shall not be equipped with more than one spot lamp, and every lighted spot lamp shall be so aimed and used upon approaching another vehicle that no part of the beam will be directed to the left of the center of the highway nor more than one hundred feet ahead of the vehicle. No spot lamps shall be used on the rear of any vehicle.

(b) **Auxiliary Driving Lamps.**—Any motor vehicle may be equipped with not to exceed two auxiliary driving lamps mounted on the front, and every such auxiliary driving lamp or lamps shall meet the requirements and limitations set forth in § 20-131, subsection (c).

(c) **Restrictions on Lamps.**—Any device, other than head lamps, spot lamps, or auxiliary driving lamps, which projects a beam of light of an intensity greater than twenty-five candle power, shall be so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than fifty feet from the vehicle. (1937, c. 407, s. 93.)

**§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions.**—It shall be unlawful for any person to drive upon the highways of this State any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, ambulances, wreckers, fire fighting vehicles or vehicles of a voluntary life-saving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or to such lights as may be prescribed by the Interstate Commerce Commission. (1943, c. 726; 1947, c. 1032.)

**Editor's Note.**—The 1947 amendment rewrote the second sentence.

**§ 20-131. Requirements as to head lamps and auxiliary driving lamps.**—(a) The head lamps of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided in subsection (c) of this section, they will at all times mentioned in § 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but any person operating a motor vehicle upon the highways, when meeting another vehicle, shall so control the lights of the vehicle operated by him by shifting, depressing, deflecting, tilting, or dimming the headlight beams in such manner as shall not project a glaring or dazzling light to persons in front of such head lamp.

(b) Head lamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the head lamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands, and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

(c) Whenever a motor vehicle is being operated upon a highway, or portion thereof, which is sufficiently lighted to reveal a person on the highway at a distance of two hundred feet ahead of the vehicle, it shall be permissible to dim the head lamps or to tilt the beams downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps, subject to the restrictions as to tilted beams and auxiliary driving lamps set forth in this section.

(d) Whenever a motor vehicle meets another vehicle on any highway it shall be permissible to tilt the beams of the head lamps downward or to substitute therefor the light from an auxiliary driving lamp or pair of such lamps subject to the requirement that the tilted head lamps or auxiliary lamp or lamps shall give sufficient illumination under normal atmospheric conditions and on a level road to render clearly discernible a person seventy-five feet ahead, but shall not project a glaring or dazzling light to persons in front of the vehicle: Provided, that at all times required in § 20-129 at least two lights shall be displayed on the front of and on opposite sides of every motor vehicle other than a motorcycle, road roller, road machinery, or farm tractor.

(e) No city or town shall enact an ordinance in conflict with this section. (1937, c. 407, s. 94; 1939, c. 351, s. 1.)

**Cross References.**—As to failure to dim headlights not cause for suspension or revocation of driver's license, see § 20-18.

As to penalties imposed for failure to dim headlights, see § 20-181.

**Editor's Note.**—The 1939 amendment

inserted in subsection (a) the provision as to controlling lights.

**Contributory Negligence.**—In an action for damages due to negligence of defendants, where the evidence showed that plaintiffs, on a joint enterprise, driving their car about 2:00 o'clock a. m., at 40 or 45 miles per hour, with lights dimmed so that they could not see ahead over 75 to 100 feet, never applied the brakes and failed to

see defendants' truck until after the collision, crashing into the back of the truck with terrific force, plaintiffs were guilty of contributory negligence which was a proximate cause of the accident, thereby barring their recovery. *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884 (1942).

**Quoted** in *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939).

§ 20-132. **Acetylene lights.**—Motor vehicles may be equipped with two acetylene head lamps of approximately equal candle power when equipped with clear plane glass fronts, bright six-inch spherical mirrors, and standard acetylene five-eighths foot burners not more and not less and which do not project a glaring or dazzling light into the eyes of approaching drivers. (1937, c. 407, s. 95.)

§ 20-133. **Enforcement of provisions.**—(a) The Commissioner is authorized to designate, furnish instructions to and to supervise official stations for adjusting head lamps and auxiliary driving lamps to conform with the provisions of § 20-129. When head lamps and auxiliary driving lamps have been adjusted in conformity with the instructions issued by the Commissioner, a certificate of adjustment shall be issued to the driver of the motor vehicle on forms issued in duplicate by the Commissioner and showing date of issue, registration number of the motor vehicle, owner's name, make of vehicle and official designation of the adjusting station.

(b) The driver of any motor vehicle equipped with approved head lamps, auxiliary driving lamps, rear lamps or signal lamps, who is arrested upon a charge that such lamps are improperly adjusted or are equipped with bulbs of a candle power not approved for use therewith, shall be allowed forty-eight hours within which to bring such lamps into conformance with the requirements of this article. It shall be a defense to any such charge that the person arrested produce in court or submit to the prosecuting attorney a certificate from an official adjusting station showing that within forty-eight hours after such arrest such lamps have been made to conform with the requirements of this article. (1937, c. 407, s. 96.)

§ 20-134. **Lights on parked vehicles.**—Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in § 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway. (1937, c. 407, s. 97.)

**It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway without lights thereon,** as an emergency may arise thereby making it impossible to move such vehicle immediately. *Pike v. Seymour*, 222 N. C. 42, 21 S. E. (2d) 884 (1942).

**Violation Is Negligence Per Se.**—The parking of a truck on a public highway at night without lights in violation of this section is negligence per se, and the question of proximate cause is for the determination

of the jury. [This case was decided under the corresponding section of the former law.] *Barrier v. Thomas, etc., Co.*, 205 N. C. 425, 171 S. E. 626 (1933).

Parking on a paved highway at night, without flares or other warning, is negligence. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388 (1943).

**Cited** in *McKinnon v. Howard Motor Lines*, 228 N. C. 132, 44 S. E. (2d) 735 (1947).

§ 20-135. **Safety glass.**—(a) It shall be unlawful to operate knowingly, on any public highway or street in this State, any motor vehicle which is registered in the State of North Carolina and which shall have been manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, unless such motor vehicle be equipped with safety glass wherever glass is used in doors, windows, windshields, wings or partitions; or for a dealer to sell a motor vehicle manufactured or assembled on or after January first, one thousand nine hundred and thirty-six, for operation upon the said highways or streets unless it be so equipped. The provisions of this article shall not apply to any motor vehicle if such motor vehicle shall have been registered previously in another state by the owner while the owner was a bona fide resident of said other state.

(b) The term "safety glass" as used in this article shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by glass when the glass is cracked or broken.

(c) The Department of Motor Vehicles shall approve and maintain a list of the approved types of glass, conforming to the specifications and requirements for safety glass as set forth in this article, and in accordance with standards recognized by the United States Bureau of Standards, and shall not issue a license for or relicense any motor vehicle subject to the provisions of this article unless such motor vehicle be equipped as herein provided with such approved type of glass.

(d) The owner of any motor vehicle which is operated knowingly or any dealer who sells a motor vehicle in violation of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars or be imprisoned not more than thirty days, or both, in the discretion of the court. (1937, c. 407, s. 98; 1941, c. 36.)

§ 20-136. **Smoke screens.**—(a) It shall be unlawful for any person or persons to drive, operate, equip or be in the possession of any automobile or other motor vehicle containing, or in any manner provided with, a mechanical machine or device designed, used or capable of being used for the purpose of discharging, creating or causing, in any manner, to be discharged or emitted, either from itself or from the automobile or other motor vehicle to which attached, any unusual amount of smoke, gas or other substance not necessary to the actual propulsion, care and keep of said vehicle, and the possession by any person or persons of any such device, whether the same is attached to any such motor vehicle, or detached therefrom, shall be prima facie evidence of the guilt of such person or persons of a violation of this section.

(b) Any person or persons violating the provisions of this section shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for a period of not less than one year or not more than ten years, in the discretion of the court. (1937, c. 407, s. 99.)

§ 20-136.1. **Location of television viewers.**—No person shall drive any motor vehicle equipped with any television viewer, screen, or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat, or which is visible to the driver while operating the motor vehicle. (1949, c. 583, s. 4.)

§ 20-137. **Unlawful display of emblem or insignia.**—It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or insignia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars (\$50) or imprisonment for a period not exceeding thirty days. (Ex. Sess. 1924, c. 63.)

**Editor's Note.**—The effect of this act was summarized in 3 N. C. Law Rev. 25.

#### Part 10. Operation of Vehicles and Rules of the Road.

**§ 20-138. Persons under the influence of intoxicating liquor or narcotic drugs.**—It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State. (1937, c. 407, s. 101.)

**Cross Reference.**—As to revocation of license for driving while intoxicated, see § 20-17.

**Editor's Note.** — Some of the cases treated below were decided under the corresponding provisions of earlier laws, but should be of assistance in the interpretation of the present section.

**Death caused by a violation of this section may be manslaughter** but a condition precedent to conviction is that the violation of the law in this respect must have caused the wreck and the death of deceased. *State v. Dills*, 204 N. C. 33, 167 S. E. 459 (1933).

One who drives his automobile, in violation of this section, and runs into another car and thereby proximately causes the death of one of the occupants, is guilty of manslaughter at least. *State v. Stansell*, 203 N. C. 69, 164 S. E. 580 (1932).

**Necessity That Causal Connection Be Shown.**—The violation of § 20-154 and this section, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter, unless a causal relation is shown between the breach of the statute and the death. *State v. Lowery*, 223 N. C. 598, 27 S. E. (2d) 638 (1943).

**Violation of Statute Not Proximate Cause of Accident.**—In a prosecution for manslaughter under repealed § 14-387, relating to drunken driving, it was held that the violation of that section was not the proximate cause of the fatal accident. *State v. Miller*, 220 N. C. 660, 18 S. E. (2d) 143 (1942).

**Permitting Intoxicated Person to Drive.**—When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway while in a state of intoxication, the owner is as guilty as the man at the wheel. *State v. Gibbs*, 227 N. C. 677, 44 S. E. (2d) 201 (1947).

**Operation of Vehicle Imports Motion.**—In a prosecution under repealed § 14-387, similar to this section, defendant tes-

tified that he was not driving the truck, but that the driver got out to examine the motor when the truck stalled, and that defendant placed his foot on the brake to keep the truck from rolling backward. The court charged the jury to the effect that holding his foot on the brake to keep the truck from rolling backward was an operation of the truck within the meaning of the statute. Held: The operation of a motor vehicle within the meaning of the statute imports motion of the vehicle, and does not include the acts of defendant as testified to by him. *State v. Hatcher*, 210 N. C. 55, 185 S. E. 435 (1936).

**Portion of Sidewalk as Highway.**—The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of this section. *State v. Perry*, 230 N. C. 361, 53 S. E. (2d) 288 (1949).

**"Under the Influence" Defined.**—A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of this section, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946).

In prosecution under this section, an instruction that defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally co-ordinate or if he was abnormal in any degree from intoxicants was held without error. *State v. Biggerstaff*, 226 N. C. 603, 39 S. E. (2d) 619 (1946).

**No Distinction between One Who Is**



**Drunk and One under the Influence of Liquor.** — The legislature did not intend that any distinction between a person who is drunk and one under the influence of liquor should be made in the interpretation and enforcement of this statute. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946).

**Instruction on Intoxication Held Erroneous.**—An instruction that a person is under the influence of intoxicating liquor when “he has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties” is erroneous. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946).

**Instruction on Intoxication Held Proper.**—In a prosecution for drunken driving under repealed § 14-387, an instruction that defendant was under the influence of intoxicating liquor if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank, was held without error. *State v. Harris*, 213 N. C. 648, 197 S. E. 142 (1938).

**Violation Must Be Shown Beyond a Reasonable Doubt.** — Before the State is entitled to a conviction under this section, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of the State while under the influence of intoxicating liquor or narcotic drugs. *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946).

**Circumstantial Evidence May Suffice.**—Though the evidence on the part of the State as to violation of this section is circumstantial, it may be sufficient to be submitted to a jury. *State v. Newton*, 207 N. C. 323, 177 S. E. 184 (1934).

**Sufficiency of Evidence of Intoxication.**—The testimony of two witnesses to the effect that from the detection of some “foreign” odor of an intoxicant from the mouth of a man whom they had not seen before, and who had been knocked unconscious by a blow on the head, they were of opinion he was under the influence of intoxicating liquor, standing alone, was insufficient to constitute substantial evidence that the man, previously, while driving an automobile on the highway, had been under the influence of intoxicants to the extent held necessary in *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946), to constitute violation of this section. *State v. Flinchem*, 228 N. C. 149, 44 S. E. (2d) 724 (1947).

**When Nonsuit Proper.** — Officers who

reached the scene of an accident some thirty minutes after it occurred testified that in their opinion defendant driver was intoxicated or under the influence of something, and one of them testified that he smelled something on defendant’s breath, but both testified that they did not know whether defendant’s condition was due to drink or to injuries sustained by him in the accident. It was held that the evidence raises no more than a suspicion or conjecture as to whether defendant was driving under the influence of liquor or narcotic drugs, and defendant’s motion as of nonsuit should have been allowed. *State v. Hough*, 229 N. C. 532, 50 S. E. (2d) 496 (1948).

**Evidence held sufficient to be submitted to the jury** on a charge of driving a motor vehicle on the highways while under the influence of intoxicants in violation of this section. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948). See *State v. Sawyer*, 230 N. C. 713, 55 S. E. (2d) 464 (1949).

**In Prosecution for Manslaughter.**—Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of this section, and was driving recklessly in violation of § 20-140, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948).

**Duty of Judge to Charge as to Good Character of Defendant.**—Where defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor, in the absence of request it was not incumbent upon the trial judge to charge specifically as to the effect of evidence of the good character of the defendant. This was not an essential feature of the case. *State v. Glatly*, 230 N. C. 177, 52 S. E. (2d) 277 (1949).

**Policeman May Arrest without Warrant.**—A policeman could arrest without a warrant a person in his presence violating repealed § 14-387, similar to this section. *State v. Loftin*, 186 N. C. 205, 119 S. E. 209 (1923).

**Jurisdiction of Municipal Court.** — Where a statute creating a municipal court does not give it criminal jurisdiction over the offense described by repealed § 14-387, similar to this section, this jurisdiction was acquired by such section to the extent only of binding the defendant over to

the superior court upon conviction. *State v. Jones*, 181 N. C. 543, 106 S. E. 827 (1921).

Quoted in *State v. Parker*, 220 N. C. 416,

17 S. E. (2d) 475 (1941).

Cited in *State v. Creech*, 210 N. C. 700, 188 S. E. 316 (1936).

§ 20-139. **Operation upon driveways of public or private institutions while under the influence of intoxicating liquors, etc.**—Any person who shall operate a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church or any of the institutions maintained and kept up by the State of North Carolina or any of its subdivisions while under the influence of narcotic drugs or intoxicating liquor, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in § 20-179. (1939, c. 292; 1951, c. 1042, s. 1.)

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

§ 20-140. **Reckless driving.**—Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in § 20-180. (1937, c. 407, s. 102.)

**Editor's Note.**—Some of the cases cited below were decided under the corresponding provisions of the former law.

A motorist is under duty at all times to operate his vehicle at a reasonable rate of speed and maintain constant attention to the highway. *Williams v. Henderson*, 230 N. C. 707, 55 S. E. (2d) 462 (1949).

**Surrounding Circumstances Govern Case.**—Driving an automobile with tires which are known to be worn out and slick, on a highway which is wet and slippery, at a rate of speed not ordinarily unlawful, under this section may be unlawful under all the circumstances shown by the evidence. *Waller v. Hipp*, 208 N. C. 117, 179 S. E. 428 (1935).

**Care Required in Emergency.**—While the operator of a public automobile is obligated to exercise a high degree of care, he is not charged with the necessity, either of possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. *Love v. Queen City Lines*, 206 N. C. 575, 174 S. E. 514 (1934).

**When Person Guilty of Reckless Driving.**—Under this section, a person is guilty of reckless driving (1) if he drives an automobile on a public highway in this State, carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or prop-

erty. *State v. Folger*, 211 N. C. 695, 191 S. E. 747 (1937).

**Duty to Keep Car under Control and Decrease Speed When Special Hazard Exist.**—The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355 (1949).

**Ability to Stop within Radius of Lights.**—And one who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355 (1949).

**Violation of Traffic Ordinance.**—The simple violation of a traffic regulation, which does not involve actual danger to life, limb or property, while importing civil liability if damage or injury ensue, would not perforce constitute the criminal offense of reckless driving. *State v. Cope*, 204 N. C. 28, 167 S. E. 456 (1933).

**Effect of Using Prudence after Violation.**—A reckless violation which put a driver in such position that he could not avoid an injury through attempting to do so after the danger became apparent, is not excused by the subsequent attempt. *State v. Gray*, 180 N. C. 697, 104 S. E. 647 (1920).

**Jurisdiction of Mayor's Court—Excessive Sentence.**—Defendant was tried in the mayor's court of North Wilkesboro on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the superior court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. It was held that the mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the superior court upon the warrants, without a bill of indictment first being found and returned, was a nullity. *State v. Johnson*, 214 N. C. 319, 199 S. E. 96 (1938).

**Proof of Violation in Criminal Prosecutions.**—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. *State v. Suddarth*, 184 N. C. 733, 114 S. E. 828 (1922).

**Proximate Cause Is Question for Jury.**—The violation of this and succeeding sections enacted for the safety of those driving upon the highway is negligence per se, and when such violation is admitted or established the question of proximate cause is ordinarily for the jury. *Godfrey v. Queen City Coach Co.*, 201 N. C. 264, 150 S. E. 412 (1931); *King v. Pope*, 202 N. C. 554, 163 S. E. 447 (1932).

The better rule under this and the following section is that except where the evidence is so conclusive that there could be, in the minds of reasonable men, no doubt as to the plaintiff's negligence contributing to the injury, the question should be left to the jury. *Morris v. Sells-Floto Circus*, 65 F. (2d) 782 (1933).

Evidence that the individual defendant drove his car in a negligent manner in violation of this and other sections and that such negligence proximately caused injury to the plaintiff is held sufficient to have been submitted to the jury. *Puckett v. Dyer*, 203 N. C. 684, 167 S. E. 43 (1932).

**Sufficient Evidence to Sustain Negligence and Proximate Cause as a Matter of Law.**—*Smith v. Miller*, 209 N. C. 170, 183 S. E. 370 (1936).

**An indictment under this section may be consolidated for trial with an indictment under § 20-217**, which prohibits the driver of a motor vehicle from passing a standing school bus on the highway without first bringing said motor vehicle to a complete stop. *State v. Webb*, 210 N. C. 350, 186 S. E. 241 (1936).

**Instruction on Reckless Driving Held Reversible Error.**—See *State v. Folger*, 211 N. C. 695, 191 S. E. 747 (1937).

**An acquittal of reckless driving in the recorder's court will not bar a prosecution of manslaughter** in the superior court arising out of the same occurrence, the two offences differing both in grade and kind and not being the same in law or in fact, and the one not being a lesser degree of the other, and the recorder being without jurisdiction over the charge of manslaughter, but having bound defendant over to the superior court on that charge. *State v. Midgett*, 214 N. C. 107, 198 S. E. 613 (1938).

**This and the following section constitute the hub of the motor traffic law** around which all other provisions regulating the operation of automobiles revolve. *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. (2d) 915 (1941).

**Sufficiency of Warrant.**—A warrant charging that defendant "did unlawfully and wilfully operate a motor vehicle on a State highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in violation" of municipal ordinances and contrary to the form of the statute, is held sufficient to charge defendant with reckless driving under this section, since, although the warrant fails to follow the language of the statute in accordance with the better practice, it does charge facts sufficient to enable the court to proceed to judgment, and the charge of violating the municipal ordinances may be treated as surplusage. *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941).

**Sufficiency of Evidence for Jury.**—The State's evidence tending to show that defendant, driving 60 miles an hour, crashed

into the rear of a car driven in the same direction on its right-hand side of the highway at 20 or 25 miles an hour, that the driver of the other car saw in his rear-view mirror defendant approaching at an excessive speed but that defendant struck the car before its driver could get on the shoulders of the road, together with evidence showing that defendant's car struck the other car with terrific force, is held sufficient to be submitted to the jury upon a warrant charging defendant with reckless driving under this section. *State v. Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941).

Allegation that defendant violated the provisions of this section, in that truck was operated carelessly and heedlessly in wilful and wanton disregard of rights and safety of others, at a speed and in a manner to endanger or be likely to endanger person and property and by operating same to the left, when he could have turned to the right and passed without striking plaintiff's testator, was not supported by evidence. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945).

Evidence held sufficient to be submitted to the jury on a charge of reckless driving in violation of this section. *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843 (1948); *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948).

Circumstantial evidence tending to identify defendant as the driver of the car which was driven in a reckless manner, was held sufficient to be submitted to the jury. *State v. Dooley*, 232 N. C. 311, 59 S. E. (2d) 808 (1950).

Evidence held properly submitted to the jury on the charge of reckless driving. *State v. Sawyer*, 230 N. C. 713, 55 S. E. (2d) 464 (1949).

**§ 20-140.1. Reckless driving upon driveways of public or private institutions, etc.**—Any person who shall operate a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina or any of its subdivisions, carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in § 20-180. (1951, c. 182, s. 1.)

**§ 20-141. Speed restrictions.**—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

**In Prosecution for Manslaughter.**—Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of § 20-138, and was driving recklessly in violation of this section, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948).

**Evidence held sufficient to justify conviction of reckless driving.** *State v. Steelman*, 228 N. C. 634, 46 S. E. (2d) 845 (1948).

The State's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway on which several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**The charge in a prosecution for reckless driving was held to be in substantial compliance with the requirements of § 1-180.** *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Applied in** *State v. Flinchem*, 228 N. C. 149, 44 S. E. (2d) 724 (1947).

**Stated in** *Etheridge v. Etheridge*, 222 N. C. 616, 24 S. E. (2d) 477 (1943).

**Quoted in** *State v. Crews*, 214 N. C. 705, 200 S. E. 378 (1939); *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939); *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868 (1948).

**Cited in** *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Bechtler v. Bracken*, 218 N. C. 515, 11 S. E. (2d) 721 (1940); *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

1. Twenty miles per hour in any business district;
2. Thirty-five miles per hour in any residential district;
3. Forty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one ton capacity, and school busses loaded with children;
4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, regular passenger carrying vehicles, and pick-up trucks of less than one ton capacity.

(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(d) Whenever the State Highway and Public Works Commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said Commission shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

(f) Whenever local authorities within their respective jurisdictions determine, upon the basis of an engineering and traffic investigation, that the speed permitted under this article at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, such local authority shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or upon the approaches thereto.

(f1) Local authorities in their respective jurisdictions may in their discretion fix by ordinance such speed limits as they may deem safe and proper on those streets which are not a part of the State highway system and which are not maintained by the State Highway and Public Works Commission, but no speed limit so fixed for such streets shall be less than twenty-five miles per hour, and no such ordinance shall become or remain effective unless signs have been conspicuously placed giving notice of the speed limit for such streets. A violation of any ordinance adopted pursuant to the provisions of this subsection shall constitute a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or a prison sentence of not more than thirty days.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher speeds than those stated in subsection (b) hereof upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections: Provided, that signs are erected giving notice of the authorized speed.

Local authorities shall not have authority to modify or alter the basic rules set forth in subsection (a) herein, nor in any event to authorize by ordinance a speed in excess of fifty miles per hour.

(h) No person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law. Police officers

are hereby authorized to enforce this provision by directions to drivers, and in the event of wilful disobedience to this provision and refusal to comply with the direction of an officer in accordance herewith, the continued slow operation by a driver shall be a misdemeanor.

(i) The State Highway and Public Works Commission shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punished as provided in § 20-180. (1937, c. 297, s. 2; 1937, c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1.)

**Cross Reference.**—See § 20-216.

**Editor's Note.** — The 1947 amendment rewrote this section as changed by the 1939 and 1941 amendments, and the 1949 amendment inserted subsection (f1).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 455; on the 1949 amendment, see 27 N. C. Law Rev. 473.

Some of the cases cited below were decided under the corresponding provisions of the former law.

**This section applies to criminal actions only** and not to civil actions for damages. *Piner v. Richter*, 202 N. C. 573, 163 S. E. 561 (1932). See *Jones v. Charlotte*, 183 N. C. 630, 112 S. E. 423 (1922).

**Regulation of Speed at Night.** — The motorist upon a public highway on a dark, misty and foggy night, is required to regulate the speed of his car with a view to his own safety according to the distance the light from his headlights is thrown in front of him upon the highway, and to observe the rule of the ordinary prudent man. *Weston v. Southern R. Co.*, 194 N. C. 210, 139 S. E. 237 (1927). See also, *Stewart v. Stewart*, 221 N. C. 147, 19 S. E. (2d) 242 (1942).

Curves on the road and darkness are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." He must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388 (1943).

A motorist must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights. *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388 (1943); *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53 (1949).

One who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to

the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355 (1949).

**Colliding with Vehicle Parked on Highway at Night without Signals.**—The driver of a car is not required to anticipate that vehicles will be parked on the highway at night without the warning signals required by statute, but this does not relieve him of the duty to keep a proper lookout and not to exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmospheric conditions. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53 (1949). See § 20-161(a).

Where plaintiff's own evidence discloses that his lights and brakes were in good condition, that he was driving with his lights full on at thirty-five miles per hour, that he could see 150 feet ahead despite the darkness and heavy fog, and that he failed to see any obstruction and hit the rear of a truck parked on the highway in his lane of traffic without lights or warning flares, the evidence discloses contributory negligence on his part as a matter of law. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53 (1949).

**Contributory Negligence at Crossing.**—Failure of a driver to keep his car under such control as will enable him to observe the restrictions imposed by this section as to grade crossings is contributory negligence sufficient to bar recovery against the railroad. *Hinnant v. Atlantic Coast Line R. Co.*, 202 N. C. 489, 163 S. E. 555 (1932).

**Passing Animals.**—See *Tudor v. Bowen*, 152 N. C. 441, 67 S. E. 1015 (1910); *Gaskins v. Hancock*, 156 N. C. 56, 72 S. E. 80 (1911); *Curry v. Fleer*, 157 N. C. 16, 72 S. E. 626 (1911).

**Intersecting Streets.**—The word "intersecting" has been construed as synonymous with "joining" or "touching" or "entering into." *Manly v. Abernathy*, 167 N.

C. 220, 83 S. E. 343 (1914); *Fowler v. Underwood*, 193 N. C. 402, 137 S. E. 155 (1927).

The words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. *Manly v. Abernathy*, 167 N. C. 220, 83 S. E. 343 (1914).

**Same — Effect of Exercising Judgment Where Speed Exceeded.** — Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed. *State v. McIver*, 175 N. C. 761, 94 S. E. 682 (1917).

**Same — Criminal Liability.** — A reckless approach and traverse of an intersection may render one criminally liable for the consequences of his acts in addition to liability under this section. *State v. Gash*, 177 N. C. 595, 99 S. E. 337 (1919).

**Same—Application to Railroads.**—The prior law, similar in phraseology to this section, was held to include railroads within its provisions, and it was therefore a misdemeanor to run an automobile at a greater speed than permitted at intersections while approaching a railroad crossing in a town. *Hinton v. Southern R. Co.*, 172 N. C. 587, 90 S. E. 756 (1916).

**Same—Effect of Violation upon Recovery from Railroad.** — The mere fact that the speed of an automobile exceeded that allowed by law, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury. *Shepard v. Norfolk Southern Railroad*, 169 N. C. 239, 84 S. E. 277 (1915).

**Same—Purpose of Regulation.**—Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter, the intersecting highway. *Etheridge v. Etheridge*, 222 N. C. 616, 24 S. E. (2d) 477 (1943).

**Same — Failure to Slacken Speed or Give Signal.**—Plaintiffs' evidence tending to show that defendant's tractor with trailer was being driven at a speed of 35

miles per hour and entered an intersection with another highway without slackening speed or giving signal warning, and collided with the truck in which plaintiffs' intestates were riding, which had already entered the intersection, is sufficient to overrule defendant's motions as of nonsuit on the issue of negligence, notwithstanding that defendant's vehicle was being operated upon the dominant highway. *Nichols v. Goldston*, 228 N. C. 514, 46 S. E. (2d) 320 (1948).

**Application to Approach from Private Drive.**—In approaching a highway from a yard the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach, and evidence of his failure to do so causing an accident to another car being properly driven on the highway, is sufficient actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule. *Fowler v. Underwood*, 193 N. C. 402, 137 S. E. 155 (1927).

**Care as to Children.**—The law requires more than ordinary care in regard to children. *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327 (1934).

**This section states several offenses each of which is a separate crime independently of the others.** *State v. Mills*, 181 N. C. 550, 106 S. E. 677 (1921). See also *State v. Rountree*, 181 N. C. 535, 106 S. E. 669 (1921).

**Limitation upon Privilege of Driving at Maximum Rate.** — The speed limit prescribed by statute at which an automobile driver may go at various places does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6 (1926).

Motorist may not lawfully drive at speed which is not reasonable and prudent under the circumstances notwithstanding that the speed is less than limit set by this section. *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. (2d) 915 (1941).

The trial court's instruction correctly defining "residential district" and charging that the lawful speed therein was 25 miles an hour, but that this limitation did not relieve the driver from further reducing his speed if made necessary by special hazards in order to avoid colliding with any per-

son or vehicle, is without error, the question whether the scene of the accident was in a "residential district" as defined by statute and the conflicting evidence as to the speed of the bus being left to the determination of the jury. *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140 (1939).

The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, ch. 148, Public Laws 1927, § 21, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, § 4 of the 1927 act, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car was going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. *Groome v. Davis*, 215 N. C. 510, 2 S. E. (2d) 771 (1939).

By provision of this section, speed in excess of that which is reasonable and prudent under the circumstances when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the prima facie limits prescribed. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

The fact that a vehicle is being driven within the statutory speed limit does not render the speed lawful when by reason of special hazards the speed is greater than is reasonable and prudent under the existing conditions. *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190 (1951).

#### **Violation as Constituting Negligence.—**

It is negligence per se to drive an automobile upon a public highway at a speed greater than that permitted by statute, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5 (1925).

**Motorist Must Decrease Speed When Special Hazards Exist.**—A speed greater than is reasonable and prudent under the conditions then existing is prohibited by this section, and the duty is imposed upon the driver to decrease the speed of his automobile when special hazard exists with respect to pedestrians or other traffic. *Baker v. Perrott*, 228 N. C. 558, 46 S. E. (2d) 461 (1948). See *Williams v. Henderson*, 230 N. C. 707, 55 S. E. (2d) 462 (1949); *Riggs v. Akers Motor Lines*, 233 N. C. 160, 63 S. E. (2d) 197 (1951).

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle. This requirement, as expressed in this section and § 20-140, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. *Cox v. Lee*, 230 N. C. 155, 52 S. E. (2d) 355 (1949).

**Curves and hills in the road** are conditions a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance." *Tyson v. Ford*, 228 N. C. 778, 47 S. E. (2d) 251 (1948).

**When Negligence Not Imputed to Passenger.** — The negligent driving of the owner of the car or his agent is not attributable to a passenger therein who has no authority over him or control over the car or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination. *Albritton v. Hill*, 190 N. C. 429, 130 S. E. 5 (1925).

**Necessity for Criminal Negligence.** — Under an indictment with three counts: assault with a deadly weapon, an automobile; operating a motor vehicle on a public highway while under the influence of intoxicating liquor; and recklessly, and in breach of this section, wherein it was admitted by the State that there was no evidence of intentional assault, and the jury having returned for their verdict that defendant "was guilty of an assault, but not with reckless driving," the admission and the verdict on the last two counts dispelled the element of criminal negligence and



criminal intent, and a conviction on the first count will not be sustained. *State v. Rawlings*, 191 N. C. 265, 131 S. E. 632 (1926). See also *State v. Rountree*, 181 N. C. 535, 106 S. E. 669 (1921).

**When Violation Amounts to Manslaughter.**—Where one drives his automobile in violation of the statutory requirements, and thus directly, or without an independent intervening sole proximate cause, the death of another results, he is guilty of manslaughter, though the death was unintentionally caused by his act. But the violation also is insufficient unless it was the proximate cause of the death, and a charge disregarding the element of proximate cause is error. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6 (1926).

**Ordinance Held in Conflict.**—Where one is permitted by the State law to enter upon and go across an intersecting highway at a speed not exceeding ten miles an hour unless due regard to the traffic or to the safety of the public requires a reduction of the speed, but the ordinance in question deprives him of this right by prescribing an arbitrary rule that he shall always and under all circumstances stop his vehicle before entering certain streets, the ordinance is inconsistent with the statute and therefore not enforceable. *State v. Stallings*, 189 N. C. 104, 126 S. E. 187 (1925).

**Circumstantial Evidence May Be Sufficient.**—Though the evidence on the part of plaintiff is not direct, but circumstantial, yet it may be sufficient evidence to be submitted to the jury that defendant was exceeding the speed limit contrary to the law of this section. *Jones v. Bagwell*, 207 N. C. 378, 177 S. E. 170 (1934).

**Proximate Cause Is for Jury.**—Where there is evidence that defendant was driving his automobile on the highway at a speed of sixty-five miles per hour and that the injury in suit was proximately caused by such excessive speed, it is sufficient to be submitted to the jury on the issue of actionable negligence. *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143 (1933).

**Burden of Showing Proximate Cause.**—Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

**Proof of Residential District or Section.**—Where there is no definite evidence as to the number of residences at the scene of the action so as to bring the place within the definition of "residential section," as provided by this section, or "residential dis-

trict," as set out in § 20-38, and no evidence that the speed of the car was a proximate cause of the accident in suit, the evidence is insufficient to be submitted to the jury on the question of defendant's negligence in exceeding the speed limit prescribed in residential districts, there being no evidence that defendant exceeded the speed limit prescribed for highway travel generally. *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43 (1934).

Where the evidence established that the scene of the accident was not in a business district, and there was no evidence that defendants' vehicle was being driven in excess of 20 miles an hour, whether the accident occurred in a residential district was immaterial, since such speed did not violate this section. *Mitchell v. Meits*, 220 N. C. 793, 18 S. E. (2d) 406 (1942).

**Sufficient Evidence to Overrule Defendant's Motion to Nonsuit in Prosecution for Manslaughter.**—Evidence that the defendant was driving his car at a speed of from 50 to 55 miles per hour, on or near the center of the highway, when he collided with another car, resulting in the death of the driver thereof, was held sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter, although defendant introduced evidence in sharp conflict. *State v. Webber*, 210 N. C. 137, 185 S. E. 659 (1936).

The State's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway whereon several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain a conviction of reckless driving under § 20-140, and driving at a speed in excess of fifty-five miles per hour in violation of this section. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Instruction failing to charge provisions of this section, in civil action, held error.** *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379 (1941).

**Mere Reading of Section Held Insufficient.**—The mere reading of the statutory speed regulations laid down in this section, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions of the evidence adduced, is insufficient to meet the requirements of § 1-180. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Necessity of Referring to Subsection 4(c).**—So material is the application of subsection 4(c) to questions of liability arising out of violation of statutory speed regulations where special hazards or unusual circumstances are shown that in *Kolman v.*

Silbert, 219 N. C. 134, 12 S. E. (2d) 915 (1941), it was held error that the trial court in that case charged the jury as to the speed limits fixed by this section without calling attention to the clause above referred to. *Garvey v. Atlantic Greyhound Corp.*, 228 N. C. 166, 45 S. E. (2d) 58 (1947).

**Charge Held Sufficient.**—The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of § 1-180. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

**Speed in excess of statutory limits is prima facie evidence of negligence.** *Morris v. Johnson*, 214 N. C. 402, 199 S. E. 390 (1938). And an instruction that such speed constitutes negligence per se is reversible error. *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372 (1938).

A speed in excess of the statutory restrictions is prima facie evidence that the speed is not reasonable or prudent and that it is unlawful, but it does not establish that the speed is unlawful as a matter of law, and is not prima facie proof of proximate cause, and does not make out a prima facie case, and an instruction that such speed constituted prima facie evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. *Woods v. Freeman*, 213 N. C. 314, 195 S. E. 812 (1938). See *Fleeman v. Citizens Transfer, etc., Co.*, 214 N. C. 117, 198 S. E. 596 (1938).

An instruction that the jury might find, but were not required to find, that a speed in excess of forty-five miles an hour was unlawful, but that if they should find such speed was unlawful it would constitute negligence per se, is held not prejudicial under the evidence in this case tending to show special hazards in that defendant was driving into a curve on wet pavement with worn, slick tires, at a speed in excess of forty-five miles per hour. *York v. York*, 212 N. C. 695, 194 S. E. 486 (1938).

An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se, and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to §§ 20-146 and 20-174 prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a viola-

tion of speed restrictions which this section makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913 (1940).

As to violation of statutory speed limit as constituting negligence per se, see *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143 (1933); *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607 (1935); *Exum v. Baumrind*, 210 N. C. 650, 188 S. E. 200 (1936). As to evidence establishing negligence per se but not wanton negligence, see *Turner v. Lipe*, 210 N. C. 627, 188 S. E. 108 (1936). See also, *Smart v. Rodgers*, 217 N. C. 560, 8 S. E. (2d) 833 (1940).

The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is not negligence per se or as a matter of law, but only prima facie evidence that the speed is unlawful under the provisions of this section. *State v. Webber*, 210 N. C. 137, 185 S. E. 659 (1936), decided before the 1947 amendment, which increased the maximum speed for passenger cars from 45 to 55 miles per hour, citing *State v. Spencer*, 209 N. C. 327, 184 S. E. 835 (1936).

**Evidence of Excessive Speed Is Not Prima Facie Evidence of Proximate Cause.**

—Speed in excess of 21 miles per hour in a business district is prima facie evidence that the speed is excessive and unlawful, but such evidence is not prima facie proof of proximate cause, but is merely evidence to be considered with other evidence in determining actionable negligence. *Templeton v. Kelley*, 215 N. C. 377, 2 S. E. (2d) 696 (1939).

**A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable.** *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565 (1942).

**Evidence Tending to Show "Speed Greater than Is Reasonable and Prudent."**

—Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949).

Evidence of speed greater than was reasonable and prudent under the conditions then existing and, in any event, in excess of 45 miles per hour, was evidence of negligence. *Steelman v. Benfield*, 228 N. C.

651, 46 S. E. (2d) 829 (1948), decided before the 1947 amendment, which increased the maximum speed for passenger cars from 45 to 55 miles an hour.

Under this section prior to the 1947 amendment, where plaintiff's evidence tended to show that the driver was operating defendant's bus at a rate of 40 to 50 miles an hour in heavy traffic around a curve on an upgrade, an instruction that a speed of 45 miles per hour, rather than a speed in excess of 45 miles per hour, was prima facie evidence that the speed was unlawful, was held not prejudicial in view of the requirement in subsection 5(c) to reduce speed below the prima facie limit prescribed in traversing a curve or when special hazards exist with respect to other traffic. *Garvey v. Greyhound Corp.*, 228 N. C. 166, 45 S. E. (2d) 58 (1947).

**Evidence Negating Excessive Speed.**— In *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945), it was held that in the light of admitted facts as to the length of marks on the shoulder of highway and the point at which truck came to rest, suggestion of a speed of forty-five miles per hour as the truck was leaving the highway and going on the shoulder was contrary to human experience.

**Evidence held to show violation of this section**, and to warrant submission to the jury of the issue of defendants' negligence. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949). See *Brafford v. Cook*, 232 N. C. 699, 62 S. E. (2d) 327 (1950).

**Truck with Trailer Attached.** — Where the evidence in a prosecution for manslaughter is not conclusive as to whether the truck operated by the defendant had attached thereto a trailer or semi-trailer, and all the evidence shows that the defendant was driving the truck between thirty and thirty-five miles per hour, it was held error for the court to instruct the jury that defendant's speed was limited to thirty miles per hour. *State v. Brooks*, 210 N. C. 273, 186 S. E. 237 (1936).

Where it was admitted that when the driver of a truck first saw a cow at a distance of several hundred feet, the truck was then traveling in excess of 30 miles an hour, the limit imposed upon motor vehicles with trailers by this section, it was held that this admission was of significance in determining whether the driver of the truck was negligent in the management of the vehicle in the descent of the hill, if the jury should find, as the witnesses for the plaintiff assert, that the truck was driven to its left side of the road in order to avoid collision with the cow. *Jarman v. Philadelphia-Detroit Lines*, 131 F. (2d) 728 (1942).

The burden is upon the State to prove that a truck had a trailer attached thereto in order to reduce the maximum lawful speed at which a vehicle might be lawfully operated from thirty-five miles per hour, as prescribed for trucks without trailers, to thirty miles per hour. *State v. Brooks*, 210 N. C. 273, 186 S. E. 237 (1936).

**Contributory Negligence of Guest Held for Jury.**—The evidence tended to show that plaintiff was a guest in a truck being driven by defendant, that it was misting rain and the road was wet, that defendant was driving at an excessive speed of 60 to 65 miles per hour, but that defendant was sober and was an experienced and competent driver, and that plaintiff remonstrated several times as to speed and was reassured by defendant that he had been driving for twenty-five years without an accident. In plaintiff's suit to recover for injuries sustained when the car skidded and turned over on the highway, it was held that plaintiff was not guilty of contributory negligence as a matter of law in failing to request that defendant stop the car and permit him to get out, but the issue of contributory negligence should have been submitted to the jury. *Samuels v. Bowers*, 232 N. C. 149, 59 S. E. (2d) 787 (1950).

**Warrant Charging No Offense.** — A warrant charging merely that defendant operated his automobile at a designated speed in excess of the maximum prescribed by statute and the applicable municipal ordinance, charges no criminal offense, and defendant's motion in arrest of judgment should be allowed, since under the provisions of this section such speed constitutes merely prima facie evidence that the speed is unlawful. *State v. Crayton*, 214 N. C. 579, 199 S. E. 918 (1938).

**Applied in** *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327 (1934); *Gaffney v. Phelps*, 207 N. C. 553, 178 S. E. 231 (1935) (speed in entering intersection); *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Sparks v. Willis*, 228 N. C. 25, 44 S. E. (2d) 343 (1947); *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948); *Bobbit v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361 (1950); *Whiteman v. Seashore Transp. Co.*, 231 N. C. 701, 58 S. E. (2d) 752 (1950).

**Stated in** *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84 (1950).

**Cited in** *State v. Mickle*, 194 N. C. 808, 140 S. E. 150 (1927); *State v. Palmer*, 197 N. C. 135, 147 S. E. 817 (1929); *Burke v. Carolina Coach Co.*, 198 N. C. 8, 150 S. E. 636 (1929); *Lancaster v. B. & H. Coast Line*, 198 N. C. 107, 150 S. E. 716 (1929); *Rudd v. Holmes*, 198 N. C. 640, 152 S. E. 894 (1930); *Jones v. Bagwell*, 207 N. C.

378, 177 S. E. 170 (1934); Pittman v. Downing, 209 N. C. 219, 183 S. E. 362 (1936); Taft v. Maryland Cas. Co., 211 N. C. 507, 191 S. E. 10 (1937); Pearson v. Luther, 212 N. C. 412, 193 S. E. 739 (1937); Swinson v. Nance, 219 N. C. 772, 15 S. E. (2d) 284 (1941) (dis. op.); Reeves v. Sta-

ley, 220 N. C. 573, 18 S. E. (2d) 239 (1942); Brown v. Southern Paper Products Co., 222 N. C. 626, 24 S. E. (2d) 334 (1943); Crone v. Fisher, 223 N. C. 635, 27 S. E. (2d) 642 (1943); Hobbs v. Queen City Coach Co., 225 N. C. 323, 34 S. E. (2d) 211 (1945).

**§ 20-141.1. Restrictions in speed zones near rural public schools.**—Whenever the State Highway and Public Works Commission shall determine that the proximity of a public school to a public highway, coupled with the number of pupils in ordinary regular attendance at such school, results in a situation that renders the applicable speed set out in G. S. 20-141 greater than is reasonable or safe, under the conditions found to exist with respect to any public highway near such school, said Commission shall establish a speed zone on such portion of said public highway near such school as it deems necessary, and determine and declare a reasonable and safe speed limit for such speed zone, which shall be effective when appropriate signs giving notice thereof are erected at each end of said zone so as to give notice to any one entering the zone. This section does not apply with respect to any portion of any street or highway within the corporate limits of any incorporated city or town. Operation of a motor vehicle in any such zone at a rate of speed in excess of that fixed pursuant to the powers granted in this section is a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1951, c. 782.)

**§ 20-142. Railroad warning signals must be obeyed.**—Whenever any person driving a vehicle approaches a highway and interurban or steam railway grade crossing, and a clearly visible and positive signal gives warning of the immediate approach of a railway train or car, it shall be unlawful for the driver of the vehicle to fail to bring the vehicle to a complete stop before traversing such grade crossing. (1937, c. 407, s. 104.)

**§ 20-143. Vehicles must stop at certain railway grade crossings.**—The road governing body (whether State or county) is hereby authorized to designate grade crossings of steam or interurban railways by State and county highways, at which vehicles are required to stop, respectively, and such railways are required to erect signs thereat notifying drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and sign-posted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet, but not closer than ten feet, from such railway tracks before traversing such crossing. No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence: Provided, that all school trucks and passenger busses be required to come to a complete stop at all railroad crossings. (1937, c. 407, s. 105.)

**Editor's Note.**—For article on automobile accidents at railroad crossings, see 23 N. C. Law Rev. 223.

Most of the cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

**Duty to Stop May Be Mixed Question of Law and Fact.**—A driver of an automobile is not required by this section under all

circumstances to stop before driving upon a railroad grade crossing, and whether he is required to do so under the particular circumstances disclosed by the evidence is ordinarily a mixed question of law and fact to be submitted to the jury upon proper instruction from the court. Keller v. Southern R. Co., 205 N. C. 269, 171 S. E. 73 (1933).

**Necessity for Section.**—Although a railroad is a highway (Hinton v. Southern R. Co., 172 N. C. 587, 90 S. E. 756 (1916)), an

amendment of the statute (Acts of 1923) was necessary in order to compel the operator of a motor vehicle to bring it to a full stop before crossing or attempting to cross a railroad track. *State v. Stallings*, 189 N. C. 104, 126 S. E. 187 (1925).

**Failure to Stop as Negligence Per Se—Contributory Negligence.**—The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by this section, “at a distance not exceeding fifty feet from the nearest rail,” does not constitute contributory negligence per se in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the tracks, and where the evidence tends only to show that the proximate cause of the plaintiff’s in-

jury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant’s motion therefore properly entered. *Weston v. Southern R. Co.*, 194 N. C. 210, 139 S. E. 237 (1927).

The failure of a motorist to come to a full stop before entering upon a railroad crossing as required by statute is not contributory negligence per se, but such failure is a circumstance to be considered by the jury with the other evidence in the case upon the question. *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939).

**Cited in** *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942).

§ 20-144. **Special speed limitation on bridges.**—It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed which is greater than the maximum speed which can with safety to such structure be maintained thereon, when such structure is sign-posted as provided in this section.

The State Highway and Public Works Commission, upon request from any local authorities, shall, or upon its own initiative may, conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this article, the Commissioner shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of one hundred feet beyond each end of such structure. The findings and determination of the Commission shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1937, c. 407, s. 106.)

**Cross Reference.**—As to power of State Highway and Public Works Commission to fix maximum load limits on bridges, see § 136-72.

§ 20-145. **When speed limit not applicable.**—The speed limitations set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies, nor to vehicles operated by the duly authorized officers, agents and employees of the North Carolina Utilities Commission when traveling in performance of their duties in regulating and checking the traffic and speed of busses, trucks, motor vehicles and motor vehicle carriers subject to the regulations and jurisdiction of the North Carolina Utilities Commission. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107; 1947, c. 987.)

**Editor’s Note.**—The 1947 amendment inserted the reference to the Utilities Commission.

§ 20-146. **Drive on right side of highway.**—Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless

it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing, set forth in §§ 20-149 and 20-150. (1937, c. 407, s. 108.)

**Editor's Note.**—Some of the cases annotated were decided under the corresponding provisions of the former law.

For discussion of the subject matter of statutes similar to this and succeeding sections, see 2 N. C. Law Rev. 178; 5 N. C. Law Rev. 248.

**A person walking along a public highway pushing a handcart is a pedestrian** within the purview of § 20-174(d), and is not a driver of a vehicle within the meaning of this section and § 20-149. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Proximate Cause.**—A violation of this section is negligence per se, but such negligence is not actionable unless there is a causal relation between the breach and the injury. *Grimes v. Carolina Coach Co.*, 203 N. C. 605, 166 S. E. 599 (1932). See *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899 (1937).

Where there was testimony of witnesses who were at the scene of the collision almost immediately after it occurred to the effect that they saw glass, flour and mud on the south side of the highway, intestate's right side and defendant's left side of the highway, and nothing of the kind on the opposite side of the highway, the north side, it was held that this was evidence that defendant's truck was being operated in violation of this and the two following sections, which required defendant to drive his truck on his right side of the highway and to give plaintiff's coupe half of the main traveled portion of the roadway as nearly as possible, and that this violation proximately caused the collision which resulted in the death of plaintiff's intestate. *Wyrick v. Ballard, etc., Co.*, 224 N. C. 301, 29 S. E. (2d) 900 (1944).

**Burden on Plaintiff to Establish Negligence.**—Where plaintiff's evidence leaves in speculation and conjecture the determinative fact of whether defendant's car was being driven on the wrong side of the highway at the time of the collision, defendant's motion to nonsuit is properly granted, the burden being on plaintiff to establish the negligence of defendant. *Cheek v. Barnwell Warehouse, etc., Co.*, 209 N. C. 569, 183 S. E. 729 (1936).

**Negligence Per Se.**—An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se, and would be ac-

tionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to this section and § 20-174 prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a violation of speed restrictions which § 20-141 makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913 (1940).

A violation of this section is negligence per se, but to be actionable, such negligence must be proximate cause of injury. *Ty-singer v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945). See *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

**Driving to Left to Avoid Collision.**—Where bus driver cut his bus to the left and crossed the center line in an effort to avoid the collision, it was held that under the circumstances of case, such act was not negligence. *Ingram v. Smoky Mountain Stages*, 225 N. C. 444, 35 S. E. (2d) 337 (1945).

**Evidence Sufficient to Show Violation of This Section.**—A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in the opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. It was held that the testimony is sufficient to support an inference that the defendant violated this section in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and compulsory nonsuit was error. *Gladden v. Setzer*, 230 N. C. 269, 52 S. E. (2d) 804 (1949).

**Applied in** *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939). See also, *State v. Toler*, 195 N. C. 481, 142 S. E. 715 (1928); *State v. Durham*, 201 N. C. 724, 161 S. E. 398 (1931); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940).

**Quoted in** *Maddox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613 (1950).

**Cited in** *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379 (1941) (dis. op.).

§ 20-147. **Keep to the right in crossing intersections or railroads.**—In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable. (1937, c. 407, s. 109.)

§ 20-148. **Meeting of vehicles.**—Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible. (1937, c. 407, s. 110.)

**Cross Reference.**—See annotations under § 20-146.

**Editor's Note.**—Some of the cases cited below were decided under the corresponding provisions of the former law.

**Violation as Negligence.**—Violation of this section is negligence per se. *Hobbs v. Queen City Coach Co.*, 225 N. C. 323, 34 S. E. (2d) 211 (1945).

A violation of this section would be negligence per se, and if such violation were proximate cause of the injury it would be actionable. *Wallace v. Longest*, 226 N. C. 161, 37 S. E. (2d) 112 (1946); *Hoke v. Atlantic Greyhound Corp.*, 226 N. C. 692, 40 S. E. (2d) 345 (1946).

**Assumption That Vehicle Will Turn to Right.**—When the driver of one of the automobiles is not observing the rule of this section, as the automobiles approach each other, the other may assume that before the automobiles meet the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. *Shirley v. Ayers*, 201 N. C. 51, 158 S. E. 840 (1931). See also *James v. Carolina Coach Co.*, 207 N. C. 742, 178 S. E. 607 (1935); *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947).

Ordinarily, a motorist has the right to assume that the driver of a vehicle approaching on the same side or on his left-hand side will yield half of the highway or turn out in time to avoid a collision, but this right is not absolute. It may be qualified by the particular circumstances existing at the time. *Brown v. Southern Paper Products Co.*, 222 N. C. 626, 24 S. E. (2d) 334 (1943); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947).

The rule that a motorist traveling on his right or seasonably turning thereto has the right to assume that a car approaching from the opposite direction will comply with this section, and turn to its right in time to avoid a collision, is not applicable to a motorist who runs completely off the road to his right, loses control, and hits a car standing still completely off the hard

surface on its left side of the highway with its lights on, since the rule merely absolves a motorist from blame if he continues at a reasonable rate of speed in his line of travel in reliance on the assumption, but does not relieve him from the duty of knowing the position of his car on the highway from his own observation. *Webb v. Hutchins*, 228 N. C. 1, 44 S. E. (2d) 350 (1947).

Notwithstanding the right of a motorist to so assume, still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947), citing *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539 (1938).

**Proximate Cause Is for Jury.**—Proximate cause is a matter for consideration of the jury under the law as declared by the court. *Wallace v. Longest*, 226 N. C. 161, 37 S. E. (2d) 112 (1946).

Where evidence tended to show that driver of defendant's truck, in meeting the pick-up truck in which plaintiffs were riding, was not passing on his right side of highway, and was not giving oncoming truck at least one-half of the main traveled portion of the roadway as nearly as possible, in violation of the provisions of this section, question of whether defendant's truck was on left side of highway and, if so, whether proximate cause of collision would be for jury. *Wallace v. Longest*, 226 N. C. 161, 37 S. E. (2d) 112 (1946).

**Evidence held sufficient to show violation of this section.** *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868 (1948).

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949).

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such

vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949).

**Charge to Jury.**—In an action for damages caused by the collision of two motor vehicles, a charge that "If plaintiff has satisfied you from the evidence and by the greater weight that on this occasion the driver of the defendant's truck at the time of the collision failed to drive the defendant's truck upon the right half of the high-

§ 20-149. **Overtaking a vehicle.**—(a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

(b) The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. (1937, c. 407, s. 111.)

**Editor's Note.**—Some of the cases cited below were decided under the corresponding provisions of the former law.

**Purpose of Section.**—This section was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence per se entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. *Wolfe v. Independent Coach Line*, 198 N. C. 140, 150 S. E. 876 (1929).

**The violation of this section is negligence** and if such negligence was the proximate cause of plaintiff's injuries, the defendant, nothing else appearing, is liable to the plaintiff in this action. *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899 (1937).

A violation of subsection (a) would be negligence per se and if injury proximately result therefrom, it would be actionable. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565 (1942).

A violation of this section is negligence per se. *Kleibor v. Colonial Stores*, 159 F. (2d) 894 (1947).

**The rule of the road set out in § 20-152 does not apply** where one motorist is overtaking and passing another, as authorized by § 20-149, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. *Mad-dox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613 (1950).

**A person walking along a public highway pushing a handcart is a pedestrian** within the purview of § 20-174(d) and is not a

way, then that would constitute negligence on the part of defendant's driver," seems to be in accord with this section. *Hopkins v. Colonial Stores*, 224 N. C. 137, 29 S. E. (2d) 455 (1944).

**Quoted** in *Robinson v. Standard Transportation Co.*, 214 N. C. 489, 199 S. E. 725 (1938).

**Cited** in *Hobbs v. Mann*, 199 N. C. 532, 155 S. E. 163 (1930); *Guthrie v. Gocking*, 214 N. C. 513, 199 S. E. 707 (1938); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940); *Ingram v. Smoky Mountain Stages*, 225 N. C. 444, 35 S. E. (2d) 337 (1945).

driver of a vehicle within the meaning of § 20-146 and this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Contributory Negligence as Question for Jury.**—The evidence tended to show that plaintiff's vehicle was following that of defendant, that defendant's truck slowed down and pulled to its left of the highway, that a person in the rear of the truck motioned plaintiff's driver to go ahead, and that as plaintiff's vehicle started to pass defendant's vehicle on its right, the driver of defendant's truck turned right to enter a private driveway, and the two vehicles collided. It was held that nonsuit on the ground of contributory negligence was erroneously entered, since, whether plaintiff's driver was guilty of contributory negligence in attempting to pass defendant's vehicle on the right is a question for the determination of the jury under the circumstances. *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632 (1950).

**Evidence Sufficient to Raise Issue of Last Clear Chance.**—Where the evidence tended to show that plaintiff, in order to avoid striking a chicken standing on the hard surface of the highway, drove his automobile gradually to the left, so that the car was traveling in about the center of the highway at the time of the accident in suit, and that a bus belonging to defendant was traveling in the same direction and hit plaintiff's car when the bus attempted to pass, it was held that, conceding plaintiff was negligent in driving to the left without giving any signal or ascertaining if the car could be driven to the left in safety,



defendant's motion to nonsuit was erroneously granted, since the pleadings and evidence are sufficient to raise the issue of the last clear chance upon the evidence tending to establish defendant's negligence in failing to keep a safe distance between the vehicles and in failing to take the precautions and give the signals required by this

section for passing cars on the highway. *Morris v. Seashore Transp. Co.*, 208 N. C. 807, 182 S. E. 487 (1935).

**Applied** in *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843 (1948).

**Quoted** in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942) (dis. op.).

§ 20-150. **Limitations on privilege of overtaking and passing.**—(a) The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

(b) The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet.

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer.

(d) The driver of a vehicle shall not drive to the left side of the center line of a highway upon the crest of a grade or upon a curve in the highway where such center line has been placed upon such highway by the State Highway and Public Works Commission, and is visible. (1937, c. 407, s. 112.)

**Editor's Note.**—Some of the cases cited below were decided under the corresponding provisions of the former law.

**Negligence Per Se.**—It is negligence per se for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction at a railroad grade crossing. *Murray v. Atlantic Coast Line R. Co.*, 218 N. C. 392, 11 S. E. (2d) 326 (1940).

It is negligence per se for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. *Donivant v. Swain*, 229 N. C. 114, 47 S. E. (2d) 707 (1948); *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86 (1949).

**A private driveway is not an intersecting highway** within the meaning of subsection (c) of this section. *Levy v. Carolina Aluminum Co.*, 232 N. C. 158, 59 S. E. (2d) 632 (1950).

**Evidence Sufficient to Show Violation of This Section.**—The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicle collided when the driver of the truck made a left turn at the intersection. Held: It was error for the court to instruct the jury that the provisions of subsection (c) of this section did not apply. *Donivant v.*

*Swain*, 229 N. C. 114, 47 S. E. (2d) 707 (1948).

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 126 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, was held sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949).

Evidence held to show violation of this section and to warrant submission to the jury of the issue of defendants' negligence. *Winfield v. Smith*, 230 N. C. 392, 53 S. E. (2d) 251 (1949).

**Sufficient Evidence to Submit Question of Negligence to Jury.**—Evidence that the driver of a truck, in attempting to pass cars going in the same direction, pulled out in the center of the road and hit the car which plaintiff was driving in the opposite direction, causing damage to the car and injury to plaintiff, was held sufficient to be submitted to the jury on the question of the actionable negligence of the driver to the truck. *Joyner v. Dail*, 210 N. C. 663, 188 S. E. 209 (1936).

**Contributory Negligence as Barring Recovery.**—Even though the driver of a truck

which collided with plaintiff's automobile failed to observe certain statutory requirements, where the evidence is equally clear in showing that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at a highway intersection, without permission so to do by a traffic or police officer, in violation of this section, contributory negligence on the part of the plaintiff bars recovery. *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86 (1949).

Where plaintiff's evidence tended to show that he started passing a truck 275 feet from an intersection, nonsuit on the ground that plaintiff was contributorily negligent in attempting to pass at an intersection

§ 20-151. **Driver to give way to overtaking vehicle.**—The driver of a vehicle upon a highway about to be overtaken and passed by another vehicle approaching from the rear, shall give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle, and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle. (1937, c. 407, s. 113.)

**Editor's Note.**—The cases treated below were decided under the corresponding provisions of the earlier law, but should be of assistance in the interpretation of the present section.

**Degree of Care in Observing Traffic in Rear.**—The driver of an auto-truck along a public highway is not held to the same degree of care in observing those who may wish to pass him coming from the rear, as in front, and is not required to turn to the right for such purpose, unless he is appraised by the one who wishes to pass, by proper signal, of his intention to do so. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29 (1926).

**Duty to Turn to Right.**—The driver of an automobile upon the signal of a faster car approaching from the rear, must turn to the right so that the other may pass to his left, when the conditions existing there at the time are reasonably safe to permit the other to pass. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29 (1926).

**When Question One of Reasonable Prudence.**—Where the driver of an automobile violates the statutes by turning to the right to avoid a motorcycle traveling in the same direction upon a public road, and collides therewith, and action is brought to recover damages therefor, and the evidence is conflicting as to whether the motorcycle was unexpectedly turned out in the wrong direction, resulting in the injury, the question of proximate cause depends upon whether the driver of the automobile acted with reasonable prudence under the circumstances, to avoid the injury, or whether the collision was caused by the wrongful

and unexpected act of the one on the motorcycle. *Cooke v. Jerome*, 172 N. C. 626, 90 S. E. 767 (1916).

**Stated in** *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945).

**Cited in** *State v. Palmer*, 197 N. C. 135, 147 S. E. 817 (1929); *Cook v. Horne*, 198 N. C. 739, 153 S. E. 315 (1930); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940).

and unexpected act of the one on the motorcycle. *Cooke v. Jerome*, 172 N. C. 626, 90 S. E. 767 (1916).

**Duty of Passer from Rear.**—The driver of an automobile who wishes to pass another ahead of him, must keep his automobile under control, so as to avoid a collision if the driver ahead of him apparently does not hear his signals or is not aware of his intention to pass, or the condition of the road makes it unsafe not only to himself, but to those who are driving from the opposite direction. *Dreher v. Divine*, 192 N. C. 325, 135 S. E. 29 (1926).

**Proof of Violation in Trial for Resulting Crime.**—See *State v. Rountree*, 181 N. C. 535, 106 S. E. 669 (1921); *State v. Jessup*, 183 N. C. 771, 111 S. E. 523 (1922).

**Same—Violation as Evidence of Intent to Assault.**—Since the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is *malum prohibitum*, not *malum in se*, the performance of this unlawful act is not evidence of a specific intent to commit an assault. *State v. Rawlings*, 191 N. C. 265, 131 S. E. 632 (1926).

**Act Must Have Been Likely to Cause Harm.**—One who violated the provisions of this section, not intentionally or recklessly, but merely through a failure to exercise due care and thereby proximately caused the death would not be culpably negligent unless in the light of the attendant circumstances his negligent act was likely to result in death or bodily harm. *State v. Stansell*, 203 N. C. 69, 164 S. E. 580 (1932).

**Questions for Jury.**—Where there was

evidence that the plaintiff, desiring to pass a truck on the highway going in the same direction, blew his horn, and that the driver of the truck heard the signal, but instead of driving to the right of the center of the road to allow the plaintiff to pass on the left, drove to the left and stopped or came almost to a stop, that the plaintiff, thinking that the truck was going to stop, and having his car under control, attempted to pass on the right, when the truck suddenly

turned to the right, forcing the plaintiff to turn to the right to avoid hitting the truck, causing the plaintiff's car to run off the embankment on the right of the road, resulting in the injury in suit: Held, the evidence should have been submitted to the jury upon issues of negligence, contributory negligence and damages. *Stevens v. Rostan*, 196 N. C. 314, 145 S. E. 555 (1928).

**Applied** in *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86 (1949).

§ 20-152. **Following too closely.**—(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon the condition of the highway.

(b) The driver of any motor truck, when traveling upon a highway outside of a business or residence district, shall not follow another motor truck within three hundred feet, but this shall not be construed to prevent one motor truck overtaking and passing another. (1937, c. 407, s. 114; 1949, c. 1207, s. 4.)

**Editor's Note.**—The 1949 amendment substituted "three hundred" for "one hundred" in subsection (b).

**The rule of the road set out in this section does not apply** where one motorist is overtaking and passing another, as authorized by § 20-149, or where there are two lanes available to the motorist and the forward vehicle is in the outer lane and the overtaking vehicle is in the passing lane. *Maddox v. Brown*, 232 N. C. 542, 61 S. E. (2d) 613 (1950).

**Charge to Jury.**—Where the court, in its charge on contributory negligence, does not call attention to this section, an exception to the charge will not be sustained in the absence of a special request for such instructions. *Alexander v. Southern Public Utilities Co.*, 207 N. C. 438, 177 S. E. 427 (1934), decided under corresponding provisions of the former law.

**Negligence Per Se.**—A violation of subdivision (a) would be negligence per se, and, if injury proximately results therefrom, it would be actionable. *Murray v. Atlantic Coast Line R. Co.*, 218 N. C. 392, 11 S. E. (2d) 326 (1940).

**Contributory Negligence.**—In *Killough v. Williams*, 224 N. C. 254, 29 S. E. (2d) 697 (1944), plaintiff was held not guilty of contributory negligence in following too closely in the rear of a truck with which he collided.

**Applied** in *State v. Holbrook*, 228 N. C. 620, 46 S. E. (2d) 843 (1948).

**Stated** in *State v. Steelman*, 228 N. C. 634, 46 S. E. (2d) 845 (1948).

**Cited** in *Hobbs v. Mann*, 199 N. C. 532, 155 S. E. 163 (1930); *Smith v. Carolina Coach Co.*, 214 N. C. 314, 199 S. E. 90 (1938).

§ 20-153. **Turning at intersection.**—(a) Except as otherwise provided in this section, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right-hand side of the highway, and in turning shall keep as closely as practicable to the right-hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.

(b) For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another.

(c) Local authorities in their respective jurisdiction may modify the foregoing method of turning at intersections by clearly indicating by buttons, markers or other direction signs within an intersection the course to be followed by vehicles turning thereat, and it shall be unlawful for any driver to fail to turn in

a manner as so directed when such direction signs are authorized by local authorities. (1937, c. 407, s. 115.)

**A violation of subsection (a) is negligence per se** and if injury proximately results therefrom, violation is actionable. *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565 (1942).

**Circumstances Warranting Inference of Negligence.**—The plaintiff was lawfully in an intersection, standing in a position where he was clearly visible to the driver of the defendant's taxicab as the latter approached the intersection. The taxi driver, had he been keeping a proper lookout, could have seen plaintiff in ample time to avoid a col-

lision. Instead he "cut the corner" in violation of subsection (a) of this section without giving any signal or warning of his approach. A collision resulted. These circumstances, unrebutted, warranted an inference of negligence and were sufficient to require the submission of appropriate issues to the jury. *Ward v. Bowles*, 228 N. C. 273, 45 S. E. (2d) 354 (1947).

**Applied in** *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86 (1949).

**Cited in** *Smith v. United States*, 94 F. Supp. 681 (1951).

§ 20-154. **Signals on starting, stopping or turning.**—(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the Department, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the Department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn.

(c) No person shall operate over the highways of this State a right-hand drive motor vehicle or a motor vehicle equipped with the steering mechanism on the right-hand side thereof unless said motor vehicle is equipped with mechanical or electrical signal devices by which the signals for left turns and right turns may be given. Such mechanical or electrical devices shall be approved by the Department. (1937, c. 407, s. 116; 1949, c. 1016, s. 1; 1951, cc. 293, 360.)

**Editor's Note.**—The 1949 amendment rewrote the first paragraph of subsection (b).

The first 1951 amendment added subsection (c) and the second 1951 amendment rewrote the last paragraph of subsection (b).

**In General.**—One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured.

*Murphy v. Asheville-Knoxville Coach Co.*, 200 N. C. 92, 156 S. E. 550 (1931).

**The manifest object of this section is to promote vehicular travel.** In the very nature of things, drivers of motor vehicles act on external appearances. These matters being true, the language of this section must be accorded a reasonable and realistic interpretation to effect the legislative purpose. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950).

**The requirement that a motorist shall not turn from a straight line until he has first seen that the movement can be made in safety** does not mean that he may not make

a left turn on the highway unless the circumstances be absolutely free from danger, but only that he exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950).

**Making Left Turn without Signaling.**—This section does not require that a motorist give proper signal before making a left turn on the highway unless the surrounding circumstances afford him reasonable grounds for apprehending that such movement may affect the operation of another vehicle, and in exercising such prevision he may, in the absence of notice to the contrary, assume that other motorists will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950).

Where a motorist makes a left turn across a street, without signaling, to enter a filling station, and makes such turn when a vehicle approaching from the opposite direction is 900 feet away, and is struck by such other vehicle which was traveling at a speed of approximately 70 miles per hour, such motorist does not violate this section, since the motorist had every reason to believe that he could complete his turn with safety to himself and others without affecting in any way the operation of the approaching vehicle. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950).

**Person Observing No Vehicles in Either Direction Is under No Obligation to Give Signal.**—The plaintiff having first looked in both directions, and having observed no automobile or other vehicle approaching from either direction, was under no obligation, by virtue of this section to give any signal of his purpose to turn to his left and enter the driveway to his home. He was therefore not negligent as a matter of law in failing to give a signal before he turned to his left and crossed the highway for the purpose of entering the driveway to his home. *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899 (1937).

**The stopping of a bus on the traveled portion of the highway to receive or discharge a passenger must be done with due regard to the provisions of this section.** *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215 (1949).

**Question for Jury.**—Whether defendant observed the rule of the road by ascertaining, first, if such turn would affect the operation of any other vehicle, and, second, by giving the required signal, under this section, held to raise an issue of fact for the

jury. *Mason v. Johnston*, 215 N. C. 95, 1 S. E. (2d) 379 (1939).

**Violation of Section as Negligence Per Se.**—The violation of this section requiring a motorist desiring to stop on the highway to first ascertain if he can stop in safety, and, where the movement of another vehicle may be thereby affected, to give the statutory signal for stopping, is negligence per se. *Holland v. Strader*, 216 N. C. 436, 5 S. E. (2d) 311 (1939).

“One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured.” *Bechtler v. Bracken*, 218 N. C. 515, 11 S. E. (2d) 721 (1940).

Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. It is the stopping without giving a signal, approved by statute, whenever the operation of any other vehicle may be affected thereby. A violation of the statute is negligence per se. *Conley v. Pearce-Young-Angel Co.*, 224 N. C. 211, 29 S. E. (2d) 740 (1944).

The failure to give a signal as required by statute, before stopping a motor vehicle on a public highway, is negligence; and ordinarily it is for the jury to determine whether or not such negligence was the proximate cause of the injury. *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215 (1949).

The violation of either of the requirements of this section that a motorist before turning to the right or left from a direct line on the highway must first exercise reasonable care to ascertain that such movement can be made in safety and shall give the appropriate statutory signal of his intention to make a turn is negligence per se and is actionable if it proximately causes injury. *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538 (1950).

**Violation Proximately Causing Injury Is Actionable.**—The violation of this section, requiring that a driver turning from a direct line shall first see that such movement can be made in safety and, whenever such movement may affect the operation of another vehicle, give proper signal, is negligence, and is actionable if such violation proximately causes injury to another. *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950).

**Causal Relation Must Be Shown.**—The violation of this section and of § 20-138, if conceded, is not sufficient to sustain a pros-

ecution for involuntary manslaughter unless a causal relation is shown between the breach of the statute and the death. *State v. Lowery*, 223 N. C. 598, 27 S. E. (2d) 638 (1943). See *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555 (1939); *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942) (dis. op.).

**Proximate Cause Is Question for Jury.**—

Whether the violation of a safety statute is a proximate cause of injury is ordinarily a question of fact for the determination of the jury. *Holland v. Strader*, 216 N. C. 436, 5 S. E. (2d) 311 (1939).

**Intervening Negligence Insulating Primary Negligence.**—Plaintiff's evidence tended to show that plaintiff was standing at the rear of a car parked completely off the hard surface on the right, that a car traveling at a speed of 45 to 50 miles per hour slowed down rapidly as it came near the parked car, that the driver of a truck following 250 feet behind the car, immediately he saw the brake light on the car, applied his brakes without effect and then applied his hand brake and skidded off the highway, striking the rear of the car and the plaintiff. Oncoming traffic prevented the truck driver from turning to the left. The driver of the truck testified that had his brakes been working properly he did not think he would have had any trouble stopping the truck. Held: Even conceding negligence on the part of the driver of the car in violating this section, the intervening negligence of the driver of the truck in driving at excessive speed or in operating the car with defective brakes, insulated any negligence of the driver of the car as a matter of law, since neither the intervening negligence nor the resulting injury could have been reasonably anticipated by the driver of the car from his act in rapidly decreasing speed. *Warner v. Lazarus*, 229 N. C. 27, 47 S. E. (2d) 496 (1948).

**Contributory Negligence Barring Recovery.**—An accident occurred when plaintiff's tractor-trailer, following defendants' tractor-trailer on the highway at night, rammed the rear of defendants' vehicle when it suddenly stopped on the highway. Plaintiff's allegations and evidence were to the effect that defendants' vehicle suddenly stopped without signal by hand or electrical device. Plaintiff's driver testified that he was familiar with the highway and knew he was ap-

proaching an intersection where traffic was congested, that he was traveling between 110 and 115 feet behind defendants' vehicle, that he did not see it had stopped until he was within 75 feet of it, and that he immediately put on his brakes but was too close to stop before hitting its rear. It was held that plaintiff's evidence discloses contributory negligence as a matter of law barring recovery. *Fawley v. Bobo*, 231 N. C. 203, 56 S. E. (2d) 419 (1949).

Even though the driver of a truck which collided with plaintiff's automobile failed to observe the requirements of this and other sections, where the evidence is equally clear that the collision occurred when plaintiff was attempting to overtake and pass the truck proceeding in the same direction at the intersection of highway, without permission so to do by a traffic or police officer, in violation of provisions of § 20-159 (c), contributory negligence on the part of the plaintiff bars recovery. *Cole v. Fletcher Lbr. Co.*, 230 N. C. 616, 55 S. E. (2d) 86 (1949).

**Evidence Insufficient to Show Mechanical or Electrical Signal.**—Plaintiff, a passenger in a bus, was injured when a truck following the bus collided with the rear thereof when the bus was stopped on the highway to permit a passenger to alight. Defendant bus company admitted that its driver gave no hand signal, but introduced evidence of a rule of the Utilities Commission as to the required lighting equipment on motor vehicles and evidence that the bus had been inspected and approved by an inspector of the Utilities Commission, and certificate of title issued by the Department of Motor Vehicles, together with testimony of the driver that the stop lights were on only when the brakes were on and then only if one stopped the bus suddenly, and that he slowed down gradually before stopping the bus. Held: The evidence is insufficient to show that a mechanical or electrical signal as required by this section was given, and appellant's motion to nonsuit was properly denied. *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215 (1949).

**Cited in** *Smith v. Carolina Coach Co.*, 214 N. C. 314, 199 S. E. 90 (1938); *Newbern v. Leary*, 215 N. C. 134, 1 S. E. (2d) 384 (1939).

§ 20-155. **Right-of-way.**—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156.

(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such in-

tersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in § 20-154.

(c) The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked cross-walk, or any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. (1937, c. 407, s. 117; 1949, c. 1016, s. 2.)

**Editor's Note.**—The 1949 amendment rewrote subsection (b).

**Entering Intersection "at Approximately the Same Time."**—Subsection (a) does not apply unless the two vehicles approach or enter the intersection at approximately the same time. When that condition does not exist, the vehicle first reaching and entering the intersection has the right of way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress so as to allow the first arrival to pass in safety. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532 (1950).

Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532 (1950).

It cannot be held as a matter of law that plaintiff's automobile and defendant's truck approached or entered the intersection "at approximately the same time," when the latter was 125 feet away from the intersection when the former was entering it, and when plaintiff's automobile had crossed within four feet of the opposite curb when defendant's truck collided therewith. *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642 (1943).

**Entering Intersection Ahead of Other Car.**—If plaintiff's automobile enters the intersection of two streets, at a time when the approaching car of defendant is far enough away to justify a person in believing that, in the exercise of reasonable care and prudence, he may safely pass over the intersection ahead of the oncoming car, the plaintiff has the right of way and it is the duty of the defendant to reduce his

speed and bring his car under control and yield. *Yellow Cab Co. of Charlotte v. Sanders*, 223 N. C. 626, 27 S. E. (2d) 631 (1943).

Where defendant's automobile came to a stop at an intersection 23 feet wide while the automobile decedent was traveling in was more than 125 feet away and a collision occurred when defendant attempted to cross the intersection, it was held that the two vehicles did not approach or enter the intersection at approximately the same time and therefore the automobile of the decedent did not have the right of way. *State v. Hill*, 233 N. C. 61, 62 S. E. (2d) 532 (1950).

**If Vehicle on Left Has Already Entered Intersection.**—This section does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection. *Kennedy v. Smith*, 226 N. C. 514, 39 S. E. (2d) 380 (1946).

**Instruction.**—Under this section where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car, an instruction correctly charging the rule of the right of way if both cars approach the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. *Piner v. Richter*, 202 N. C. 573, 163 S. E. 561 (1932).

**Applied in** *Wooten v. Smith*, 215 N. C. 48, 200 S. E. 921 (1939).

**Quoted in** *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361 (1950).

**Cited in** *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284 (1941) (dis. op.); *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942).

§ 20-156. **Exceptions to the right-of-way rule.**—(a) The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway.

(b) The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of any arbitrary exercise of such right-of-way. (1937, c. 407, s. 118.)

**Quoted** in *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361 (1950). **Cited** in *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284 (1941) (dis. op.).

§ 20-157. **What to do on approach of police or fire department vehicles.**—(a) Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm. (1937, c. 407, s. 119.)

**Cited** in *State v. Payne*, 213 N. C. 719, 197 S. E. 573 (1938); *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) (1942); *State v. Chavis*, 232 N. C. 83, 59 S. E. (2d) 348 (1950).

§ 20-158. **Vehicles must stop at certain through highways.**—(a) The State Highway and Public Works Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.

(b) This section shall not interfere with the regulations prescribed by towns and cities.

(c) When a stop light has been erected or installed at any intersection in this State outside of the corporate limits of a municipality, no operator of a vehicle approaching said intersection shall enter the same with said vehicle while the stop light is emitting a red light or stop signal for traffic moving on the highway and in the direction that said approaching vehicle is traveling.

(d) Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days. (1937, c. 407, s. 120; 1941, c. 83; 1949, c. 583, s. 2.)

**Editor's Note.**—The 1941 amendment struck out former subsections (b) and (d) and relettered the remaining subsections. For comment on amendment, see 19 N. C. Law Rev. 455.

The 1949 amendment inserted present subsection (c) and redesignated former subsection (c) as subsection (d).



**Failure to Stop at Intersection Not Negligence Per Se.**—The failure of a motorist traveling upon a servient highway to stop in obedience to a sign before entering an intersection with a dominant highway is not negligence per se and is insufficient alone to make out a prima facie case of negligence, but is only evidence of negligence to be considered along with other facts and circumstances adduced by the evidence, and an instruction that failure to stop in obedience to the sign is negligence, must be held for reversible error. *Hill v. Lopez*, 228 N. C. 433, 45 S. E. (2d) 539 (1947). See *Nichols v. Goldston*, 228 N. C. 514, 46 S. E. (2d) 320 (1948); *Lee v. Robertson Chemical Corp.*, 229 N. C. 447, 50 S. E. (2d) 181 (1948); *Bobbitt v. Haynes*, 231 N. C. 373, 57 S. E. (2d) 361 (1950); *Bailey v. Michael*, 231 N. C. 404, 57 S. E. (2d) 372 (1950).

Failure to come to a complete stop before entering a through street intersection is not negligence per se, but only evidence of negligence to be considered with other facts in the case, such holding being a necessary corollary to the provision of this section, that failure to stop before entering a through street intersection should not be considered contributory negligence per se, but only evidence to be considered with the other facts in the case upon the issue of contributory negligence. *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539 (1938); *Reeves v. Staley*, 220 N. C. 573, 18 S. E. (2d) 239 (1942).

This rule is unaffected by a municipal ordinance making such failure to stop unlawful, since this section prevails over the ordinance. *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2d) 284 (1941).

**Negligence of Car Approaching on Through Highway.**—The driver of an automobile upon a through highway did not have the right to assume absolutely that a driver approaching the intersection along a servient highway would obey the stop sign before entering or crossing the through highway, ch. 148, Public Laws 1927, § 21, but was required to keep a proper lookout and to keep his car at a reasonable speed under the circumstances in order to avoid injury to life or limb, § 4 of the 1927 Act, and the driver of the car along the through highway forfeited his right to rely upon the assumption that the other driver would stop before entering or crossing the intersection when he approached and attempted to traverse it himself at an unlawful or excessive speed, and even when his speed was lawful he remained under duty to exercise due care to ascertain if the driver of the other car

was going to violate the statutory requirement in order to avoid the consequences of such negligence, it being necessary to construe the pertinent statutes in pari materia and this result being consonant with such construction. *Groome v. Davis*, 215 N. C. 510, 2 S. E. (2d) 771 (1939).

**Right of Way.**—While the failure to stop before attempting to cross a through street intersection in violation of a municipal ordinance is negligence per se, a vehicle traveling along the through street does not have the right of way at the intersection if a vehicle from the cross street is already in the intersection before the vehicle traveling along the through street is near enough the intersection to constitute an immediate hazard. *Pearson v. Luther*, 212 N. C. 412, 193 S. E. 739 (1937).

**Proximate Cause Must Be Shown Beyond a Mere Chance.**—Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference to the driving of automobiles upon the State highways, the question of proximate cause must be shown beyond a mere chance or casualty. *State v. Satterfield*, 198 N. C. 682, 153 S. E. 155 (1930).

The manifest object of this section is to protect the public by requiring the driver of an automobile upon the public highways of the State to stop and ascertain the circumstances and conditions at highway intersections, particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time, should have been granted. *State v. Satterfield*, 198 N. C. 682, 153 S. E. 155 (1930).

**Instruction** as to negligence held error since it was counter to the provision of this section. *Stephens v. Johnson*, 215 N. C. 133, 1 S. E. (2d) 367 (1939).

**Applied** in *Jones v. Bagwell*, 207 N. C. 378, 177 S. E. 170 (1934).

**Cited in** *Leary v. Norfolk Southern Bus* (1942); *Smith v. United States*, 94 F. Supp. Corp., 220 N. C. 745, 18 S. E. (2d) 426 681 (1951).

§ 20-159. **Passing street cars.**—(a) The driver of a vehicle shall not overtake and pass upon the left any street car proceeding in the same direction, whether actually in motion or temporarily at rest, when a travelable portion of the highway exists to the right of such street car.

(b) The driver of a vehicle overtaking any railway, interurban or street car stopped or about to stop for the purpose of receiving or discharging any passenger, shall bring such vehicle to a full stop not closer than ten feet to the nearest exit of such street car and remain standing until any such passenger has boarded such car or reached the adjacent sidewalk, except that where a safety zone has been established, then a vehicle may be driven past any such railway, interurban or street car at a speed not greater than ten miles per hour and with due caution for the safety of pedestrians. (1937, c. 407, s. 121.)

§ 20-160. **Driving through safety zone prohibited.**—The driver of a vehicle shall not at any time drive through or over a safety zone as defined in part one of this article. (1937, c. 407, s. 122.)

**Cross Reference.** — As to definition of safety zone, see § 20-38, subsec. (z).

§ 20-161. **Stopping on highway.**—(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway: Provided further, that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway bridge: Provided further that in the event that a truck, trailer or semi-trailer be disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front and rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed, and after sundown red flares or lanterns. These warning signals shall be displayed as long as such vehicle is disabled upon the highways.

(b) Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. (1937, c. 407, s. 123; 1951, c. 1165, s. 1.)

**Editor's Note.** — The 1951 amendment substituted "front and rear" for "front or rear" near the end of subsection (a).

The word "park" means the permitting of such vehicles to remain standing on a public highway or street, while not in use. *State v. Carter*, 205 N. C. 761, 172 S. E. 415 (1934).

To "park" means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. *Stallings v. Buchan Transport Co.*, 210 N. C. 201, 185 S. E. 643 (1936).

Thus where the driver of a truck with a trailer stopped on the highway at night on the right-hand side, with lights burning,

because two automobiles in front of him were interlocked in a wreck, and at the time of the collision the truck and trailer had been standing still only a fraction of a minute, and it remained parked for about five minutes thereafter, it was held that at the time of the collision the truck was not parked on the highway within the meaning of this section, and the length of time it remained still after the collision is immaterial to plaintiff's right to recover since it was not the intention of those who drafted the statute to make it a violation of law for a driver of a heavy truck and trailer to stop on his right-hand side of the highway before driving around or by two cars interlocked in a collision on the highway, and around which a number of people were working. *Stallings v. Buchan Transport Co.*, 210 N. C. 201, 185 S. E. 643 (1936).

Starting and stopping on a highway in accordance with the exigencies of the occasion is an incident to the right of travel, and the word "park" and the words "leave standing" as used in this section are modified by the words "whether attended or unattended" so that they are synonymous, and neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the travel. *Peoples v. Fulk*, 220 N. C. 635, 18 S. E. (2d) 147 (1942).

The stopping of a bus on the hard surface of a highway outside of a business or residential district for the purpose of taking on a passenger is not parking or leaving the vehicle standing within the meaning of the terms as used in this section, *Peoples v. Fulk*, 220 N. C. 635, 18 S. E. (2d) 147 (1942); *Morgan v. Carolina Coach Co.*, 225 N. C. 668, 36 S. E. (2d) 263 (1945); even though the shoulders of the highway at the scene are of sufficient width to permit the bus to be stopped thereon. *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942). See also *Conley v. Pearce-Young-Angel Co.*, 224 N. C. 211, 29 S. E. (2d) 740 (1944); *Banks v. Shepard*, 230 N. C. 86, 52 S. E. (2d) 215 (1949).

"I cannot authoritatively define 'parking' in a dissenting opinion, but it seems to me clear that a car is parked when those in charge stop it upon a highway and intentionally leave it upon the concrete to pursue some activity other than that concerned with the car and its operation, however commendable it may be." *Beck v. Hooks*, 218 N. C. 105, 10 S. E. (2d) 608 (1940) (dis. op.).

**Parking in a Residential or Business**

**District.**—The parking or leaving standing of any vehicle in a business or residential district is not a violation of this section. *Hammett v. Miller*, 227 N. C. 10, 40 S. E. (2d) 480 (1946).

**To Be Actionable Negligence Must Be Proximate Cause of Injury.**—Negligence in parking an automobile on a public highway in violation of this section, to be actionable, must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. *Burke v. Carolina Coach Company*, 198 N. C. 8, 150 S. E. 636 (1929).

**The parking of a car on the hard surface of a highway at night without a tail light** in violation of statute is sufficient to sustain the jury's affirmative answer upon the issue of actionable negligence, and the question of contributory negligence in failing to see the parked car under the circumstances in time to have avoided the collision is also properly submitted to the jury. *Lambert v. Caronna*, 206 N. C. 616, 175 S. E. 303 (1934).

**Parking on a paved highway at night, without flares or other warning, is negligence.** *Allen v. Dr. Pepper Bottling Co.*, 223 N. C. 118, 25 S. E. (2d) 388 (1943).

**Negligent Parking Need Not Be Anticipated.**—Where defendant leaves his truck unattended, partly on a paved or improved portion of a State highway, between sunset and sunup, without displaying flares or lanterns not less than two hundred feet to the front and rear of the vehicle, it is an act of negligence, and the driver of the car in which plaintiff was riding, traveling at about 30 to 35 miles per hour on his right side of the road, under conditions which made it impossible for him to see more than a few feet ahead, although apparently guilty of negligence, is not under the duty of anticipating defendant's negligent parking, so that the concurrent negligence of the two made the resulting collision inevitable and an exception to the denial of a motion of nonsuit cannot be sustained. *Caulder v. Gresham*, 224 N. C. 402, 30 S. E. (2d) 312 (1944).

**Exception in Subsection (c) Is Question for Jury.**—Where there is evidence tending to show that the defendant had parked his truck upon the hard surface of a highway in violation of this section, resulting in injury to the plaintiff, and the defendant claims that under the facts it came within the exception, subsection (c), under the statute and the facts disclosed by the rec-

word the matter should have been submitted to the jury under proper instructions, and the granting of defendant's motion as of nonsuit was error. *Smithwick v. Colonial Pine Co.*, 200 N. C. 519, 157 S. E. 612 (1931).

**Charge to Jury.** — The charge of the court as to subsection (a) of this section, will not be held for error for the failure to instruct the jury upon the provision in subsection (c), where the defendant's only evidence in excuse of parking was that he had a flat tire, such evidence being insufficient to bring defendant within the exception. *Lambert v. Caronna*, 206 N. C. 616, 175 S. E. 303 (1934).

**Section Not Violated Where Disabled Truck Is Parked on Shoulder of Highway.** — See *State v. McDonald*, 211 N. C. 672, 191 S. E. 733 (1937).

**Evidence Disclosing Contributory Negligence.**—Conceding defendant was negligent in parking the car on the hard surface in violation of this section, the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety. *McNair v. Kilmer & Co.*, 210 N. C. 65, 185 S. E. 481 (1936).

**Evidence Not Showing Contributory Negligence.** — Where evidence tended to show that defendant's mud-spattered truck was parked on a dark, foggy morning, with all four wheels on the pavement without lights, flares, or any other mode of signal, and had been so parked for some time, and that plaintiff was compelled to dim his lights, when about 20 feet south of defendant's truck, in response to the dimmed lights of an oncoming car the lights of this car partly blinding plaintiff, who collided with the rear of defendant's truck, motion for nonsuit on the ground of contributory negligence was properly refused.

§ 20-162. **Parking in front of fire hydrant, fire station or private driveway.**—No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within fifteen feet in either direction of a fire hydrant or the entrance to a fire station, nor within twenty-five feet from the intersection of curb lines or if none, then within fifteen feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant. (1937, c. 407, s. 124; 1939, c. 111.)

§ 20-163. **Motor vehicle left unattended; brakes to be set and engine stopped.**—No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor of said vehicle, and, when

*Cummins v. Southern Fruit Co.*, 225 N. C. 625, 36 S. E. (2d) 11 (1945).

**Nonsuit on Ground of Contributory Negligence Not Warranted.** — Evidence disclosing that plaintiff's automobile was parked on a bridge 40 feet wide, leaving a space of 30 feet for the passage of traffic, that the driver of defendants' bus was blinded by the lights of an approaching car and hit the rear of plaintiff's car, and that the bridge constituted part of a city street and the parking of cars on the bridge was customary, was held not to warrant nonsuit on the ground of contributory negligence, since even though the parking of the car on the bridge was negligence per se, whether such negligence under the circumstances was a proximate cause of the injury is a question for the jury. *Boles v. Hegler*, 232 N. C. 327, 59 S. E. (2d) 796 (1950).

**Evidence of Negligence Sufficient to Go to Jury.**—Evidence that a disabled truck was left standing on the hard-surface of a highway at night without warning flares or lanterns as required by subsection (a) of this section, and that a car, approaching from the rear, collided with the back of the truck, resulting in injuries to the driver and passengers in the car, is held sufficient to be submitted to the jury on the issue of negligence in each of the actions instituted by the driver and occupants of the car against the driver and owner of the truck. *Wilson v. Central Motor Lines*, 230 N. C. 551, 54 S. E. (2d) 53 (1949).

**Applied in Parkway Bus Co. v. Coble Dairy Products Co.**, 229 N. C. 352, 49 S. E. (2d) 623 (1948).

**Cited in White v. Chappell**, 219 N. C. 652, 14 S. E. (2d) 843 (1941) (dis. op.); *Riggs v. Gulf Oil Corp.*, 228 N. C. 774, 47 S. E. (2d) 254 (1948); *Thomas v. Thurston Motor Lines*, 230 N. C. 122, 52 S. E. (2d) 377 (1949).

standing upon any grade, without turning the front wheels of such vehicle to the curb or side of the highway. (1937, c. 407, s. 125.)

§ 20-164. **Driving on mountain highways.**—The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right-hand side of the highway as reasonably possible, and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway, shall give audible warning with a horn or other warning device. (1937, c. 407, s. 126.)

§ 20-165. **Coasting prohibited.**—The driver of a motor vehicle when traveling upon a down grade upon any highway shall not coast with the gears of such vehicle in neutral. (1937, c. 407, s. 127.)

**Violation Negligence Per Se.**—The violation of this section is negligence per se, and, if injury to the violator proximately result therefrom, it would bar his right to recover therefor. *Dillon v. Winston-Salem*, 221 N. C. 512, 20 S. E. (2d) 845 (1942).

§ 20-166. **Duty to stop in event of accident; accident reports.**—(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in § 20-182.

(b) The driver of any vehicle involved in an accident resulting in damage to property and in which there is not involved injury or death of any person, shall immediately stop such vehicle at the scene of the accident, and any person violating this provision shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court.

(c) The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in § 20-182.

(d) The driver of any vehicle involved in any accident resulting in injuries or death to any person, or property damage to an apparent extent of twenty-five dollars (\$25.00) or more, shall, within twenty-four hours, file or cause to be filed a report of such accident with the Department, except that when such accident occurs within a city such report shall be made within twenty-four hours to the police department of such city. Every police department shall forward on the fifth day of each month every such report received during the previous calendar month, or a copy thereof, so filed with it to the main office of the Department. All accident reports shall be made on forms approved by the Department. With respect to any such accident involving a collision between any common carrier and another vehicle, such common carrier shall also make a report of the accident to the Department, such report to be filed on or before the tenth day of the month following the accident. Whenever any police officer of any city, town or county shall investigate an accident, a report showing the results of his investigation shall be made to the Department by the investigating officer on forms to be supplied by the Department under the provisions of subsection (i) of this section. Such reports shall be filed with the Department on the fifth day of the next succeeding month after the investigation is made.

(e) Where a person required to report an accident by the preceding subsec-

tion is physically incapable of making such report, and there is another occupant in the vehicle at the time of the accident, such occupant shall make the report.

The Department may require drivers, or common carriers involved in accidents, to file supplemental reports, and may require witnesses of accidents to render reports to it upon forms furnished by it whenever the original report is insufficient in the opinion of the Department.

All accident reports together with all supplemental reports above mentioned shall be without prejudice and shall be for the use of the Department, and shall not be used in any manner whatsoever as evidence, or for any other purpose in any trial, civil or criminal, arising out of such accident: Provided, however, that all reports made by State, city or county police shall be subject to inspection by members of the general public at all reasonable times; and provided, further, that a certified copy of any such report shall be furnished to any member of the general public who shall request the same upon receipt of a fee of one dollar. The Department shall be required to furnish, upon demand of any court, a properly executed certificate stating that a specific accident report has or has not been filed with the Department solely to prove a compliance with this section, provided, further, that notwithstanding the foregoing provisions of this subsection, the Department is hereby authorized to furnish, without charge, to the United States Veterans Administration or any of its agents, or to the State Veterans Commission or any of its agents, or to local veterans commissions or any of their agents, certified copies of accident reports made by State, county or city police officers.

(f) The Department shall prepare and shall upon request supply to police, coroners, sheriffs and other suitable agencies, or individuals, forms for accident reports calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing, and the persons and vehicles involved.

The Department shall receive accident reports required to be made by this section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause and location of highway accidents.

Based upon its findings after such analysis, the Department may conduct further necessary detailed research to more fully determine the cause and control of highway accidents. It may further conduct experimental field tests within areas of the State from time to time to prove the practicability of various ideas advanced in traffic control and accident prevention.

(g) Every person holding the office of coroner in this State shall, on the tenth day of each month, report to the Department the death of any person during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident. (1937, c. 407, s. 128; 1939, c. 10, ss. 1, 1½; 1943, c. 439; 1951, cc. 309, 794, 823.)

**Editor's Note.** — The 1939 amendment clarified inconsistencies between this section and § 20-182. See 17 N. C. Law Rev. 349.

The 1943 amendment increased the amount named in the first sentence of subsection (d) from ten dollars to twenty-five dollars.

The first 1951 amendment added the proviso at the end of subsection (e). The second 1951 amendment added the last two sentences of subsection (d). And the third 1951 amendment added the second proviso to the first sentence of the third paragraph of subsection (e).

**Driver Must Stop at Scene of Accident.**

—This section requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. *State v. Brown*, 226 N. C. 681, 40 S. E. (2d) 34 (1946).

Where defendant admitted that he knew he had hit a man and did not stop or return to the scene, his own testimony disclosed a violation of this section, and his good faith in stopping 200 yards away from the accident and obtaining aid for the

injured man before proceeding on his way to his home was immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect was without error. *State v. Brown*, 226 N. C. 681, 40 S. E. (2d) 34 (1946).

**Knowledge of Accident Is Essential Element of Offense.**—Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an essential element of the offense of "hit and run driving." *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494 (1948).

**Evidence Sufficient for Jury.**—Where all the evidence tended to show that the car of the prosecuting witness was struck by a car which was traveling at the time of the accident with its left wheels over the center line of the highway, that an occupant in the car of the prosecuting witness was injured, and that the car which collided with her car failed to stop after the collision, in violation of this section, and the State's circumstantial evidence, including marks on the highway leading uninterruptedly from the point of collision to a car parked at defendant's place of business, which defendant admitted to be his, the condition of defendant's car, a hub cap and other automobile parts found at the scene of the collision which were missing from defendant's car, and other circumstances tending to show efforts on the part of defendant to conceal the identity of his car as the one involved in the collision, together with testimony by defendant that

no one else had driven his car on the evening in question, it was held sufficient to have been submitted to the jury on the question of defendant's guilt, and his motions for judgment as of nonsuit were held properly refused. *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803 (1941).

**Instruction.**—In a prosecution for "hit and run driving" an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement not being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, it further appearing that the court correctly charged upon the presumption of innocence and the burden of proof. *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803 (1941).

**Former Jeopardy.**—In a prosecution for hit and run driving the trial court properly refused to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law. *State v. Williams*, 229 N. C. 415, 50 S. E. (2d) 4 (1948).

**Cited in** *State v. Newton*, 207 N. C. 323, 177 S. E. 184 (1934); *State v. Midgett*, 214 N. C. 107, 198 S. E. 613 (1938); *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942).

§ 20-167. **Vehicles transporting explosives.**—Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(a) Said vehicle shall be marked or placarded on each side and the rear with the word "Explosives" in letters not less than eight inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four inches square marked with the word "Danger" in white letters six inches high.

(b) Every said vehicle shall be equipped with not less than two fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(c) The Commissioner is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highways as he shall deem advisable for the protection of the public. (1937, c. 407, s. 129.)

**Cross Reference.**—As to provision that vehicles transporting motor fuels shall be labelled, see § 119-41.

**Cited in** *Latham v. Elizabeth City Orange Crush Bottling Co.*, 213 N. C. 158, 195 S. E. 372 (1938).

§ 20-168. **Drivers of State, county and city vehicles subject to provisions of this article.**—The provisions of this article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by this State or any political subdivisions thereof, or of any city, town

or district, except persons, teams, motor vehicles and other equipment while actually engaged in work on the surface of the road, but not when traveling to or from such work. (1937, c. 407, s. 130.)

Cited in *Babbs v. Eury*, 206 N. C. 679, 175 S. E. 100 (1934).

**§ 20-169. Powers of local authorities.**—Local authorities, except as expressly authorized by § 20-141 and § 20-158, shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rules or regulations contrary to the provisions of this article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. (1937, c. 407, s. 131; 1949, c. 947, s. 2.)

**Editor's Note.**—Prior to the 1949 amendment the first reference in the section was to "§ 20-141, subsection (g)," instead of "§ 20-141."

For application of former statute pro-

hibiting ordinance in conflict, see *State v. Freshwater*, 183 N. C. 762, 111 S. E. 161 (1922).

Cited in *Stewart v. Yellow Cab Co.*, 225 N. C. 654, 36 S. E. (2d) 256 (1945).

**§ 20-170. This article not to interfere with rights of owners of real property with reference thereto.**—Nothing in this article shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner, and not as matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this article or otherwise regulating such use as may seem best to such owner. (1937, c. 407, s. 132.)

**§ 20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles.**—Every person riding an animal or driving any animal drawing a vehicle upon a highway shall be subject to the provisions of this article applicable to the driver of a vehicle, except those provisions of the article which by their nature can have no application. (1939, c. 275.)

#### Part 11. Pedestrians' Rights and Duties.

**§ 20-172. Pedestrians subject to traffic control signals.**—Pedestrians shall be subject to traffic control signals at intersections as heretofore declared in this article, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in part eleven of this article. (1937, c. 407, s. 133.)

**Duty to Charge Sections in Civil Actions.**—It is the duty of the court to charge the duty of drivers to pedestrians, imposed by this and the following sections, in an action for damages for their violation and this error is not cured by a general charge as to the use of necessary prudence, and

is reversible even in the absence of a prayer for more specific instructions. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922).

Cited in *Metcalf v. Foister*, 232 N. C. 355, 61 S. E. (2d) 77 (1950).

**§ 20-173. Pedestrians' right-of-way at cross-walks.**—(a) Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked cross-walk or within any unmarked cross-walk at an intersection, except as otherwise provided in part eleven of this article.



(b) Whenever any vehicle is stopped at a marked cross-walk or at any unmarked cross-walk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle. (1937, c. 407, s. 134.)

Cited in *Leary v. Norfolk Southern Bus Corp.*, 220 N. C. 745, 18 S. E. (2d) 426 (1942).

§ 20-174. **Crossing at other than cross-walks.**—(a) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked cross-walk.

(d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic.

(e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway. (1937, c. 407, s. 135.)

**Crossing between Adjacent Intersections at Which Traffic Control Signals Are in Operation.**—It is unlawful for a pedestrian to cross a street between intersections at which traffic lights are maintained unless there is a marked crosswalk between the intersections at which he may cross and on which he has the right of way over vehicles, and his failure to observe the statutory requirement is evidence of negligence but not negligence per se. *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555 (1939). See also, *Templeton v. Kelley*, 215 N. C. 577, 2 S. E. (2d) 696 (1939).

**Duty of Pedestrian to Yield Right of Way.**—It is the duty of pedestrian, in crossing highway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, to yield right of way to truck approaching upon the roadway. *Tysinger v. Coble Dairy Products*, 225 N. C. 717, 36 S. E. (2d) 246 (1945).

**Pedestrian Need Not Yield Right of Way at Unmarked Intersection.**—An instruction placing the duty upon a pedestrian to yield the right of way to vehicles in traversing a highway at an unmarked intersection of highways must be held for error. *Gaskins v. Kelly*, 228 N. C. 697, 47 S. E. (2d) 34 (1948).

**Walking on Traveled Portion of Highway.**—Evidence established contributory negligence in that it disclosed that deceased was walking on the traveled por-

tion of the highway otherwise than on his extreme left-hand side thereof, as required by this section. *Miller v. Lewis, etc., Motor Freight Corp.*, 218 N. C. 464, 11 S. E. (2d) 300 (1940).

Where the evidence failed to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left side at the place provided by law and was struck by a board projecting from defendants' truck, defendants' motion to nonsuit was properly allowed for failure of plaintiff to establish negligence proximately causing the fatal injury. *Pack v. Auman*, 220 N. C. 704, 18 S. E. (2d) 247 (1942).

**A person walking along a public highway pushing a handcart is a pedestrian** within the purview of subsection (d) of this section, and is not a driver of a vehicle within the meaning of §§ 20-146 and 20-149. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Handcart Is Not "Vehicle."**—A person pushing a handcart along the highway is a pedestrian within the purview of subsection (d) of this section, since a handcart, being propelled solely by human power, is not a vehicle as defined by § 20-38(ff). *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Motorist Must Use Due Care to Avoid Striking Pedestrian on Wrong Side of Highway.**—The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in viola-

tion of subsection (d) of this section, and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. It was held that the fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under the duty notwithstanding the provisions of subsection (d) to exercise due care to avoid colliding with any pedestrian upon the highway. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948). For a discussion of this case, see 27 N. C. Law Rev. 274.

**Warning Should Be Given Pedestrians.**—An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence per se and would be actionable if the proximate cause of injury, is held without error when it appears that the instruction was applied solely to § 20-146 and this section prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, there being no reference in the charge to a violation of speed restrictions which § 20-141 makes merely prima facie evidence that the speed is unlawful. *Williams v. Woodward*, 218 N. C. 305, 10 S. E. (2d) 913 (1940).

While ordinarily a motorist is not required to anticipate that a pedestrian will leave a place of safety and get in a line of

travel, when the circumstances are such that it should appear to the motorist that a pedestrian is oblivious of his approach, or when he may reasonably anticipate the pedestrian will come into his way, it is his duty to give warning by sounding his horn. *Williams v. Henderson*, 230 N. C. 707, 55 S. E. (2d) 462 (1949).

**Subsection (e) States the Common Law.**—Both the common law and subsection (e) of this section provide that notwithstanding the provisions of subsection (d) "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Necessity for Instruction.**—The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that § 20-146 and § 20-149 applied. Defendant contended that intestate was a pedestrian and was required by subsection (d) of this section to push the handcart along the extreme left-hand side of the highway. Held: An instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of § 1-180. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

**Applied in Sparks v. Willis**, 228 N. C. 25, 44 S. E. (2d) 343 (1947) (subsection (e)).

**Cited in Metcalf v. Foister**, 232 N. C. 355, 61 S. E. (2d) 77 (1950).

§ 20-175. **Pedestrians soliciting rides.**—No person shall stand in the travel portion of the highway for the purpose of soliciting a ride from the driver of any private vehicle. (1937, c. 407, s. 136.)

#### Part 11A. Blind Pedestrians—White Canes or Guide Dogs.

§ 20-175.1. **Public use of white canes by other than blind persons prohibited.**—It shall be unlawful for any person, except one who is wholly or partially blind, to carry or use on any street or highway, or in any other public place, a cane or walking stick which is white in color or white tipped with red. (1949, c. 324, s. 1.)

§ 20-175.2. **Right-of-way at crossings, intersections and traffic control signal points; white cane or guide dog to serve as signal for the blind.**—At any street, road or highway crossing or intersection, where the movement of traffic is not regulated by a traffic officer or by traffic control signals, any blind or partially blind pedestrian shall be entitled to the right-of-way at such crossing or intersection, if such blind or partially blind pedestrian shall extend before him at arm's length a cane white in color or white tipped with red, or if such person is accompanied by a guide dog. Upon receiving such a signal, all vehicles at or approaching such intersection or crossing shall come to a full

stop, leaving a clear lane through which such pedestrian may pass, and such vehicle shall remain stationary until such blind or partially blind pedestrian has completed the passage of such crossing or intersection. At any street, road or highway crossing or intersection, where the movement of traffic is regulated by traffic control signals, blind or partially blind pedestrians shall be entitled to the right-of-way if such person having such cane or accompanied by a guide dog shall be partly across such crossing or intersection at the time the traffic control signals change, and all vehicles shall stop and remain stationary until such pedestrian has completed passage across the intersection or crossing. (1949, c. 324, s. 2.)

§ 20-175.3. **Rights and privileges of blind persons without white cane or guide dog.**—Nothing contained in this part shall be construed to deprive any blind or partially blind person not carrying a cane white in color or white tipped with red, or being accompanied by a guide dog, of any of the rights and privileges conferred by law upon pedestrians crossing streets and highways, nor shall the failure of such blind or partially blind person to carry a cane white in color or white tipped with red, or to be accompanied by a guide dog, upon the streets, roads, highways or sidewalks of this State, be held to constitute or be evidence of contributory negligence by virtue of this part. (1949, c. 324, s. 3.)

§ 20-175.4. **Violations made misdemeanor.**—Any person violating any provision of this part shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding thirty days, or both. (1949, c. 324, s. 4.)

#### Part 12. Penalties.

§ 20-176. **Penalty for misdemeanor.**—(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment: Provided, that upon conviction for the following offenses—operating motor vehicles without displaying registration number plates issued therefor; permitting or making any unlawful use of registration number plates, or permitting the use of registration by a person not entitled thereto, and violation of §§ 20-116, 20-117, 20-122, 20-123, 20-124, 20-125, 20-126, 20-127, 20-128, 20-129, 20-130, 20-131, 20-132, 20-133, 20-134, 20-142, 20-143, 20-144, 20-146, 20-147, 20-148, 20-150, 20-151, 20-152, 20-153, 20-154, 20-155, 20-156, 20-157, 20-159, 20-160, 20-161, 20-162, 20-163, 20-165—the punishment therefor shall be a fine not to exceed fifty dollars (\$50.00) and not less than ten dollars (\$10.00), or imprisonment not to exceed thirty days for each offense. (1937, c. 407, s. 137; 1951, c. 1013, s. 7.)

**Editor's Note.** — The 1951 amendment struck out "20-118" from the list of sections in subsection (b).

Most of the cases cited below were decided under the corresponding provisions of the former law.

In addition to being liable to punishment under these statutes, it is possible for a person to be so negligent in the violation in disregarding the rights of others as to be guilty of other crimes at the same time.

For example, although it is a misdemeanor to violate the statute regulating the law of the road as to speed under the motor vehicle law, one may also be guilty of murder, manslaughter or assault and battery if he is so reckless in the violation that he runs down and kills or injures another, if the elements essential to constitute such crimes are present in the violation. See *State v. McIver*, 175 N. C. 761, 94 S. E. 682 (1917); *State v. Gush*, 177 N. C. 595, 99

S. E. 337 (1919). And evidence of violation of this chapter is admissible upon such trials. *State v. Suddeth*, 184 N. C. 753, 114 S. E. 828 (1922).

**Strict Construction of Penal Provisions.**—Inasmuch as this article contains provisions of a highly penal nature, and, although it is within the police power, the courts will not, by construction, extend its penal provisions unless the case comes within the letter of the law, and within its

**§ 20-177. Penalty for felony.**—Any person who shall be convicted of a violation of any of the provisions of this article herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this State, be punished by imprisonment in the State prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both fine and imprisonment. (1937, c. 407, s. 138.)

**§ 20-178. Penalty for bad check.**—When any person, firm, or corporation shall tender any uncertified check for payment of any tax or fees found to be due by him under the provisions of this article, and such check shall have been returned to the Commissioner unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, then in that event an additional tax shall be imposed equal to ten per cent of the fees due, and in no case shall the increase of said tax, because of said failure, be less than one dollar (\$1.00), and the said additional tax shall not be waived or diminished by the Commissioner. (1937, c. 407, s. 139.)

**§ 20-179. Penalty for driving while under the influence of intoxicating liquor or narcotic drugs.**—Every person who is convicted of violating § 20-138, relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall, for the first offense, be punished by a fine of not less than one hundred dollars (\$100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court. For a second conviction of the same offense, the defendant shall be punished by a fine of not less than two hundred dollars (\$200.00) or imprisonment for not less than six months, or by both such fine and imprisonment, in the discretion of the court. For a third or subsequent conviction of the same offense, the defendant shall be punished by a fine of not less than five hundred dollars (\$500.00) or by both such fine and imprisonment in the discretion of the court. (1937, c. 407, s. 140; 1947, c. 1067, s. 18.)

**Cross Reference.** — As to mandatory revocation of license for driving under influence of liquor or drugs, see § 20-17, paragraph 2.

**Editor's Note.** — The 1947 amendment rewrote this section.

**Sentence Not Excessive.**—A sentence to the county jail for a term of six months, and to be assigned to work on the public

roads, upon defendant's plea of nolo contendere to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. *State v. Parker*, 220 N. C. 416, 17 S. E. 475 (1941).

**Quoted** in *State v. Wooten*, 228 N. C. 628, 46 S. E. (2d) 868 (1948).

**Cited** in *State v. Mickle*, 194 N. C. 808, 140 S. E. 150 (1927); *Lancaster v. B. & H. Coach Line*, 198 N. C. 107, 150 S. E. 716 (1929).

**Applied** in *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948).

**§ 20-180. Penalty for speeding and reckless driving.**—Every person convicted of violating § 20-140, § 20-140.1 or § 20-141 shall be guilty of a misdemeanor. (1937, c. 407, s. 141; 1947, c. 1067, s. 19; 1951, c. 182, s. 2.)

**Cross Reference.**—As to revocation of license for two convictions on reckless driving charges, see § 20-17, paragraph 6.

**Editor's Note.** — The 1947 amendment rewrote this section.

The 1951 amendment inserted the ref-

erence to § 20-140.1.

**Penalty Not Excessive.**—Upon conviction of reckless driving, sentence of defendant to six months in the county jail to be assigned to work the roads under the direction of the State Highway and Public Works Commission is within the limitations prescribed by this section and therefore cannot be held excessive. *State v.*

*Wilson*, 218 N. C. 769, 12 S. E. (2d) 654 (1941).

**Applied** in *State v. Blankenship*, 229 N. C. 589, 50 S. E. (2d) 724 (1948).

**Stated** in *State v. Sumner*, 232 N. C. 386, 61 S. E. (2d) 84 (1950).

**Cited** in *State v. Cody*, 224 N. C. 470, 31 S. E. (2d) 445 (1944).

§ 20-181. **Penalty for failure to dim, etc., beams of head lamps.**—Any person operating a motor vehicle on the highways of this State, who shall fail to shift, depress, deflect, tilt or dim the beams of the head lamps thereon whenever another vehicle is met on such highways shall, upon conviction thereof, be fined not more than ten (\$10.00) dollars or imprisoned for not more than ten (10) days. (1939, c. 351, s. 3.)

**Cross Reference.**—As to conviction not being ground for revocation of operator's or chauffeur's license, see § 20-18.

**headlights in passing.** *Cummins v. Southern Fruit Co.*, 225 N. C. 625, 36 S. E. (2d) 11 (1945).

**Cars are required to dim or slant their**

§ 20-182. **Penalty for failure to stop in event of accident involving injury or death to a person.**—Every person convicted of wilfully violating § 20-166, relative to the duties to stop in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years, or by fine of not less than five hundred dollars or by both such fine and imprisonment. The Commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142.)

**Cross Reference.**—As to mandatory revocation of license in event of failure to stop and render aid in case of accident, see § 20-17, paragraph 4.

**Cited** in *State v. King*, 219 N. C. 667, 14 S. E. (2d) 803 (1941); *State v. Ray*, 229 N. C. 40, 47 S. E. (2d) 494 (1948).

§ 20-183. **Duties and powers of law enforcement officers.**—It shall be the duty of the law enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article. (1937, c. 407, s. 143.)

### ARTICLE 3A.

#### *Motor Vehicle Law of 1947.*

##### Part 1. Safe Use of Streets and Highways.

§ 20-183.1. **Rights, privileges and duties; declarations of policy.**—Fully cognizant of the fact that the preservation of human life is a sacred duty and obligation of the legislative, the judicial, and the executive branches of the government, the General Assembly hereby recognizes the following rights, privileges, and duties, and makes the following declarations of policy:

(a) Each of the citizens of the State of North Carolina has the right and privilege of using the streets and highways of the State either as a pedestrian or a motorist or both, without needless exposure to accident, injury, or death

occasioned by the reckless or otherwise unlawful operation by others of vehicles over or upon said streets and highways;

(b) The right and privilege of any person to use the streets and highways of the State is, however, subject to the right and privilege of other persons to use said streets and highways in a safe, lawful, sane, and prudent manner;

(c) In order to secure to law-abiding and prudent pedestrians and motorists the full enjoyment of the right and privilege herein declared to exist, those operators of vehicles who are heedless of the duties and obligations imposed upon them and unmindful of the rights of others shall be barred from the streets and highways of the State;

(d) To guarantee to motorists and pedestrians the safe use of the streets and highways of the State is the purpose of the General Assembly in enacting this act. (1947, c. 1067, s. 1.)

**Editor's Note.**—The act from which this section was codified inserted §§ 20-183.1 through 20-183.8, repealed §§ 20-13 and 20-36, and amended §§ 20-7, 20-16, 20-17, 20-19, 20-28, 20-141, 20-179, 20-180 and 20-188. Except as otherwise expressly provided, the act is effective from July 1, 1947.

Session Laws 1947, c. 1067, § 24, provides: "When in any part or section of this act a greater or higher punishment, penalty, or loss of rights or privileges is imposed for a second or subsequent con-

viction of any offense than is imposed for a first conviction of such offense, no conviction occurring prior to the effective date of the part or section under which the punishment, penalty, or loss of rights or privileges is to be imposed shall be considered as a prior conviction of such offense in determining whether or not the conviction under any part or section of this act is a second or subsequent conviction of such offense."

## Part 2. Inspection of Motor Vehicles.

§§ 20-183.2 to 20-183.8: Repealed by Session Laws 1949, c. 164.

### ARTICLE 3B.

#### *Permanent Weighing Stations and Portable Scales.*

§ 20-183.9. **Establishment and maintenance of permanent weighing stations.**—The State Highway and Public Works Commission is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than twelve permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the State Highway and Public Works Commission and shall be maintained by said Commission.

There is hereby appropriated to the State Highway and Public Works Commission out of the State Highway and Public Works Fund the sum of three hundred thousand dollars (\$300,000.00). The funds appropriated by this paragraph shall be used exclusively for the purpose of carrying out the provisions of this section and may be expended at any time during the biennium ending June 30, 1953. (1951, c. 988, s. 1.)

§ 20-183.10. **Operation by Department of Motor Vehicles; uniformed personnel with powers of peace officers.**—The permanent weighing stations to be established pursuant to the provisions of this article shall be operated by the Department of Motor Vehicles, and the personnel assigned to the various stations shall wear uniforms to be selected and furnished by the Department of Motor Vehicles. The uniformed officers assigned to the various

permanent weighing stations shall have the powers of peace officers in making arrests, serving process, and appearing in court in all matters and things relating to the weight of vehicles and their loads.

There is hereby appropriated to the Department of Motor Vehicles out of the State Highway and Public Works Fund the sum of two hundred fifty thousand dollars (\$250,000.00) for each year of the biennium ending June 30, 1953. The funds appropriated in this paragraph shall be expended exclusively for the operation of the permanent weighing stations established pursuant to this article. (1951, c. 988, s. 2.)

**§ 20-183.11. Refusal of operator to co-operate in weighing vehicle; removal of excess portion of load.**—When a permanent weighing station is established under the provisions of this section, it shall constitute a misdemeanor for the operator of any vehicle to refuse to permit his vehicle to be weighed at such station or to refuse to drive his vehicle upon the scales so that the same may be weighed. Any vehicle and its load found to be above the weight authorized in chapter 20 of the General Statutes shall have immediately removed by the operator such portion of its load as may be necessary to decrease the gross weight of the vehicle to the maximum therefor specified in chapter 20 of the General Statutes: Provided, that the Department may allow any vehicle transporting refrigerated or iced perishable foods for human consumption to proceed without removing all or a portion of its load when the owner or operator has paid the taxes and penalties due because of the overload or has made satisfactory arrangements with the Commissioner of Motor Vehicles to pay said taxes and penalties. The material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of the owner or operator of such vehicle. (1951, c. 988, s. 3.)

**§ 20-183.12. Portable scales.**—In addition to the appropriation contained in § 20-183.9, there is hereby appropriated to the Department of Motor Vehicles out of the State Highway and Public Works Fund the sum of sixty-five thousand dollars (\$65,000.00) for each year of the biennium ending June 30, 1953. The money appropriated in this section shall be used by the Commissioner of Motor Vehicles for the purchase and use of portable scales for weighing vehicles traveling over the streets and highways of this State. (1951, c. 988, s. 4.)

#### ARTICLE 4.

##### *State Highway Patrol.*

**§ 20-184. Patrol under supervision of Department of Motor Vehicles.**—The Commissioner of Motor Vehicles, under the direction of the Governor, shall have supervision, direction and control of the State Highway Patrol. The Commissioner shall establish in the Department of Motor Vehicles a Division of Highway Safety and Patrol, prescribe regulations governing said Division, and assign to the Division such duties as he may deem proper. (1935, c. 324, s. 2; 1939, c. 387, s. 1; 1941, c. 36.)

**§ 20-185. Personnel; appointment; salaries.** — The State Highway Patrol shall consist of a commanding officer, whose rank shall be designated by the Governor, and such additional subordinate officers and men as the Commissioner of Motor Vehicles, with the approval of the Governor and Advisory Budget Commission, shall direct. Members of the State Highway Patrol shall be appointed by the Commissioner, with the approval of the Governor, and shall serve at the pleasure of the Governor and Commissioner. The commanding officer, other officers and members of the State Highway Patrol shall be paid such salaries as may be established by the Division of Personnel of the Budget

Bureau. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 1.)

**Editor's Note.**—Prior to the 1947 amendment the commanding officer was designated as "major."

**§ 20-186. Oath of office; bond.**—Each member of the Highway Patrol shall subscribe and file with the Commissioner of Motor Vehicles an oath of office for the faithful performance of his duties, and shall give a bond with good surety payable to the State of North Carolina in a sum not less than one thousand dollars (\$1000.00) and not more than two thousand five hundred dollars (\$2500.00) to be fixed by the Commissioner of Motor Vehicles, conditioned as well for the faithful discharge of his duty as patrolman as for his diligently endeavoring to collect faithfully and pay over all sums of money received. The bond shall be duly approved and filed in the office of the Insurance Commissioner, and copies of the bond certified by the Insurance Commissioner shall be received and read in evidence in all actions and proceedings where the original might be. (1929, c. 218, s. 2; 1937, c. 339, s. 1; 1941, c. 36.)

**Cross Reference.**—See § 128-9.

**§ 20-187. Orders and rules for organization and conduct.** — The Commissioner of Motor Vehicles is authorized and empowered to make all necessary orders, rules and regulations for the organization, assignment, and conduct of the members of the State Highway Patrol. Such orders, rules and regulations shall be subject to the approval of the Governor. (1929, c. 218, ss. 1, 3; 1931, c. 381; 1933, c. 214, ss. 1, 2; 1939, c. 387, s. 2; 1941, c. 36.)

**§ 20-188. Duties of Highway Patrol.**—The State Highway Patrol shall be subject to such orders, rules and regulations as may be adopted by the Commissioner of Motor Vehicles, with the approval of the Governor, and shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State. To this end, the members of the Patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officers, is engaged in the violation of any of the laws of the State regulating travel and the use of vehicles upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the State, irrespective of county lines.

The State Highway Patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the Governor, and such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The State Highway Patrol shall be required to perform such other and additional duties as may be required of it by the Commissioner of Motor Vehicles in connection with the work of the Department of Motor Vehicles, and such other and additional duties as may be required of it from time to time by the Governor.

Members of the State Highway Patrol, in addition to the duties, power and authority hereinbefore given, shall have the authority throughout the State of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20.)

**Cross Reference.**—As to duty to refer to or arrests made for unlawful transportation of liquor, see § 18-6.1.



**Editor's Note.** — The 1947 amendment changed the last paragraph, which was added by the 1945 amendment.

**Power to Make Arrests.**—As to power of highway patrolman to make arrests, see 23 N. C. Law Rev. 338.

Where a highway patrolman is advised by a person that an armed convict had come to her home, made threats, and demanded food, such patrolman is given authority under this section to arrest such convict. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

**Armed robbery is a crime of violence** within the meaning of this section. *Gallo-*

*way v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

The word "accused" in this section is used in the generic sense and does not import that the person to be arrested must have been accused of crime by judicial procedure. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

The use of an airplane by highway patrolmen to locate a person sought to be arrested by them is not a departure from the terms of their employment. *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

§ 20-189. **Patrolman assigned to Governor's office.**—The Commissioner of Motor Vehicles, at the request of the Governor, shall assign and attach one member of the State Highway Patrol to the office of the Governor, there to be assigned such duties and perform such services as the Governor may direct. The salary of the State highway patrolman so assigned to the office of the Governor shall be paid from appropriations made to the office of the Governor and shall be fixed in an amount to be determined by the Governor and the Advisory Budget Commission. (1941, cc. 23, 36.)

§ 20-190. **Uniforms; furnishing motor vehicles.**—The Department of Motor Vehicles shall adopt some distinguishing uniform for the members of said State Highway Patrol, and furnish each member of the Patrol with an adequate number of said uniforms and each member of said Patrol force when on duty shall be dressed in said uniform. The Department of Motor Vehicles shall likewise furnish each member of the Patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said Patrol while on duty. (1929, c. 218, s. 5; 1941, c. 36.)

§ 20-191. **Establishment of district headquarters.**—The Department of Motor Vehicles shall supply at its various district offices, or at some other point within the district if it shall be deemed advisable, suitable district headquarters, and the necessary clerical assistance for the commanding officer of the force at his headquarters in Raleigh and at the several district headquarters. (1929, c. 218, s. 6; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 2.)

**Editor's Note.** — The 1947 amendment substituted "commanding officer" for "major."

§ 20-192. **Shifting of patrolmen from one district to another.**—The commanding officer of the State Highway Patrol under such rules and regulations as the Department of Motor Vehicles may prescribe shall have authority from time to time to shift the forces from one district to another, or to consolidate more than one district force at any point for special purposes. Whenever a member of the State Highway Patrol is transferred from one point to another for the convenience of the State or otherwise than upon the request of the patrolman, the Department shall be responsible for transporting the household goods, furniture and personal apparel of the patrolman and members of his household. (1929, c. 218, s. 7; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 3; 1951, c. 285.)

**Editor's Note.** — The 1947 amendment substituted "commanding officer" for "major." The 1951 amendment added the second sentence.

§ 20-193. **Fees for service of process by patrolmen to revert to county.**—All fees for arrests or service of process that may be taxed in the bill

of costs for the various courts of the State on account of the official acts of the members of the State Highway Patrol shall be remitted to the general fund in the county in which the said cost is taxed. (1929, c. 218, s. 8.)

§ 20-194. **Expense of administration.**—All expenses incurred in carrying out the provisions of this article shall be paid out of the maintenance funds of the State Highway and Public Works Commission. (1929, c. 218, s. 9; 1941, c. 36.)

§ 20-195. **Co-operation between Patrol and local officers.** — The Commissioner of Motor Vehicles with the approval of the Governor, through the Division of Highway Safety and Patrol, shall encourage the co-operation between the Highway Patrol and the several municipal and county peace officers of the State for the enforcement of all traffic laws and the proper administration of the Uniform Drivers' License Law, and arrangements for compensation of special services rendered by such local officers out of the funds allotted to the Division of Highway Safety and Patrol may be made, subject to the approval of the Director of the Budget. (1935, c. 324, s. 5; 1939, c. 387, s. 3; 1941, c. 36.)

**Editor's Note.** — The 1939 amendment "the Governor" near the beginning of the inserted the words "with the approval of" section.

§ 20-196. **State-wide radio system authorized; use of telephone lines in emergencies.**—The Commissioner of Motor Vehicles, through the Division of Highway Safety and Patrol is hereby authorized and directed to set up and maintain a State-wide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the State for the purpose of maintaining radio contact with the members of the State Highway Patrol and other officers of the State, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the Director of the Budget shall find that the appropriation provided for the Department is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the State Highway and Public Works Commission, upon the order of the Director of the Budget approved by the Advisory Budget Commission, shall make available such additional sum as the said Budget Commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the State Highway and Public Works Commission shall constitute a valid charge against the appropriation item of betterments for State and county roads.

The Commissioner of Motor Vehicles is likewise authorized and empowered to arrange with the various telephone companies of the State for the use of their lines for emergency calls by the members of the State Highway Patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the State.

In order to make this service more generally useful, the various boards of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1935, c. 324, s. 6; 1941, c. 36.)

#### ARTICLE 5.

#### *Enforcement of Collection of Judgments against Irresponsible Drivers of Motor Vehicles.*

§§ 20-197 to 20-211: Repealed by Session Laws 1947, c. 1006, s. 58.

## ARTICLE 6.

*Giving Publicity to Highway Traffic Laws through the Public Schools.*

§ 20-212. **State Highway Commission to prepare digest.**—The State Highway and Public Works Commission shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have published in pamphlet form and delivered on or before the first day of August, one thousand nine hundred and twenty-seven, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1; 1933, c. 172, s. 17.)

§ 20-213. **State Superintendent of Public Instruction to distribute pamphlets.**—The State Superintendent of Public Instruction shall cause to be delivered to the superintendents or principals of the various high schools of the State sufficient number of said pamphlets to supply one to each of the teachers engaged for said schools. (1927, c. 242, s. 2.)

§ 20-214. **Pamphlets brought to attention of children.**—The superintendents or principals, or other persons in charge of the public high schools of the State, shall cause the contents of said pamphlet to be brought to the attention of all the children in attendance upon the said high schools in the form of lessons of at least one each week until the entire contents of said pamphlet shall have been read and explained. (1927, c. 242, s. 3.)

§ 20-215. **Practice to be continued; Highway Commission to supply additional copies yearly.**—This practice shall be continued during each school year and the State Highway and Public Works Commission is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet, having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the State Highway and Public Works Commission to be necessary. (1927, c. 242, s. 4.)

## ARTICLE 7.

*Miscellaneous Provisions Relating to Motor Vehicles.*

§ 20-216. **Driving regulations; frightened animals; crossings.**—A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading, or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or other animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or other animal: Provided, that in case such horse or other animal appears badly frightened, and the person operating such motor vehicle is so signaled to do, such person shall cause the motor of the motor vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others; and it shall also be the duty of any male chauffeur or driver of any motor vehicle and other male occupants thereof over the age of sixteen years while passing any horse, horses or other draft animals which appear frightened, upon the request of the person in charge thereof and driving such horse or horses or other draft animals, to give such assistance as would be reasonable to insure the safety of all persons concerned and to prevent accident. (1917, c. 140, s. 15; C. S., s. 2616.)

**Passing Animals.** — The laws with respect to passing animals, with the exception of establishing a speed limit, are to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. *Tudor v. Bo-*

wen, 152 N. C. 441, 67 S. E. 1015 (1910); Gaskins v. Hancock, 156 N. C. 56, 72 S. E. 80 (1911). See Curry v. Fleer, 157 N. C. 16, 72 S. E. 626 (1911).

Where the law prescribed a maximum speed limit for the running of motor vehicles upon the highways in approaching animals it did not contemplate or intend that the specified limits were always permissible; for one driving a machine of this character was charged with notice of things which he observed or could have

observed in the exercise of proper care, having regard to the nature of the vehicle he was operating and its tendency to frighten animals; and not infrequently it might have become his duty to move at a much slower speed, or stop altogether if conditions so require. Curry v. Fleer, 157 N. C. 16, 72 S. E. 626 (1911).

**Cited** in Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928); York v. York, 212 N. C. 695, 194 S. E. 486 (1938).

**§ 20-217. Motor vehicles to stop for school, church and Sunday school busses in certain instances.**—Every person using, operating, or driving a motor vehicle upon or over the roads or highways of the State of North Carolina, or upon or over any of the streets of any of the incorporated towns and cities of North Carolina, upon approaching from any direction on the same highway any school bus transporting children to or from school or any church or Sunday school bus transporting children to or from church or Sunday school, while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the State or upon any of the streets of any incorporated cities and towns of the State, shall bring such motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until said passengers are received or discharged at that place and until the "stop signal" of such bus has been withdrawn or until such bus has moved on.

The provisions of this section are applicable only in the event the school, church or Sunday school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" or the words "church bus" or "Sunday school bus" in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars (\$50.00) or imprisoned not to exceed thirty days. (1925, c. 265; 1943, c. 767; 1947, c. 527.)

**Editor's Note.** — The 1943 amendment rewrote the first paragraph and inserted the second paragraph.

The 1947 amendment made this section applicable also to church and Sunday school busses.

**This section applies** to passing a school bus from either direction, from the rear or from the front. State v. Webb, 210 N. C. 350, 186 S. E. 241 (1936).

**A violation of this section is negligence per se**, but such violation must be proximate cause contributing to injury and death of intestate to warrant recovery on that ground. Morgan v. Carolina Coach Co., 225 N. C. 668, 36 S. E. (2d) 263 (1945).

**Evidence Failing to Show Violation of This Section.** — The evidence tended to show that a school bus and two following cars stopped on the right side of the highway, that two children alighted, one of

whom ran immediately in front of the bus across the highway, and the other, a boy eight years old, waited until the three vehicles were in motion and crossed the highway after the third vehicle had passed, and was struck by defendant's truck operated by defendant's agent which was traveling in the opposite direction about thirty miles per hour, and which failed to give any warning of its approach and failed to reduce speed prior to the collision. Held: Although the evidence fails to show a violation of the letter of this section, since the school bus was in motion and its stop signal had been withdrawn prior to the impact, the evidence is sufficient to be submitted to the jury upon the issues of the negligence of the driver of the truck and the contributory negligence of defendant's intestate. Hughes v. Thayer, 229 N. C. 773, 51 S. E. (2d) 488 (1949).

**§ 20-218. Standard qualifications for school bus drivers; speed limit.**—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall

be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the Highway Patrol of North Carolina, or from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school busses in said county showing that he has been examined by a member of the said Highway Patrol, or a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school busses, in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than thirty-five miles per hour.

Any person violating paragraph two of this section shall, upon conviction, be fined not more than fifty dollars (\$50.00) or imprisoned not more than thirty days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216.)

**Cross Reference.** — As to selection and employment of school bus drivers, see § 115-378.

**Editor's Note.** — The 1941 amendment inserted the provision in the first paragraph requiring an examination by the chief mechanic.

The 1943 amendment inserted in the first paragraph the words "or from any representative duly designated by the Commissioner of Motor Vehicles," and the 1945 amendment inserted therein the words "or a representative duly designated by the Commissioner of Motor Vehicles."

§ 20-218.1: Repealed by Session Laws 1949, c. 163, s. 1.

**Editor's Note.**—As to jurisdiction over violations of motor vehicle laws formerly vested in the superior courts by the re-

pealed section, see § 110-21.1 and note. For comment on the repealed section, see 21 N. C. Law Rev. 356.

§ 20-219. **Refund to counties of costs of prosecuting theft cases.**—Whenever the Motor Vehicle Department of the State has caused to be instituted criminal prosecutions in the superior court of any county of the State for violation of the automobile theft laws, and the county wherein such case was tried has incurred court costs incident thereto, upon certificate of the clerk of the superior court of said county showing an itemized statement thereof, and that the same has been paid, upon the approval of the Commissioner of Motor Vehicles and the Attorney General, the sum or sums so paid shall be refunded to said county, the same to be paid from the highway maintenance fund from receipts from the motor vehicle registration title fees.

This section shall apply to costs incurred in the prosecution of automobile theft cases only. (1929, c. 275; 1941, c. 36.)

ARTICLE 8.

*Sales of Used Motor Vehicles Brought into State.*

§§ 20-220 to 20-223: Repealed by Session Laws 1945, c. 635.

ARTICLE 9.

*Motor Vehicle Safety and Financial Responsibility Act.*

§ 20-224. **Title.**—The short title of this article shall be "Motor Vehicle Safety and Responsibility Act." (1947, c. 1006, s. 1.)

**Cross Reference.**—As to liability insurance covering negligent operation of municipal vehicles, see §§ 160-191.1 through

160-191.5.

**Editor's Note.** — For discussion of this article, see 25 N. C. Law Rev. 455.

§ 20-225. **Purposes and construction of article.**—The purposes of this article are to promote greater safety in the operation of motor vehicles in this

State and to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles, and of operators and owners of motor vehicles involved in accidents; and it is the legislative intent that this article be liberally construed so as to effectuate these purposes, as far as legally and practically possible. (1947, c. 1006, s. 2.)

§ 20-226. **Definitions.**—Unless a different meaning is clearly required by the context—

“Chauffeur” means every person who is employed for the principal purpose of operating a motor vehicle, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property.

“Commissioner” means the Commissioner of Motor Vehicles.

“Conviction” means conviction upon a plea of guilty, or of *nolo contendere*, or the determination of guilt by a jury or by a court though no sentence has been imposed or, if imposed, has been suspended, and it includes a forfeiture of bail or collateral deposited to secure appearance in court of the defendant, unless the forfeiture has been vacated.

“Department” means the Department of Motor Vehicles, acting directly or through its duly authorized officers and agents.

“Insured” means the person in whose name there is issued a motor vehicle liability policy, as defined in this article, and any other person insured under its terms.

“Judgment” means any judgment which has become final by expiration without appeal of the time within which appeal might be perfected, or by final affirmance on appeal, rendered by a court of competent jurisdiction of this State, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either.

“Motor vehicle” means every vehicle which is self-propelled, or designed for self-propulsion, and every vehicle drawn, or designed to be drawn, by a motor vehicle, and includes every device in, upon or by which any person or property is or can be transported or drawn upon a highway, except devices moved by human or animal power, and devices used exclusively upon stationary rails or tracks, and vehicles used in this State but not required to be licensed by the State.

“Nonresident” means every person who is not a bona fide resident of this State.

“Operator” means every person other than a chauffeur who is in actual physical control of a motor vehicle.

“Owner” means a person who holds the legal title to a vehicle. In the event a vehicle is the subject of an agreement for its conditional sale or lease with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, the conditional vendee or lessee of the mortgagor is deemed the owner; provided, that in all such instances, when the rent paid by the lessee includes charge for services of any nature, or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor is to be deemed the owner and the vehicle shall be subject to such requirements of this article as are applicable to vehicles operated for compensation.

“Person” includes individuals, firms, partnerships, associations, corporations, receivers, trustees, assignees for the benefit of creditors, executors, and administrators, but does not include the State of North Carolina or any political subdivision thereof.

Masculine Terms Include Feminine.—Whenever the masculine form of a word

is used herein, it shall be construed to include the feminine, unless the context clearly requires the contrary. (1947, c. 1006, s. 3.)

**§ 20-227. Motor vehicle liability policy defined; provisions and requisites of policy; coverage, etc.**—(1) “Motor vehicle liability policy,” when used herein, means an owner’s or an operator’s policy of liability insurance certified, as provided by this article, by an insurance carrier licensed to do business in this State, or by an insurance carrier not licensed to do business in this State upon compliance with the provisions of this article, as proof of financial responsibility, or a policy issued under the provisions of the assigned risk plan prescribed by this article and issued by an insurance carrier authorized to transact business in this State, to or for the benefit of the named insured.

(2) Every owner’s policy shall—

(a) Designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted;

(b) Insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession; and

(c) Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this State, any other state of the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, to the limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of one thousand dollars because of injury to or destruction of property of others in any one accident.

(3) Every operator’s policy shall insure the person named therein as insured against loss from liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property, arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to an owner’s policy.

(4) Every policy of insurance subject to the provisions of this article—

(a) Must contain an agreement that the insurance is provided in accordance with the coverage defined in this article as respects bodily injury, death, property damage and destruction, and that it is subject to all the provisions of this article and of the laws of this State relating to this kind of insurance;

(b) May grant any lawful coverage in excess of or in addition to the coverage herein specified, and this excess or additional coverage shall not be subject to the provisions of this article, but shall be subject to other applicable laws of this State.

(5) Every policy shall be subject to the following provisions which need not be contained therein:

(a) The liability of any insurance carrier to the insured under a policy becomes absolute when loss or damage covered by the policy occurs, and the satisfaction by the insured of a judgment for the loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of the loss or damage.

(b) No policy shall be cancelled or annulled, as respects any loss or damage, by any agreement between the carrier and the insured after the insured has be-

come responsible for the loss or damage, and any attempted cancellation or annulment shall be void.

(c) If the death of the insured occurs after the insured has become liable during the policy period, for loss or damage covered by the policy, the policy shall not be terminated by the death with respect to the liability, and the insurance carrier shall be liable thereunder as though death had not occurred.

(d) Upon the recovery of a judgment against any person for loss or damage if the person or the decedent he represents was at the accrual of the cause of action insured against the liability under the policy, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment.

(e) If the death, insolvency, or bankruptcy of the insured occurs within the policy period, the policy, during the unexpired portion of the period, shall cover the legal representative of the insured.

(f) No statement made by the insured or on his behalf, and no violation of the terms of the policy, shall operate to defeat or avoid the policy so as to bar recovery within the limits provided in this article.

(6) Any policy may provide—

(a) That the insured, or any other person covered by the policy shall reimburse the insurance carrier for payments made on account of any accident, claim or suit involving a breach of the terms, provisions or conditions of the policy;

(b) For proration of the insurance with other applicable valid and collectible insurance.

(7) Insurance carriers, authorized to issue policies as provided in this article, may, pending the issuance of the policy, execute an agreement to be known as a binder, which shall not be valid beyond thirty days from the date it becomes effective, or may, in lieu of a policy, issue an endorsement to an existing policy, each of which shall be construed to provide indemnity or protection in like manner and to the same extent as a formal policy. The provisions of this article apply to such binders and endorsements.

(8) When an insurance carrier has certified a policy under the provisions of this article, the insurance so certified cannot be cancelled or terminated until at least twenty days after a notice of cancellation or termination of the insurance has been filed in the office of the Commissioner, except that a policy subsequently procured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates. Provided, that when an insurance carrier has certified a policy under the provisions of this article, such policy shall be deemed to be continued in full force and effect and to provide the insured with financial responsibility as required by this article until twenty days after notice of cancellation or termination of the policy, whether such cancellation or termination is by reason of the expiration of the term of the policy or for other cause, it being the intent of this proviso to permit insurance carriers to issue renewal or substitute policies meeting the requirements of this article without the necessity of furnishing to the Commissioner new certificates of insurance coverage upon the issuance of each renewal or substituted policy, and it being the further intent of this proviso to authorize the Commissioner to rely upon the original certificate of liability insurance coverage so long as the insured maintains with the same insurance carrier adequate insurance coverage meeting the requirements of this article.

(9) No policy required under this article shall be issued or delivered in this State unless it complies with the terms and conditions of this article, and with all other applicable and not inconsistent laws of the State now or hereafter in force.

(10) Several policies of one or more insurance carriers which together meet



the relevant requirements of this article shall be deemed a "motor vehicle liability policy" within the meaning of this article.

(11) Policies issued under the provisions of this article shall not insure any liability of the employer on account of bodily injury to, or death of, an employee of the insured for which benefits are payable under any workmen's compensation law. (1947, c. 1006, s. 4; 1949, c. 1161.)

**Editor's Note.** — The 1949 amendment added the proviso to subsection (8).

**§ 20-228. Commissioner authorized to adopt regulations and administer article.**—The Commissioner shall administer and enforce the provisions of this article, and he is authorized to adopt regulations for its administration in accordance with the guiding principles prescribed in, and not inconsistent with, the terms of this article. (1947, c. 1006, s. 5.)

**§ 20-229. When article does not apply.**—This article, except its provisions as to the filing of proof of financial responsibility by a common carrier for its drivers and chauffeurs, does not apply to any vehicle operated under a permit or certificate of convenience and necessity issued by the North Carolina Utilities Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it, or to any motor vehicle owned by the State of North Carolina, or any political subdivision thereof. However, this article shall not be construed to exempt the driver or operator of any motor vehicle owned by the State of North Carolina, or any political subdivision thereof, from the provisions of this article. (1947, c. 1006, s. 6.)

**§ 20-230. Proof of financial responsibility must be given when driver's license is suspended or revoked.**—Nothing in this article shall affect the authority or duty of the Department of Motor Vehicles to issue, suspend or revoke operator's and chauffeur's license under the Uniform Drivers' License Act, article 2, chapter 20, of the General Statutes, and any amendments thereto; and any person whose operator's or chauffeur's license has been revoked or suspended under the provisions of the Uniform Drivers' License Act, as amended, shall not be entitled to have said license again issued or reinstated until such person shall have given and thereafter maintains proof of his financial responsibility, as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license. (1947, c. 1006, s. 7; 1949, c. 977.)

**Editor's Note.** — The 1949 amendment added the proviso to this section.      ments to this and the following section, see 27 N. C. Law Rev. 471.

For a brief comment on the 1949 amend-

**§ 20-231. Revocation of license and registration certificates and plates upon conviction of certain offenses; provisions for reinstatement when proof of financial responsibility given.**—The Commissioner shall immediately revoke the operator's and chauffeur's license issued to any person, resident or nonresident, upon receiving a record of such person's conviction or forfeiture of bail in connection with any of the offenses set forth in General Statutes, § 20-17, and any amendments thereto, and such operator's and chauffeur's licenses shall remain suspended and revoked for at least one year, and shall not be reinstated or renewed thereafter unless and until such person shall have given, and thereafter maintains, proof of financial responsibility as provided in this article. Provided, in order to maintain the validity of any such reissuance or reinstatement, such person shall not be required to maintain such proof of financial responsibility, under this article, for more than two years after the reissuance or reinstatement of such license.

Whenever the motor vehicle operator's or chauffeur's license of any person has been suspended, cancelled or revoked under the provisions of §§ 20-16 or 20-17 and the period of such suspension, cancellation or revocation shall have expired, and such person shall have met the requirements of this article if required to furnish proof of financial responsibility as a condition precedent to the right to have such license restored or reissued, such license shall be immediately restored or reissued to such person without a re-examination of such person if such person would not have been required to be re-examined at the time of the application for the restoration or reissuance of the license, if the offense for which the license was suspended, cancelled or revoked had not been committed; provided, however, if such person has not been re-examined since July 1, 1947, any license issued to such person shall expire at the same time as licenses issued to persons whose last names begin with the same letter as such person's, as provided in subsection (n) of § 20-7. (1947, c. 1006, s. 8; 1949, c. 977; 1949, c. 1032, s. 1.)

**Editor's Note.**—The first 1949 amendment added the proviso to the first paragraph of this section. The second 1949 amendment added the second paragraph.

**§ 20-232. Revocation of licenses of mental incompetents and inebriates; procedure.**—(a) The Commissioner, upon receipt of notice that any person has been (1) legally adjudged to be insane, or a congenital idiot, an imbecile, epileptic or feeble-minded, or (2) committed to, or has entered, an institution as an inebriate or an habitual user of narcotic drugs, shall forthwith revoke his license and registration, but he shall not revoke the license if the person has been adjudged competent by judicial order or decree, or discharged as cured from an institution for the insane or feeble-minded, for the cure of inebriates, or for the treatment of habitual users of narcotic drugs, upon a certificate of the person in charge that the releasee is competent.

(b) In any case in which the person's license or registration has been revoked or suspended prior to his release it shall not be returned to him unless the Commissioner is satisfied that he is competent to operate a motor vehicle with safety to persons and property and only then if he gives and maintains proof of financial responsibility.

(c) The clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.

(d) The person in charge of every institution of any nature for the care or cure of the insane, idiots, imbeciles, epileptic, feeble-minded, inebriates or habitual users of narcotic drugs, shall forthwith report to the Commissioner in sufficient detail for accurate identification the admission of every patient. (1947, c. 1006, s. 9.)

**§ 20-233. Appeal from action of Commissioner; review by court of record; effect.**—Any person aggrieved by an order or act of the Commissioner requiring a suspension or revocation of his license or registration under the provisions of this article, may file a petition in any court of record having criminal jurisdiction in the city or county in which the petitioner resides, for a review, but the commencement of such a proceeding shall not suspend the order or act, unless for good cause shown, a stay is allowed by the court pending final determination of the review. (1947, c. 1006, s. 10.)

**§ 20-234. Revocation or suspension of license, etc., for failure to satisfy judgment.**—(a) The Commissioner shall suspend the operator's or chauffeur's license and all of the registration certificates and registration plates issued to any person who has failed for a period of sixty days to satisfy any judgment in amounts and upon a cause of action as hereinafter stated, immediately upon receiving authenticated report as hereinafter provided to that effect.

(b) The Commissioner shall not, however, revoke the license of an owner,

operator or chauffeur if the insurance carried by him was in a company which was authorized to transact business in this State and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner, operator or chauffeur is thereby unable to satisfy the judgment arising out of the accident. (1947, c. 1006, s. 11.)

**§ 20-235. Judgment specifically defined.**—The judgment herein referred to means any judgment for more than fifty dollars for damages because of injury to or destruction of property, including loss of its use, or any judgment for damages, including damages for care and loss of services, because of bodily injury to or death of any person arising out of the ownership, use or operation of any motor vehicle. (1947, c. 1006, s. 12.)

**§ 20-236. Commissioner's duty to revoke or suspend license, etc.**—The Commissioner shall take action as required in the two preceding sections upon receiving proper evidence that the person has failed for a period of sixty days to satisfy any judgment, in amount and upon a cause of action as stated in the two preceding sections, rendered by a court of competent jurisdiction of this State, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either. (1947, c. 1006, s. 13.)

**§ 20-237. When judgment deemed satisfied; credits on judgment.**—(a) Every judgment herein referred to shall for the purpose of this article be deemed satisfied: (1) when paid in full or when five thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or (2) when, subject to the limit of five thousand dollars because of bodily injury to or death of one person, the judgment has been paid in full or when the sum of ten thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or (3) when the judgment has been paid in full or when one thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident.

(b) Payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amount provided for in this section. (1947, c. 1006, s. 14.)

**§ 20-238. Installment payments on judgment by order of court.**—A judgment debtor upon five days' notice to the judgment creditor may apply to the court in which the judgment was obtained for the privilege of paying it in installments and the court, without prejudice to other legal remedies which the judgment creditor may have, may so order, fixing the amounts and times of payment of the installments. (1947, c. 1006, s. 15.)

**§ 20-239. Installments in default; licenses, etc., subject to revocation and suspension.**—If the judgment debtor fails to pay any installments as permitted by the order of the court, then, upon notice of default, the Commissioner shall forthwith suspend the license and registration certificates and registration plates of the judgment debtor until the judgment is satisfied as provided in this article, except that the judgment debtor may apply, after due notice to the judgment creditor, to the court which allowed installment payment of the judgment, within thirty days after the default, for resumption of the privilege of paying

the judgment in installments, if past-due installments are first paid. (1947, c. 1006, s. 16.)

**Editor's Note.** — The word "payment" of the Secretary of State but has been supplied by the editor as expressing the obvious intent of the legislature. following the word "installment" near the end of this section does not appear in the authenticated copy of the act in the office

**§ 20-240. Effect of court order permitting installment payments.**—The Commissioner shall not suspend a license or registration of a motor vehicle, and shall restore any license or registration suspended following nonpayment of a judgment, if the judgment debtor obtains an order from the court in which the judgment was rendered permitting payment of the judgment in installments, and if the judgment debtor gives proof of his future financial responsibility as hereinafter provided, but default in payment of any installment will render the license or registration subject to suspension. (1947, c. 1006, s. 17.)

**§ 20-241. Judgment creditor may consent to issuance or renewal of licenses pending satisfaction of judgment, upon proof of financial responsibility.**—If the judgment creditor consents in writing, in such form as the Commissioner prescribes, that the judgment debtor be allowed license and registration certificates and plates, the Commissioner may allow same, notwithstanding default in the payment of the judgment or any installment thereof, for six months from the date of consent and thereafter until it is revoked in writing, if the judgment debtor furnishes proof of his future financial responsibility as hereinafter provided. (1947, c. 1006, s. 18.)

**§ 20-242. Proof of financial responsibility required of unlicensed person at fault in accident.**—Any unlicensed person involved in a motor vehicle accident, in which it should be determined that he is at fault, involving damages in excess of fifty dollars, must show and thereafter maintain proof of financial responsibility, as defined in this article, before obtaining license. (1947, c. 1006, s. 19.)

**§ 20-243. State responsible for safekeeping of deposits held by Treasurer under this article.**—The State shall be responsible for the safekeeping of all bonds, cash and securities deposited with the Treasurer of the State under the provisions of this article and if the deposit or any part thereof be lost, destroyed, or misappropriated the State shall make good the loss to any person entitled thereto. Bonds, cash or securities so deposited shall only be released by the Treasurer upon consent of the Commissioner given in conformity with the terms of this article. (1947, c. 1006, s. 20.)

**§ 20-244. Bankruptcy listing of claim for damages does not relieve judgment debtor hereunder.**—A discharge in bankruptcy listing a claim for damages arising out of the operation of a motor vehicle shall not relieve the judgment debtor from any of the requirements of this article. (1947, c. 1006, s. 21.)

**§ 20-245. Applicable to resident and nonresident alike.**—(a) Whenever by the laws of this State the Commissioner has the power to suspend or revoke (1) the license of a resident operator or chauffeur, or (2) the registration certificates and registration plates of a resident owner, he is empowered (1) to suspend or revoke the license or to forbid the operation of a motor vehicle in this State by a nonresident operator or chauffeur, and (2) to forbid the operation within this State of any motor vehicle of a nonresident owner.

(b) Every provision of this article applies to any person who is not a resident of this State under the same circumstances as they would apply to a resident; and no nonresident may operate any motor vehicle in this State and no motor vehicle owned by him may be operated in this State, unless and until the nonresident, or

the owner of the motor vehicle, if another person, has complied with the requirements of this article with respect to furnishing security and giving proof of future financial responsibility. (1947, c. 1006, s. 22.)

**§ 20-246. Commissioner to transmit record of conviction in North Carolina to officials of home state of nonresident.**—Upon conviction of a nonresident or in case any unsatisfied judgment results in suspension of a nonresident's driving privileges in this State and the prohibition of the operation within this State of any motor vehicle owned by him, or upon suspension of a nonresident's driving privileges in this State and the prohibition of the operation within this State of any motor vehicle owned by the nonresident pursuant to any other provision or provisions of this article, the Commissioner shall transmit a certified copy of the record of the conviction or the unsatisfied judgment or any other action pursuant to this article resulting in suspension of a nonresident's driving privileges in this State and the prohibition of the operation within this State of any motor vehicle owned by such nonresident to the commissioner of motor vehicles or officer performing the functions of a commissioner in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which the nonresident resides. (1947, c. 1006, s. 23.)

**§ 20-247. Suspension or revocation upon conviction or adverse judgment against North Carolina resident in out-of-State court.**—(a) The Commissioner shall suspend or revoke the license and registration certificate and plates of any resident of this State upon receiving notice of his conviction, in a court of competent jurisdiction of this State, any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, of an offense therein, which if committed in this State would be grounds for the suspension or revocation of the license granted to him, or registration of any motor vehicle registered in his name.

(b) The Commissioner shall take like action upon receipt of notice that a resident of this State has failed, for a period of thirty days, to satisfy any final judgment in amount and upon a cause of action as stated herein, rendered against him in a court of competent jurisdiction of any other state of the United States, the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland or any province or territorial subdivision of either. (1947, c. 1006, s. 24.)

**§ 20-248. Proof of financial responsibility by owner on behalf of chauffeur or member of household.**—When the Commissioner finds that any person required to give proof or furnish security under this article is or later becomes a chauffeur or motor vehicle operator, however designated, or a member of the immediate family or household, in the employ or home of an owner of a motor vehicle, the Commissioner shall accept proof of financial responsibility given by the owner in lieu of proof by such person to permit him to operate a motor vehicle for which the owner has given proof as herein provided. In case the person is one who is furnished proof of financial responsibility by his employer, he shall not be required to furnish security. The Commissioner shall designate the restrictions imposed by this section on the face of such person's, operator's or chauffeur's license. (1947, c. 1006, s. 25.)

**§ 20-249. Proof of financial responsibility on behalf of another by owner who holds certificate from Utilities Commission.**—If the owner of a motor vehicle is one whose vehicles are operated under a permit or certificate

of convenience and necessity issued by the State Utilities Commission, proof by the owner on behalf of another as provided by this article may be made if there is filed with the Commissioner satisfactory evidence that the owner has complied with the law with respect to his liability for damage caused by the operation of vehicles by providing the required insurance or other security, or has qualified as a self-insurer as described in § 20-275. (1947, c. 1006, s. 26.)

**§ 20-250. Revoked and suspended licenses, certificates and plates to be surrendered to Commissioner; penalty for failure.**—(a) Any person whose operator's or chauffeur's license or registration certificates or registration plates have been suspended or revoked as provided in this article and have not been reinstated shall immediately return every such license, registration certificate and set of registration plates held by him to the Commissioner. Any person wilfully failing to comply with this requirement is guilty of a misdemeanor.

(b) The Commissioner is authorized to take possession of any license, registration certificate or set of registration plates upon their suspension or revocation under the provisions of this article or to direct any police officer to take possession of and return them to the office of the Commissioner. (1947, c. 1006, s. 27.)

**§ 20-251. Proof of financial responsibility specifically defined.**—Proof of financial responsibility means proof of ability to respond in damages for liability thereafter incurred arising out of the ownership, maintenance, use or operation of a motor vehicle, in the amount of five thousand dollars because of bodily injury to or death of any one person, and subject to a limitation of five thousand dollars, for one person, in the amount of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of one thousand dollars because of injury to or destruction of property in any one accident. Proof in these amounts shall be furnished for each motor vehicle registered by the person. (1947, c. 1006, s. 28.)

**§ 20-252. Proof of financial responsibility; how made.**—(a) Proof of financial responsibility may be made: (1) by filing with the Commissioner the written certificate of any insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. This certificate shall give the effective date of the policy which must be the same date as the effective date of the certificate and, unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered. The Commissioner is authorized to accept from the holder of a restricted or limited chauffeur's or motor vehicle operator's license, as proof of financial responsibility, a certificate of an insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for the benefit of the holder of such license covering the operation by such person of a motor vehicle in accordance with the restriction or limitation to which such person's chauffeur's or operator's license is subject; (2) by filing with the Commissioner proof that a satisfactory bond has been executed; (3) that an adequate deposit of cash or securities has been made; or (4) that self-insurance certificates have been filed.

(b) No motor vehicle shall be, or continue to be, registered in the name of any person required to file proof of financial responsibility unless it is so designated in the certificate. (1947, c. 1006, s. 29; 1949, c. 1160.)

**Editor's Note.** — The 1949 amendment to proof of financial responsibility of holder inserted in subsection (a) the provision as of restricted or limited operator's license.

**§ 20-253. Nonresidents; how proof of financial responsibility established.**—The nonresident owner of a foreign vehicle may give proof of financial responsibility by filing with the Commissioner a written certificate or

certificates of an insurance carrier not authorized to transact business in this State, but authorized to transact business in the state, the District of Columbia, any territory, district or possession of the United States and under its exclusive control, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either, in which each motor vehicle described in the certificate is registered; or if the nonresident does not own a motor vehicle, then in the like jurisdiction in which the insured resides and otherwise conforming to the provisions of this article, and the Commissioner shall accept the same if the insurance carrier, in addition to having complied with all other provisions of this article as requisite shall (1) execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this State; (2) duly adopt a resolution, which shall be binding upon it, declaring that its policies are to be deemed to be varied to comply with the law of this State and the terms of this article relating to the terms of motor vehicle liability policies issued herein; (3) agree to accept as final and binding the judgment of any court of competent jurisdiction in this State from which judgment no appeal is, or can be taken, duly rendered in any action arising out of a motor vehicle accident; or (4) deposit with the Treasurer of North Carolina cash or securities such as are mentioned in § 20-264 or the surety bond of a company authorized to do business in North Carolina, equal in value to eleven thousand dollars for each insurance policy filed as proof of financial responsibility. (1947, c. 1006, s. 30.)

**§ 20-254. Nonresident may elect to file certificate of insurance carrier authorized to transact business in this State; default of foreign insurance carriers; effect.**—(a) If a nonresident required to file a certificate of insurance under this article files the certificate of insurance of a company authorized to do business in this State the provisions of the foregoing section shall not apply.

(b) If any foreign insurance carrier which has qualified to furnish proof of financial responsibility defaults in any of its undertakings or agreements, the Commissioner shall not thereafter accept any certificate of that carrier so long as the default continues and shall revoke licenses theretofore granted on basis of its policies unless the default be immediately repaired. (1947, c. 1006, s. 31.)

**§ 20-255. Liability under other statutes not affected; article not applicable to certain policies.**—This article does not apply to or affect (1) policies of automobile insurance against liability which may now or hereafter be required by any other law of this State but such policies if endorsed to conform to the requirements of this article shall be accepted as proof of financial responsibility when required under this article; (2) policies insuring solely the insured named in the policy against liability resulting from the maintenance, use or operation by persons in the insured's employ or in his behalf of motor vehicles now owned by the insured. (1947, c. 1006, s. 32.)

**§ 20-256. Bond as proof of financial responsibility.**—A person required to give proof of financial responsibility may file with the Commissioner a bond meeting the requirements of this article. (1947, c. 1006, s. 33.)

**§ 20-257. Nature of bond required; sureties.**—The bond referred to in the foregoing section shall be executed by the person giving proof and by a surety company duly authorized to transact business in this State, or by the person giving proof and by one or more individual sureties owning real estate within this State and having an equity therein in at least the amount of the bond, which real estate shall be scheduled therein, but the Commissioner may not accept any real estate bond unless it is first approved by the clerk of the superior court of county wherein the real estate is located. (1947, c. 1006, s. 34.)

§ 20-258. **Conditions of bond to conform to those of motor vehicle liability policy.**—The Commissioner shall not accept any such bond unless it is conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy furnished by the person giving proof. (1947, c. 1006, s. 35.)

§ 20-259. **Cancellation of bond; notice required.**—No such bond shall be cancelled unless twenty days' prior written notice of cancellation is given the Commissioner but cancellation of the bond shall not prevent recovery thereon with respect to any right or cause of action arising prior to the date of cancellation. (1947, c. 1006, s. 36.)

§ 20-260. **Bond constitutes a lien in favor of State; notice of cancellation; recordation of bond.**—(a) A bond with individual sureties shall constitute a lien in favor of the State upon the real estate of any individual surety, which lien shall exist in favor of any holder of any final judgment against the principal on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of his, or any other, motor vehicle, upon the recording of the bond in the office of the register of deeds of the county where the real estate is located.

(b) Notice of cancellation is to be signed by the Commissioner or by someone designated by him and the seal of the Department placed thereon. Notwithstanding any other provision of law the register of deeds shall record the notice in the books kept for the recording of deeds and shall index the same in the indexes thereto for grantors and grantees, under the respective names of the individual sureties in the column for grantors, and the State of North Carolina in the column for grantees, for which he shall receive the sum of two dollars and fifty cents to be paid by the principal in full payment of all services in connection with the recordation and release of the bond. The register of deeds shall place on the notice a statement showing the time of recording and the book and page of recording and return the notice to the Commissioner. (1947, c. 1006, s. 37.)

§ 20-261. **Release of bond by Commissioner; certificate of cancellation.**—When a bond with individual sureties filed with the Commissioner is no longer required under this article, the Commissioner shall, upon request, cancel it as to liability for damage to property or injury to or death of any person or persons thereafter caused and when a bond has been cancelled by the Commissioner or otherwise he shall upon request furnish a certificate of cancellation signed by him or by someone designated by him with the seal of the Department thereon. The certificate, notwithstanding any other provision of law, may be recorded in the office of the register of deeds in which the bond was admitted to record. (1947, c. 1006, s. 38.)

§ 20-262. **Discharge of lien of bond by order of court.**—Upon satisfactory proof that the bond has been cancelled and that there are no claims or judgments against the principal in the bond on account of damage to property or injury to or death of any person or persons resulting from the ownership, maintenance, use or operation of a motor vehicle of the principal caused while the bond was in effect, the clerk of the superior court in the county in which the bond was admitted to record, may enter an order discharging the lien of the bond on the real estate of the sureties thereon, upon their petition and at their proper cost. (1947, c. 1006, s. 39.)

§ 20-263. **Judgment creditor may sue on bond or proceed against parties to bond, if judgment unsatisfied.**—(a) If a final judgment rendered against the principal on the bond filed with the Commissioner as provided in this article be not satisfied within sixty days after its rendition, the judgment creditor



may, for his own use and benefit and at his sole expense, bring an action on the bond in the name of the State against the company or persons executing the bond.

(b) When the sureties on the bond are individuals the judgment creditor may proceed against any or all parties to the bond at law for a judgment or for a decree and foreclosure of the lien on the real estate of the sureties. The proceeding may be against one, all or intermediate number of parties to the bond and when less than all are joined other or others may be impleaded in the same proceeding and after final judgment or decree other proceedings may be instituted until full satisfaction be obtained. (1947, c. 1006, s. 40.)

**§ 20-264. Deposit of cash or securities as proof of financial responsibility.**—A person may give proof of financial responsibility by delivering to the Commissioner eleven thousand dollars in cash, or in securities, such as fiduciaries may invest in under General Statutes, chapter 36, as amended. (1947, c. 1006, s. 41.)

**§ 20-265. State Treasurer custodian of deposits; depletion of deposits; duties of Treasurer.**—(a) All money or securities so delivered to the Commissioner shall be placed by him in the custody of the State Treasurer and shall be subject to execution to satisfy any judgment within the limits on amounts required by this article for motor vehicle liability insurance policies.

(b) Whenever the moneys or securities are subjected to attachment, garnishment, execution, or other legal process, or are otherwise depleted or threatened with depletion or impairment in amount or value the depositor must immediately furnish additional moneys or securities, free from lien, claim, or threat of impairment, in sufficient amount or value fully to comply with the requirements of this article.

(c) The Treasurer shall notify the Commissioner promptly of any depletion, impairment, or decrease or of any legal threat of depletion, impairment, or decrease in the value of the securities or in the moneys on deposit with him under the provisions of this article. (1947, c. 1006, s. 42.)

**§ 20-266. Cancellation or substitution of bond or certificate of insurance; legal determination of disputes as to ownership or liability.**—(a) The Commissioner may cancel any bond or return any certificate of insurance, and upon the substitution and acceptance by him of other adequate proof of financial responsibility, pursuant to this article, and upon his direction to such effect, the State Treasurer shall return any money or securities on deposit with him to the person entitled thereto.

(b) The Commissioner and the Treasurer, or either, may proceed by bill of interpleader for the determination of any dispute as to ownership of or rights in any deposit, and may have recourse to any other appropriate proceeding for determination of any question that arises as to their rights or liabilities or as to the rights or liabilities of the State under this article. (1947, c. 1006, s. 43.)

**§ 20-267. Commissioner must require replacement of unsatisfactory proof of financial responsibility.**—Whenever any proof of financial responsibility filed by any person under the provisions of this article no longer fulfills the purpose for which required the Commissioner shall require other proof of financial responsibility as required by this article and shall suspend his operator's or chauffeur's license, registration certificate and registration plates pending the furnishing of proof as required. (1947, c. 1006, s. 44.)

**§ 20-268. When Commissioner may consent to cancellation or release of bonds, policies, funds or securities; waiver of requirement of proofs of financial responsibility.**—The Commissioner, upon request and subject to the provisions of the succeeding section, shall consent to the cancella-

tion of any bond or insurance policy, or to the return to the person entitled thereto of any money or securities deposited pursuant to this article as proof of financial responsibility, or he shall waive the requirements of filing proof of financial responsibility, in the event (1) of the death of the person on whose behalf the proof was filed; or (2) of his permanent incapacity to operate a motor vehicle; or (3) that the person who has given proof of financial responsibility surrenders his operator's or chauffeur's license, and all of his registration certificates and registration plates to the Commissioner. (1947, c. 1006, s. 45.)

**§ 20-269. When Commissioner may not release proof.**—(a) Notwithstanding the provisions of the preceding section, the Commissioner shall not release the proof in the event: (1) any action for damages upon a liability included in this article is then pending; or (2) any judgment upon any such liability is then outstanding and unsatisfied; or (3) the Commissioner has received notice that the person involved has within the period of twelve months immediately preceding been involved as a driver in any motor vehicle accident.

(b) An affidavit of the applicant of the nonexistence of these facts shall be sufficient evidence thereof in the absence of evidence in the records of the Department to indicate the contrary. (1947, c. 1006, s. 46.)

**§ 20-270. Re-establishment of proof as requisite to reissuance of license.**—Whenever any person to whom proof has been surrendered as provided in § 20-268 applies for an operator's or chauffeur's license or the registration of a motor vehicle, the application shall be refused unless the applicant re-establishes proof as requisite. (1947, c. 1006, s. 47.)

**§ 20-271. Commissioner to furnish abstract of record of licensee.**—The Commissioner upon request shall furnish any insurance carrier or any person or surety a certified abstract of the operating record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles, if any, registered in the name of the person, and if there exists on record of the conviction of the person of a violation of any provisions of any statute or ordinance relating to the operation of a motor vehicle or of any injury or damage caused by him as provided in this article the Commissioner shall so certify, upon the payment to him of a fee of one dollar (\$1.00); provided further, however, that such certified abstract shall not be admissible in evidence in any court proceedings. (1947, c. 1006, s. 48.)

**§ 20-272. Operation of motor vehicle while revocation or suspension of license, etc., in effect; penalties.**—Any person whose operator's or chauffeur's license or registration certificate or other privilege to operate a motor vehicle has been suspended or revoked, restoration thereof or the issuance of a new license or registration certificate being contingent upon the furnishing of proof of financial responsibility and who, during the period of suspension or while revocation is in effect, or in the absence of full authorization from the Commissioner, drives any motor vehicle upon any highway, and any nonresident from whom the privilege of operating any motor vehicle on the highways of this State has been withdrawn as provided in this article who operates a motor vehicle in this State, shall be guilty of a misdemeanor. (1947, c. 1006, s. 49.)

**§ 20-273. Forgery of evidence of ability to respond in damages; penalties.**—Any person who forges or without authority signs any evidence of ability to respond in damages as required by the Commissioner in the administration of this article shall be guilty of a misdemeanor. (1947, c. 1006, s. 50.)

**§ 20-274. Additional penalties.**—Any person who violates any provision of this article for which another penalty is not prescribed by law shall be guilty of a misdemeanor. (1947, c. 1006, s. 51.)

§ 20-275. **Self-insurers.**—(a) Any person may become a self-insurer who shall obtain from the Commissioner a certificate of self-insurance as provided for in subsection (b) of this section; (b) the Commissioner may, in his discretion and upon the application of such a person, issue a certificate of self-insurance when he is reasonably satisfied that such person is possessed and will continue to be possessed of financial ability to respond to judgment as hereinbefore described, obtained against such person arising out of the ownership, maintenance, use, or operation of any such person's motor vehicles; (c) upon the due notice and hearing, the Commissioner may in his discretion and upon reasonable grounds cancel a certificate of self-insurance. (1947, c. 1006, s. 52.)

§ 20-276. **Assignment of risk.**—The Commissioner of Insurance, after consultation with representatives of the insurance carriers licensed to write motor vehicle liability insurance in this State, shall consider such reasonable plans and procedures as such insurance carriers may submit to him for the equitable apportionment among such insurance carriers of those applicants for motor vehicle liability insurance who are entitled to such coverage under this article but who are unable to secure such insurance through ordinary methods.

Upon the approval by the Commissioner of Insurance of any such plans and procedures thus submitted, all insurance carriers licensed to write motor vehicle liability insurance in this State, as a prerequisite to further engaging in writing such insurance in this State shall formally subscribe to, and participate in, such plans and procedures so submitted.

In the event the Commissioner of Insurance, in the exercise of his discretion, does not approve any plan so submitted, or should no such plan be submitted, then the Commissioner of Insurance shall formulate and put into effect reasonable plans and procedures for the apportionment among such insurance carriers of all such applications for motor vehicle liability insurance submitted to him in accordance with the provisions of this article by persons entitled to coverage under this article but unable to obtain such coverage through ordinary methods.

Should no such plan be submitted by the insurance carriers and approved by the Commissioner of Insurance, then, as a prerequisite to further engaging in the selling of motor vehicle liability insurance in this State, every insurance carrier licensed to write motor vehicle liability insurance in this State shall formally subscribe to and participate in the plans and procedures formulated by the Commissioner of Insurance as provided in this section, and every such insurance carrier shall accept any and all risks assigned to it by the Commissioner of Insurance under such plan and shall upon payment of a proper premium issue a policy covering the same, such policy to meet at least the minimum requirements for establishing financial responsibility as provided in this article.

Every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods shall have the right to apply to the Commissioner of Insurance to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this State, and the insurance carrier shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article. In each instance where application is made to the Commissioner of Insurance to have a risk assigned to an insurance carrier, it shall be deemed that the applicant has been denied the issuance of a liability insurance policy, and the Commissioner of Insurance shall, upon receipt of such application, which shall have attached thereto a statement from the Motor Vehicle Department that the suspension of the applicant's license will be no longer in effect after the date noted therein, immediately assign the risk to an insurance carrier which carrier shall be required, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this State, to issue a motor vehicle lia-

bility policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article.

The power granted the Commissioner of Insurance under the provisions of this article to deny, directly or indirectly, insurance to any person applying for insurance hereunder, shall be restricted to persons whose license has been suspended and continues to be suspended by the Department of Motor Vehicles under authority of § 20-16 or otherwise and the power of the Commissioner of Insurance to approve the revocation or cancellation of insurance under the provisions of this article shall be exercised only when the Department of Motor Vehicles suspends the license of the insured under the authority granted to it under the motor vehicles act.

The Commissioner of Insurance shall have the authority to make reasonable rules and regulations for the assignment of risks to insurance carriers.

The Commissioner of Insurance shall establish, or cause to be established, such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk motor vehicle liability policies in accordance with this article, as appear to him to be proper.

In the establishment of rate classification, rating schedules, rates, rules and regulations, the Commissioner of Insurance shall be guided by such principles and practices as have been established under his statutory authority to regulate motor vehicle liability insurance rates, and he may act in conformity with his statutory discretionary authority in such matters, and may in his discretion assign to the North Carolina Automobile Rate Administrative Office, or other State bureau or agency any of the administrative duties imposed upon him by this article.

The Commissioner of Insurance is empowered, if in his judgment he deems such action to be justified after reviewing all information pertaining to the applicant or policyholder available from his records, the records of the Department of Motor Vehicles, or from other sources—

- (a) To refuse to assign an application.
- (b) To approve the rejection of an application by an insurance carrier.
- (c) To approve the cancellation of a motor vehicle liability policy by an insurance carrier; or
- (d) To refuse to approve the renewal or the reassignment of an expiring policy.

The Commissioner of Insurance shall not be held liable for any act, or omission, in connection with the administration of the duties imposed upon him by the provisions of this article, except upon proof of actual malfeasance.

The provisions of this article relevant to assignment of risks shall be available to nonresidents who are unable to obtain a motor vehicle liability insurance policy with respect only to motor vehicles registered and used in this State. (1947, c. 1006, s. 53; 1949, c. 1209, ss. 1, 2.)

**Editor's Note.** — The 1949 amendment added the second sentence to the fifth paragraph and inserted the sixth paragraph. For a brief discussion of the 1949 amendment, see 27 N. C. Law Rev. 459.

**§ 20-277. Judgments subsequently obtained arising out of accidents prior to effective date of article unaffected.**—Persons against whom judgments are obtained subsequent to the effective date of this article, as a result of an action for damages arising out of an accident involving the operation of a motor vehicle prior to the effective date of this article, are not subject to the provisions hereof. (1947, c. 1006, s. 54.)

**§ 20-278. Clerk of court required to furnish abstract of convictions and judgments.**—The clerk of the court, or the court when it has no clerk shall forward to the Commissioner a certified copy or abstract of any conviction,

and of any forfeiture of bail or collateral deposited to secure a defendant's appearance in court unless the forfeiture has been vacated, upon a charge of a violation of any of the offenses set forth in § 20-17 of the General Statutes, and any amendments thereto, and a certified copy or abstract of any judgment for damages, the rendering and nonpayment of which judgment, under the terms of this article, require the Commissioner to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor. Every such copy or abstract of conviction or forfeiture shall be forwarded to the Commissioner immediately upon the expiration of fifteen days after the conviction or forfeiture, and every such copy or abstract of judgment shall be forwarded to the Commissioner immediately upon the expiration of sixty days after the judgment has become final by expiration without appeal or other action of the time within which appeal or other action might have been perfected, or has become final by affirmation on appeal, and has not been otherwise stayed or satisfied. (1947, c. 1006, s. 55.)

§ 20-279. **Other remedies unaffected.**—This article shall not be construed to prevent the plaintiff in any action at law from relying for security upon any other remedy now or hereafter provided by law. (1947, c. 1006, s. 56.)

#### ARTICLE 10.

##### *Financial Responsibility of Taxicab Operators.*

§ 20-280. **Filing proof of financial responsibility with governing board of municipality or county.**—A. Within 30 days after March 27, 1951, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs within a municipality shall file with the governing board of the municipality in which such business is operated proof of financial responsibility as hereinafter defined.

No governing board of a municipality shall hereafter issue any certificate of convenience and necessity, franchise, license, permit or other privilege or authority to any person, firm or corporation authorizing such person, firm or corporation to engage in the business of operating a taxicab or taxicabs within the municipality unless such person, firm or corporation first files with said governing board proof of financial responsibility as hereinafter defined.

Within thirty days after the ratification of this section, every person, firm or corporation engaging in the business of operating a taxicab or taxicabs without the corporate limits of a municipality or municipalities, shall file with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

No person, firm or corporation shall hereafter engage in the business of operating a taxicab or taxicabs without the corporate limits of a municipality or municipalities in any county unless such person, firm or corporation first files with the board of county commissioners of the county in which such business is operated proof of financial responsibility as hereinafter defined.

B. As used in this section proof of financial responsibility shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: Five thousand dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident and, sub-

ject to said limit for one person, ten thousand dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident.

C. Every person, firm or corporation who engages in the taxicab business and who is a member of or participates in any trust fund or sinking fund, which said trust fund or sinking fund is for the sole purpose of paying claims, damages or judgments against persons, firms or corporations engaging in the taxicab business and which trust fund or sinking fund is approved by the governing body of any city or municipality with a population of over 50,000, shall be deemed a compliance with the financial responsibility provisions of this section.

Provided, however, that in the case of operators of 15 or more taxicabs, the limits (exclusive of interests and costs), with respect to each such motor vehicle shall be as follows: Ten thousand dollars (\$10,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, twenty thousand dollars (\$20,000.00) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident. (1951, c. 406.)

**Cross Reference.**—As to power of municipality to require insurance or surety bond of vehicles operated for hire in city, see also § 160-200, paragraph 35.

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## Chapter 21.

### Bills of Lading.

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#### ARTICLE 1.

##### *Definitions.*

§ 21-1. **General definitions.**—In this chapter, unless the context of subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this chapter.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

“To purchase” includes to take as mortgagee and to take as pledgee. (1919, c. 65, s. 42; C. S., s. 280.)

**Editor’s Note.**—This chapter is based upon and closely follows the Federal Bills of Lading Act. However, the North Carolina statutes depart in phraseology from the federal act wherever such a change is necessary to adopt the statutes to intrastate commerce. See § 21-4 providing that bills of lading issued in intrastate commerce shall be governed by this chapter.

§ 21-2. **Definition of straight bill.**—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill. (1919, c. 65, s. 2; C. S., s. 284.)

**Cross Reference.**—As to bills of lading in evidence, see § 8-41.

§ 21-3. **Definition of order bill.**—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void, and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper. (1919, c. 65, s. 3; C. S., s. 285.)

**Cross Reference.**—As to bills of lading in evidence, see § 8-41.

## ARTICLE 2.

### *Issue of Bills of Lading.*

§ 21-4. **Bills governed by this chapter.**—Bills of lading issued by any common carrier for the transportation of goods from one point in North Carolina to another shall be governed by this chapter. (1919, c. 65, s. 1; C. S., s. 283.)

§ 21-5. **Order bills must not be issued in sets.**—Order bills issued in North Carolina for transportation of goods from one point to another in North Carolina shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. (1919, c. 65, s. 4; C. S., s. 286.)

§ 21-6. **Duplicate order bills must be so marked.**—When more than one order is issued in North Carolina for the same goods to be transported to any place in North Carolina, the word “duplicate” or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. (1919, c. 65, s. 5; C. S., s. 287.)

**Cross Reference.**—As to duplicate bills of lading in evidence, see § 8-41.

§ 21-7. **Straight bill shall be marked "nonnegotiable."**—A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character. (1919, c. 65, s. 6; C. S., s. 288.)

§ 21-8. **Insertion of name of person to be notified.**—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. (1919, c. 65, s. 7; C. S., s. 289.)

**Editor's Note.**—Formerly it was the rule in this State that when goods were shipped under a bill of lading made out to the order of the vender, the mere insertion of the name of the consignee to be notified, would not bring such consignee into contract relations with the carrier so as to enable him to bring suit against the carrier for delay, damage, etc. And likewise in such a case the rule was that title did not pass

until the draft was paid. *Mfg. Co. v. R. R.*, 149 N. C. 261, 62 S. E. 1091 (1908); *Bank v. R. R.*, 153 N. C. 346, 69 S. E. 261 (1910); *Killingsworth v. R. R.*, 171 N. C. 47, 87 S. E. 947 (1916). But the law has been changed by legislative enactment. See also §§ 21-9 and 21-32 and notes.

As to shipment made "order, notify" see *Watts v. R. R.*, 183 N. C. 12, 110 S. E. 582 (1922).

### ARTICLE 3.

#### *Obligations and Rights of Carriers upon Bills of Lading.*

§ 21-9. **Obligation of carrier to deliver.**—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods;
2. Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is an order bill; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. (1919, c. 65, s. 8; C. S., s. 290.)

**Possession of Properly Endorsed Bill Is Sufficient.**—An order bill of lading indorsed by the shipper, in the possession of the plaintiff, is sufficient evidence of the plaintiff's ownership of the bill and of the goods for which the bill was issued. *Temple v. R. R.*, 190 N. C. 439, 129 S. E. 815 (1925).

**Consignee Must Produce Bill.**—The failure or refusal of consignee to produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession is ordinarily a valid defense to an action to recover of the carrier the value of a shipment, which has never been de-

livered, but the burden is upon the carrier to prove that such demand has been made and not complied with. *Jeans v. Seaboard Air Line R. Co.*, 164 N. C. 224, 80 S. E. 242 (1913).

**Bill Must Be Properly Endorsed.**—Where shipper paid the draft and obtained the bill of lading but failed to have it endorsed by a certain bank as required by the terms of the bill, the carrier was not liable for failure to deliver the goods. *Killingsworth v. R. R.*, 171 N. C. 47, 87 S. E. 947 (1916).

§ 21-10. **Justification of carrier in delivery.**—A carrier is justified, subject to the provisions of §§ 21-11, 21-12 and 21-13, in delivering goods to one who is—

1. A person lawfully entitled to the possession of the goods, or

2. The consignee named in a straight bill for the goods; or

3. A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (1919, c. 65, s. 9; C. S., s. 291.)

**§ 21-11. Carrier's liability for misdelivery.**—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 2 and 3 of § 21-10; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

1. Had been requested by or on behalf of a person having a right of property or possession in the goods, not to make such delivery; or

2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (1919, c. 65, s. 10; C. S., s. 292.)

**§ 21-12. Carrier's liability on order bill not cancelled on delivery.**—Except as provided in § 21-27, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (1919, c. 65, s. 11; C. S., s. 293.)

**§ 21-13. Carrier's liability on order bill unmarked to show partial delivery.**—Except as provided in § 21-27, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill has been issued and fails, either—

1. To take up and cancel the bill, or

2. To place plainly upon it a statement that a portion of the goods has been delivered with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. (1919, c. 65, s. 12; C. S., s. 294.)

**§ 21-14. Altered bills.**—Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, whether in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. (1919, c. 65, s. 13; C. S., s. 295.)

**§ 21-15. Lost or destroyed bills.**—Where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction, and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss

incurred by reason of the original bill remaining outstanding. The court may also, in its discretion, order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without an order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been, or shall be, negotiated for value without notice of the proceedings or of the delivery of the goods. (1919, c. 65, s. 14; C. S., s. 296.)

**§ 21-16. Effect of duplicate bills.**—A bill, upon the face of which the word "duplicate," or some other word or words indicating that the document is not an original bill, is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. (1919, c. 65, s. 15; C. S., s. 297.)

**§ 21-17. When title or right of carrier excuses liability for non-delivery.**—No title to the goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of the bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. (1919, c. 65, s. 16; C. S., s. 298.)

**§ 21-18. Interpleader of adverse claimants.**—If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for non-delivery of the goods or as an original suit, whichever is appropriate. (1919, c. 65, s. 17; C. S., s. 299.)

**Cross Reference.** — As to interpleader, new parties by order of court, see § 1-73.

**§ 21-19. Carrier has reasonable time to determine validity of claims.**—If some one other than the consignee or the person in possession of the bill has claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1919, c. 65, s. 18; C. S., s. 300.)

**§ 21-20. Adverse title is no defense except as above provided.**—Except as provided in the preceding sections of this article, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand. (1919, c. 65, s. 19; C. S., s. 301.)

**§ 21-21. Carriers not to insert "shipper's weight, load and count" when goods loaded by carrier.**—When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity, if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation or tariff, "shipper's weight, load and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or, in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 20; C. S., s. 302.)

**§ 21-22. Liability for nonreceipt or misdescription of goods loaded by shipper.**—When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words “shipper’s weight, load, and count,” or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and, if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carrier shall not in such case insert in the bill of lading the words “shipper’s weight,” or other words of like purport; and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. (1919, c. 65, s. 21; C. S., s. 303.)

**Editor’s Note.**—The rule formerly was that when goods were sent “shipper’s load and count” the bill of lading was only prima facie evidence that the carrier received the goods described in it. And where the evi-

dence showed that the loading was all done by the shipper the burden was upon the plaintiff to prove that the goods were actually delivered to the carrier. *Peele v. R. R.*, 149 N. C. 390, 63 S. E. 66 (1908).

**§ 21-23. Liability for nonreceipt or misdescription of goods.**—If a bill of lading has been issued by a carrier, or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to—

1. The owner of goods covered by a straight bill, subject to existing right of stoppage in transit; or

2. The holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue. (1919, c. 65, s. 22; C. S., s. 304.)

**Editor’s Note.**—This section changes the rule which was laid down in *Peele v. R. R.*, 149 N. C. 390, 63 S. E. 66 (1908). For other cases in accord, see *Williams, Black & Co. v. R. R.*, 93 N. C. 42 (1885); *Commercial Bank v. R. R.*, 175 N. C. 415, 95 S. E. 777 (1918). These latter cases went to the extent of holding that where the

carrier had issued a bill of lading “shippers load and count” the carrier was not liable even to a holder of the bill who had taken it for value and without notice. This old doctrine as laid down in these cases is contrary to the modern theory of the negotiability of order bills of lading.

**§ 21-24. Attachment or levy upon goods for which an order bill has been issued.**—If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or other-

wise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. (1919, c. 65, s. 23; C. S., s. 305.)

§ 21-25. **Creditor's remedy to reach order bills.**—A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1919, c. 65, s. 24; C. S., s. 306.)

§ 21-26. **Lien for charges under order bill.**—If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. (1919, c. 65, s. 25; C. S., s. 307.)

§ 21-27. **Effect of sale.**—After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill. (1919, c. 65, s. 26; C. S., s. 308.)

#### ARTICLE 4.

##### *Negotiation and Transfer of Bills.*

§ 21-28. **Negotiation of order bills by delivery.**—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank. (1919, c. 65, s. 27; C. S., s. 309.)

§ 21-29. **Negotiation of order bills by indorsement.**—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. (1919, c. 65, s. 28; C. S., s. 310.)

§ 21-30. **Transfer of bills.**—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right. (1919, c. 65, s. 29; C. S., s. 311.)

**In General.**—The meaning of this section is that a valid transfer of a bill of lading is effected by the holder when he delivers it to a third party with the intention of transferring the title to the property represented thereby. *Lawshe v. R. R.*, 191 N. C. 473, 132 S. E. 160 (1926).

§ 21-31. **Who may negotiate an order bill.**—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver

the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. (1919, c. 65, s. 30; C. S., s. 312.)

**§ 21-32. Rights of person to whom an order bill has been negotiated.**

—A person to whom an order bill has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. (1919, c. 65, s. 31; C. S., s. 313.)

**Cross Reference.**—See note under § 21-8.

**In General.**—The person to be notified on shipment to order of consignor has, by this section, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith

to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. *Watts v. Norfolk Southern R. Co.*, 183 N. C. 12, 110 S. E. 582 (1922).

**§ 21-33. Rights of person to whom a bill has been transferred.**—A

person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods. (1919, c. 65, s. 32; 1919, c. 290; C. S., s. 314.)

**§ 21-34. Right to compel indorsement of negotiable bill.**—Where an

order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1919, c. 65, s. 33; C. S., s. 315.)

**§ 21-35. Warranties on sale of bill.**—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

1. That the bill is genuine;
2. That he has a legal right to transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the bill;
4. That he has a right to transfer the title to the goods, and that the goods are



merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby. (1919, c. 65, s. 34; C. S., s. 316.)

**§ 21-36. Indorser not a guarantor.**—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorser of the bill to fulfill their respective obligations. (1919, s. 65, s. 35; C. S., s. 317.)

**§ 21-37. No warranty implied from accepting payment of a debt.**—A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described. (1919, c. 65, s. 36; C. S., s. 318.)

**Editor's Note.**—The rule which this section lays down is stated by the court in *E. 625 (1908), overruling Finch v. Gregg, 126 N. C. 176, 35 S. E. 251 (1900).* *Mason v. Cotton Co., 148 N. C. 492, 62 S.*

**§ 21-38. When negotiation not impaired by fraud, accident, mistake, duress, conversion, etc.**—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion. (1919, c. 65, s. 37; C. S., s. 319.)

**§ 21-39. Subsequent negotiation.**—Where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. (1919, c. 65, s. 38; C. S., s. 320.)

**§ 21-40. Negotiation defeats vendor's lien.**—Where an order bill has been issued for goods no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transit. Nor shall the carrier be obliged to deliver or be justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. (1919, c. 65, s. 39; C. S., s. 321.)

**§ 21-41. When rights and remedies under mortgages and liens are not limited.**—Except as provided in § 21-40, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien, and obtained possession of them. (1919, c. 65, s. 40; C. S., s. 322.)

## ARTICLE 5.

*Criminal Offenses.*

§ 21-42. **Issuing false bills or violating chapter made felony.**—Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this State, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a felony and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both. (1919, c. 65, s. 41; 1919, c. 290; C. S., s. 323.)

**Cross Reference.**—As to draft attached to bill of lading for intoxicating liquors, etc., see § 18-33.

## Chapter 22.

### Contracts Requiring Writing.

Sec.	Sec.
22-1. Contracts charging representative personally; promise to answer for debt of another.	22-2. Contract for sale of land; leases.
	22-3. Contracts with Cherokee Indians.
	22-4. Promise to revive debt of bankrupt.

§ 22-1. **Contracts charging representative personally; promise to answer for debt of another.**—No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized. (29 Charles II, c. 3, s. 4; 1826, c. 10; R. C., c. 50, s. 15; Code, s. 1552; Rev., s. 974; C. S., s. 987.)

**Cross References.**—As to requirement that promise be in writing to be evidence of new or continuing contract from which statutes may run, see § 1-26. As to requirement for written contract to refrain from business in given territory, see § 75-4.

**Editor's Note.**—This and the following sections of this chapter are generally known as the "statute of frauds," and are based upon the original English "Act for the Prevention of Frauds and Perjuries." As the name indicates, its object was to prevent fraud and perjury; and it was designated by Lord Campbell as the most important piece of judicial legislation of which England can boast. In modern usage the term "statute of frauds" has assumed an exclusive meaning as to the necessity for certain contracts to be in writing. See 13 N. C. Law Rev. 263, for comment on this section.

**The purpose of the statute of frauds** is to prevent fraud upon individuals charged with participation in transactions coming within its purview, and not upon the public at large. *Allison v. Steele*, 220 N. C. 318, 17 S. E. (2d) 339 (1941).

**Contracts within the Statute.**—The relaxing construction of the statute of frauds under which so many cases have been taken out of its operation, which seem to be within its letter, ought not to be extended further than it has already been carried. *Grant v. Naylor*, 4 Cranch (8 U. S.) 224, 2 L. Ed. 603 (1808).

The clause relating to promise to answer for the debt, default, miscarriage, etc., of another does not apply to a promise in respect to debts created at the instance and for the benefit of the promisor. But it applies only to those by which the debt of one party is sought to be charged upon

and collected from another. *Davis v. Patrick*, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826 (1891).

The question always is what the parties mutually understood by the language, whether they understood it to be collateral or a direct promise. *Davis v. Patrick*, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826 (1891).

A promise is an original promise not coming within the statute of frauds if the extension of credit is made to the promisor or if the contract is made for the benefit of the promisor; but if the contract is made with the third person and the promise constitutes a separate and independent contract under which the promisor agrees to pay upon default of the primary debtor, the promise is a collateral agreement and comes within the statute. *Balentine v. Gill*, 218 N. C. 496, 11 S. E. (2d) 456 (1940).

**Contracts Not within the Statute.**—One financially interested in a crop induced the landlord to part with his lien, in order that the tenant might retain possession, and to sign an appeal bond of the tenant, and promised to save the landlord from harm thereon. The landlord was required to pay the bond. It was held that the release of the landlord's lien was sufficient consideration for the promise to save from harm, and the transaction was not within this section. *Jennings v. Keel*, 196 N. C. 675, 146 S. E. 716 (1929).

Plaintiff held assignments covering all funds to become due under a building contract, and was entitled to apply such funds to the extinguishment of claims it held for advancements made to carry on the work. Defendant, surety on the contractors' bond, orally agreed that if allowed to use part of the money received by plaintiff, on

a payment under the contract, to pay claims for labor and materials so the construction could be carried on without going outside of the funds derived from the work, it would pay the balance due plaintiff from the contractors. It was held that such agreement was not within this section. *National Surety Co. v. Jackson County Bank*, 20 F. (2d) 644 (1927).

Where a business run in the name of J. W. J. was in charge of W. P. J., J. W. J.'s son, and J. W. J. being desirous of having goods shipped to W. P. J. permitted them to be shipped in the name of J. W. J. & Son, saying to plaintiff, "you won't lose anything by it," and a payment on account was made by "J. W. J. & Son," this section was held inapplicable. *Noland Co. v. Jones*, 211 N. C. 462, 190 S. E. 720 (1937).

**Section Is Not Applicable to Action on Parol Trust.**—The portion of this section providing in substance that an action on a promise to pay the debt of another may not be maintained unless the agreement upon which it is based shall be in writing, and signed by the party charged, or by some other person lawfully authorized, is not applicable to an action on a parol trust. *Cuthrell v. Greene*, 229 N. C. 475, 50 S. E. (2d) 525 (1948).

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the balance due on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. It was held that the action was one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore this section had no application. *Cuthrell v. Greene*, 229 N. C. 475, 50 S. E. (2d) 525 (1948).

**Or to Promise Creating Original Obligation.** — Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, or is a promise to make good notes transferred in payment of property, the promise is valid although in parol. If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is

a writing; and this is true whether the promise is made at the time the debt is created or not. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629 (1949).

An agreement by a mortgage company with a lumber dealer to pay for lumber to be used in the construction of a building on the mortgaged premises is an original promise which does not come within the purview of the statute of frauds and parol evidence of such agreement is competent. *Pegram-West v. Winston Mut. Life Ins. Co.*, 231 N. C. 277, 56 S. E. (2d) 607 (1949).

The following illustrates when a promise comes within the provisions of this section. If, for instance, two persons come into a store and one buys and the other, to gain him credit, promises the seller, "If he does not pay you, I will", this is a collateral undertaking and must be in writing; but if he says, "Let him have the goods and I will pay", or "I will see you paid", and credit is given to him alone, he is himself the buyer, and the undertaking is original. *Goldsmith v. Erwin*, 183 F. (2d) 432 (1950).

**What Determines Nature of Promise.**—Whether a promise is an original one not coming within the provisions of this section, or a superadded one barred by the statute, does not depend altogether on the form of expression, but the situation of the parties, and whether they understood the promise to be direct or collateral, should also be considered. *Dozier v. Wood*, 208 N. C. 414, 181 S. E. 336 (1935).

Whether a promise is an original one not coming within the statute of frauds, or a collateral one required by this section to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects sought to be accomplished. *Goldsmith v. Erwin*, 183 F. (2d) 432 (1950).

**Oral Agreement of Stockholders to Be Responsible for Merchandise Held Original Promise.**—Defendants agreed orally to be personally responsible for merchandise shipped to a corporation of which they were the main stockholders, and which they later took over. It was held that the agreement was an original promise not coming within the statute of frauds. *Brown v. Benton*, 209 N. C. 285, 183 S. E. 292 (1936).

**Agreement to Furnish Merchandise for Use on Farm.** — Evidence on defendant's statements to plaintiff merchant at the time plaintiff agreed to furnish certain merchandise for use on defendant's farm is held susceptible of the interpretation that defendant's promise to pay therefor

was an original promise not coming within this section, and not a superadded one barred by the statute, and the question of interpretation should have been submitted to the jury. *Dozier v. Wood*, 208 N. C. 414, 181 S. E. 336 (1935).

**A parol promise by owners of building to pay materialmen amount due them by contractor** cannot form the basis of a claim of lien by virtue of this section. *Roberts, etc., Lbr. Co. v. Horton*, 232 N. C. 419, 61 S. E. (2d) 100 (1950).

**Oral Promise by Administrator.** — A promise by the administrator that he would see that a debt of his intestate is paid, or that he would pay it, is void under this section, unless made in writing. *Smithwick v. Shepherd*, 49 N. C. 196 (1856).

**Cut of Representative's Estate.** — The agreement, in order not to be enforceable unless in writing, must be to pay out of the representative's own estate. *Norton v. Edwards*, 66 N. C. 367 (1872).

**Original Undertakings — New Consideration.**—The general rule is that a promise to answer for the debt, default or miscarriage of another for which that other remains liable, must be in writing to satisfy this section. It is otherwise when the other does not remain liable. *Mason v. Wilson*, 84 N. C. 51 (1881).

In other words, if the promise is an original undertaking, it need not be in writing. For example, where the debtor places in the hands of the promisor property for the payment of the debt, and he converts it into money and promises to pay the debt. And if the promise is supported by a new and independent consideration, whether the old debt subsists or not, the case does not fall within the statute. See *Cooper v. Chambers*, 15 N. C. 261 (1833); *Mason v. Wilson*, 84 N. C. 51 (1881); *Whitehurst v. Hyman*, 90 N. C. 487 (1884); *Peale v. Powell*, 156 N. C. 553, 73 S. E. 234 (1911); *Hasty Mercantile Co. v. Bryant*, 186 N. S. 551, 120 S. E. 200 (1923); *Taylor v. Lee*, 187 N. C. 393, 121 S. E. 659 (1924); *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314 (1924). And this is true even where the benefit of the consideration for the promise accrues to a person other than the promisor. *Gainesville, etc., Hospital Ass'n v. Hobbs*, 153 N. C. 188, 69 S. E. 79 (1910). But see *Stanly v. Hendricks*, 35 N. C. 86 (1851); *Threadgill v. McLendon*, 76 N. C. 24 (1877), where it is said that a new consideration does not take the promise out of the operation of the statute. In connection with the rule set out above, see *Sharp v. Tatham*, 205 N. C. 827, 170 S. E. 654 (1933); *Gennett v. Ly-*

*erly*, 207 N. C. 201, 176 S. E. 275 (1934).

The mere fact that there may be a new consideration for the oral promise of a defendant to pay the subsisting debt of another is not sufficient of itself to take the promise out of the prohibition of the statute of frauds. To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629 (1949).

In order for the defendant to fall within the protection of the statute, it must be shown that the debt is that of a third person who still continues liable for the same. If the debt is an original obligation of the defendant, or if the creditor in accepting the promise of the defendant has released a third person who was the original debtor, the statute has no application. *Shepard v. Newton*, 139 N. C. 533, 52 S. E. 143 (1905). The statute does not forbid an oral contract to assume the debt of another who is thereupon discharged of all liability to the creditor, the promisor becoming sole debtor in his stead. *Jenkins v. Holley*, 140 N. C. 379, 53 S. E. 237 (1906).

A promise made at the time or before the debt is created, and where credit is given solely to the promisor, or a promise based on a new consideration between the promisor and the creditor, or a promise for the benefit of the promisor where he has a personal and pecuniary interest in the transaction in which a third party is the original obligor, has been held to be an original promise. *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240 (1911).

Similarly a direct and unconditional promise by one to pay for goods furnished to a third party, made prior to the delivery of the goods, upon the faith of which the goods are delivered is an original undertaking. *Morrison v. Baker*, 81 N. C. 76 (1879); *Garrett Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448 (1902).

In *Hanes Funeral Home v. Spencer*, 214 N. C. 702, 200 S. E. 397 (1939), evidence was held ample to support finding that undertaking by defendant's ward to pay expenses for the funeral of the wife of a close friend was an original promise not coming within the purview of this section.

Where the party promising to pay a debt receives a new and original consideration from the debtor for his promise, this section

does not apply. *Daniels v. Duck Island, Inc.*, 212 N. C. 90, 193 S. E. 7 (1937).

**What Constitutes Collateral Promise.**—Where there is no benefit to the one promising to answer for the debt of another, and the promise does not create an original obligation, but is a collateral promise, merely superadded to the promise of another, the original promisor remaining liable, the collateral promisor is not liable unless there is a writing, whether the promise is made when the debt is created or not. *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143 (1905); *Peele v. Powell*, 156 N. C. 553, 73 S. E. 234 (1911).

Where the promisor says to the creditor "collect from him (the debtor) and if he fails to pay, I will," the undertaking is a collateral one, and not enforceable unless in writing. *Garrett Co. v. Hamill*, 131 N. C. 57, 42 S. E. 448 (1902).

**Promise to Pay Out of Money Placed in Hands of Promisor by Debtor.**—While the statute of frauds does not apply to an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying the debt, evidence tending to show that the debtor entrusted certain funds to the promisor for the purpose of carrying on the debtor's business, without evidence that he entrusted the funds for the specific purpose of paying debtor's debts, is insufficient to bring the promise within this rule. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629 (1949).

**Where purchaser orally agrees in consideration of conveyance to him of property to pay certain debts of his vendor due to a third person, the promise is original and not within the statute.** *Rice v. Carter*, 33 N. C. 298 (1850); *Stanly v. Hendricks*, 35 N. C. 86 (1851).

**Intent of Promisor—How Determined.**—The intent of the promisor to become bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promisor. *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314 (1924).

**Anything which shows the intention or the actual contract of the parties is material, and any evidence which goes to show the real intention of the parties is admissible whether it be by way of conduct or documentary in nature in order to determine whether a promise is an original one not coming within the provisions of this section, or a superadded one barred by this section.** *Goldsmith v. Erwin*, 183 F. (2d) 432 (1950).

**Where a writing or notation is not a continuing guaranty, each order being a separate and independent transaction, the defendant is bound only for the order upon which his guaranty appears.** *Gennett v. Lyerly*, 207 N. C. 201, 176 S. E. 275 (1934).

**Goods Furnished to Son on Father's Credit.**—If goods are furnished to a son upon the promise and credit of the father, the promise need not be in writing; but if the son was the principal debtor and the father merely a surety, the promise must be in writing. *White v. Tripp*, 125 N. C. 523, 34 S. E. 686 (1899).

**Definiteness of Subject Matter of Contract.**—The principle that no contract can be enforced unless the subject matter upon which it is intended by the parties to operate can first be definitely ascertained from its terms, either through an explicit description therein or a reference which points to extrinsic means of identification applies to verbal agreements as well as to those required by this section to be in writing. *Hemphill v. Annis*, 119 N. C. 514, 26 S. E. 152 (1896).

**Evidence of Guarantor's Obligation.**—The obligation of one as guarantor of payment must be evidenced and established by a written agreement, or some written note or memorandum signed by him or some person authorized to sign for him. *Supply Co. v. Finch*, 147 N. C. 106, 60 S. E. 904 (1908); *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314 (1924).

**What Amounts to Contract of Guaranty.**—A telegram that the debtor is a reliable person and that any justifiable claims will be taken care of is insufficient to establish a contract of guaranty or a promise to answer for the debt, etc., of another, in the absence of a promise to pay the debt if the debtor does not pay. *Fain Grocery Co. v. Farly, etc., Co.*, 181 N. C. 459, 107 S. E. 497 (1921).

**Parol Assumption of Mortgage Debt Not within the Statute.**—A promise by a grantee of mortgaged land to assume and pay the amount of the mortgage is not a promise to pay the debt of another required by this section to be in writing, but is a direct obligation of the grantee supported by sufficient consideration. *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898 (1923).

**Agreement to Prevent Sale of Land.**—An agreement in consideration of the extension of an option that the defendant will pay a certain mortgage note owned by the plaintiff or otherwise prevent the sale of the land is not a promise to answer for the debt, etc., of another, within

this section. *Whedbee v. Ruffin*, 189 N. C. 257, 126 S. E. 616 (1925).

**Promise to Guarantee Safety of Money.**

—An oral promise to guarantee the safety of money placed in the promisor's hands for investment is not an agreement to answer for the debt of another within the meaning of this section. *Partin v. Prince*, 159 N. C. 553, 75 S. E. 1080 (1912).

**A promise by the president of a bank to become personally liable for a deposit when supported by a new and independent consideration constitutes an original undertaking by him, and the agreement does not come within the provisions of this section.** *Dillard v. Walker*, 204 N. C. 16, 167 S. E. 636 (1933).

**The guaranty of payment of a deposit made by the vice-president, director and stockholder of the bank was an original promise to answer for the debt, upon sufficient consideration and does not come within the provisions of this section, and upon the insolvency of the bank and loss to the depositor the plea of the statute of frauds is not a valid defense.** *Garren v. Youngblood*, 207 N. C. 86, 176 S. E. 252 (1934).

**The president and treasurer of a corporation who has no personal, immediate and pecuniary benefit in the purchase of materials by the corporation is not an original promisor under this section and may not be held personally liable for the purchase price because of verbal promises to answer for the benefit made in his behalf by the secretary for the corporation as his alleged agent.** *Gennett v. Lysterly*, 207 N. C. 201, 176 S. E. 275 (1934).

**An oral guarantee of genuineness or validity of a note and the liability of the maker to pay it, made by the holder upon a transfer of it for value, is not a promise contemplated by this section to be in writing.** *Adcock v. Fleming*, 19 N. C. 225 (1837); *Ashford v. Robinson*, 30 N. C. 114 (1847); *Rowland v. Rorke*, 49 N. C. 337 (1857).

**Statement of Consideration.**—Under this section, the consideration for a promise to answer need not be contained in the writing. *Green v. Thornton*, 49 N. C. 230 (1856); *Standard Supply Co. v. Person*, 154 N. C. 456, 70 S. E. 745 (1911).

§ 22-2. **Contract for sale of land; leases.**—All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. (29 Ch. II, c. 3, ss. 1,

**Facts Showing Promise within Statute.**

—The evidence was to the effect that a check given by an automobile retailer to plaintiff in payment of a car was returned unpaid, that plaintiff went to the debtor's place of business and that defendant, who was the debtor's brother, and who was handling the business during debtor's illness, told plaintiff to redeposit the check in about two weeks and that if it were not then paid by the bank he would send plaintiff a cashier's check for part and a personal check for the balance. It was alleged that after the debtor's death the defendant and two others purchased the business, but it was not alleged that at the time of the promise defendant contemplated purchasing the business or any interest therein. Held: While the evidence is sufficient to justify a finding that defendant personally promised to pay the check if his brother's funds were insufficient, and plaintiff's forbearance to take any action on the check for a period of two weeks was sufficient consideration for the promise, there is no allegation that the defendant made the promise to obtain any personal advantage from such forbearance, and therefore the promise comes within the statute of frauds, and defendant's motion to nonsuit was properly allowed. *Myers v. Allsbrook*, 229 N. C. 786, 51 S. E. (2d) 629 (1949).

**Question for Jury as to Whether Original Promise Covered Second Transaction.**

—Where evidence tended to show that defendants ordered two or three cars of lumber, both defendants being present and promising to be personally responsible therefor, and after the first car was shipped, one of defendants went to plaintiff and told him to ship another car under the same arrangements, it was sufficient to be submitted to the jury on the question whether the original promise of both defendants, made when both were present, covered the second car as well as the first. *Brown v. Benton*, 209 N. C. 285, 183 S. E. 292 (1936).

**Cited in** *Coxe v. Dillard*, 197 N. C. 344, 148 S. E. 545 (1929); *Newburn v. Fisher*, 198 N. C. 385, 151 S. E. 875 (1930); *Strayhorn v. Aycock*, 215 N. C. 43, 200 S. E. 912 (1939).

2, 3; 1819, c. 1016, P. R.; 1844, c. 44; R. C., c. 50, s. 11; 1868, c. 156, ss. 2, 33; Code, ss. 1554, 1743; Rev., s. 976; C. S., s. 988.)

- I. In General.
- II. What Constitutes an Interest in or Concerning Land.
- III. Sufficiency of Compliance with Section.
  - A. In General.
  - B. The Signature.
  - C. Statement of Consideration.
- IV. Part Performance.
- V. Pleading and Practice.

#### Cross Reference.

See also §§ 43-38 and 47-18.

#### I. IN GENERAL.

**Purpose to Prevent Fraud.**—Contracts within the meaning of this section were required to be in writing, to prevent frauds and perjuries. *Winberry v. Koonce*, 83 N. C. 351 (1880).

This section will not prevent an unwritten promise from being the basis for an action to cancel a deed where the promise was merely a device to accomplish fraud, and the relief sought is not to enforce the promise or to recover damages for its breach. *Mitchell v. Mitchell*, 206 N. C. 546, 174 S. E. 447 (1934).

A suitor will not be permitted to make use of the statute of frauds, not to prevent a fraud upon himself, but to commit a fraud upon his adversary. *Johnson v. Noles*, 224 N. C. 542, 31 S. E. (2d) 637 (1944).

**Who May Plead Statute.**—Any person, plaintiff or defendant, against whom enforcement is sought may plead the statute of frauds against a contract voidable under the statute of frauds. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680 (1946).

**Executory Contracts.**—This section applies to executory and not executed contracts. *Choat v. Wright*, 13 N. C. 289 (1830); *Bailey v. Bishop*, 152 N. C. 383, 67 S. E. 968 (1910); *Rogers v. Lumber Co.*, 154 N. C. 108, 69 S. E. 788 (1910); *Hernon v. Durham, etc., R. Co.*, 161 N. C. 650, 77 S. E. 683 (1913).

This section applies to executory contracts, and not to those that have been executed. *Keith Bros. v. Kennedy*, 194 N. C. 784, 140 S. E. 721 (1927).

Where a contract was for the sale of an automobile in consideration of the conveyance of certain realty, and the vendor executed a good and sufficient deed, it was held that the contract was executed as to the conveyance of lands under this section. *Keith Bros. v. Kennedy*, 194 N. C. 784, 140 S. E. 721 (1927).

**Parol Trusts.**—This section has no application to parol trusts, and does not prohibit

their establishment by parol evidence. *Thompson v. Davis*, 223 N. C. 792, 28 S. E. (2d) 556 (1944).

Where co-tenants of the equity in lands, subject to a mortgage, agreed orally among themselves that one of their number, himself or through another for him, should bid off the lands at foreclosure sale, the other co-tenants refraining from bidding, and hold the same in trust for the benefit of all the co-tenants, to be sold and proceeds divided, after reimbursing the purchaser for his outlay, the agreement was held not in violation of the statute of frauds. *Embler v. Embler*, 224 N. C. 811, 32 S. E. (2d) 619 (1945).

A parol agreement to purchase land and hold it in trust for another is valid and enforceable. *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323 (1921).

But a parol agreement to create a trust, entered into after the purchase of property is void under this section. To establish a parol trust the agreement to hold in trust must have been entered into before or at the sale of the property. *Kelly v. McNeill*, 118 N. C. 349, 24 S. E. 738 (1896).

**Written Agreement to Adopt Minor.**—Where intestate made a written agreement with parents of a minor to adopt minor and make her his sole heir in consideration of the parents agreeing to the adoption, such agreement, being in writing, did not come within the provisions of this section. *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398 (1938).

**Parol Evidence to Establish Contract of Sale.**—Under this section, parol evidence is incompetent to establish agreement to pay purchase price, so as to show that contract was one of sale and not an option, since this is an essential element of a contract of sale and purchase, and an essential element of a contract required to be in writing may not be established by parol. *Kluttz v. Allison*, 214 N. C. 379, 199 S. E. 395 (1938).

**Effect of Noncompliance.**—The contracts which are not entered into in compliance with this section are not void, but voidable merely at the instance of the party charged. And when such party takes advantage of the provisions of the statute, he repudiates the contract in its entirety and cannot derive any benefit from it. For example a vendee cannot recover the money he has paid the vendor under a parol contract which he has repudiated. *Improvement Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952 (1895). They are enforceable unless



the party to be charged takes advantage of the statute. *McCall v. Textile Industrial Inst.*, 189 N. C. 775, 128 S. E. 349 (1925).

Our statute of frauds affects not only the enforcement of contracts coming within its terms but also their validity. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561 (1948).

**Rights of Vendee under Parol Contract.**—The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Union Cent. Life Ins. Co. v. Cordon*, 208 N. C. 723, 192 S. E. 496 (1935), citing *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519 (1892), and *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494, 40 A. L. R. 273 (1925). See *Dupree v. Moore*, 227 N. C. 626, 44 S. E. (2d) 37 (1947).

**Purchaser Takes with Notice of Enforceable Parol Lease.**—Purchaser of real property takes with notice that the premises may be under parol lease for a term not exceeding three years, but beyond that period he is protected by provision that the lease must have been in writing. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107 (1946).

**A parol agreement of the grantee to re-vest title in the grantor** by destroying his deed, comes within the statute of frauds and is voidable at the election of the grantee. *Walker v. Walker*, 231 N. C. 54, 55 S. E. (2d) 801 (1949).

**Resulting Trusts.**—Resulting trusts, which arise by operation of law, do not come within the statute of frauds, and may be proved by parol evidence. *Wilson v. Williams*, 215 N. C. 407, 2 S. E. (2d) 19 (1939).

**Recovery on Quantum Meruit for Services Rendered Pursuant to Parol Contract.**—A parol contract to devise realty in consideration of personal services is unenforceable under the statute of frauds, but where the services have been rendered in reliance upon the promise to devise, the law substitutes in place of the unenforceable promise a valid promise to pay the reasonable worth of the services, and recovery may be had upon quantum meruit, the mainspring of the statute of frauds being to prevent frauds and not to promote them. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764 (1947).

As to recovery on quantum meruit for services rendered pursuant to oral contract to devise, see 26 N. C. Law Rev. 417.

**Applied in** *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948).

**Cited in** *Peele v. Le Roy*, 222 N. C. 123, 22 S. E. (2d) 244 (1942); *Creech v. Creech*, 222 N. C. 656, 24 S. E. (2d) 642 (1943);

*Buford v. Mochy*, 224 N. C. 235, 29 S. E. (2d) 729 (1944); *Williams v. Joines*, 228 N. C. 141, 44 S. E. (2d) 738 (1947).

## II. WHAT CONSTITUTES AN INTEREST IN OR CONCERNING LAND.

**Parol Transfer of Parol Contract.**—A parol transfer of the interest of a purchaser of land under a parol contract is invalid. *Wilkie v. Womble*, 90 N. C. 254 (1884).

**An agreement to buy and sell land at a profit** is not a contract relating to any interest in land which is required to be in writing. It relates only to profits of the land, and is valid even though not in writing. *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323 (1921), citing *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966 (1914).

The section contemplates those transactions in which there is a conveyance of land from one party to another; not those as to ventures for profits in realty. *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323 (1921).

**Agreement That Is Not One to Sell or Convey Land.**—Where plaintiff alleged that his vendor agreed to procure a release of the land from a prior deed of trust upon the payment by the plaintiff of a note given for the balance of the purchase price of the land, and secured by a deed of trust to his vendor, the agreement is not one to sell or convey land, or any interest in or concerning same, and does not come within the provisions of this section. *Hare v. Hare*, 208 N. C. 442, 181 S. E. 246 (1935).

**A dower interest** cannot be surrendered by parol. *Houston v. Smith*, 88 N. C. 312 (1883).

**Partition.**—A contract between tenants in common for the partition in lands is a contract concerning realty, within the meaning of this section. *Anders v. Anders*, 13 N. C. 529 (1830); *Medlin v. Steele*, 75 N. C. 154 (1876); *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685 (1892); *Rhea v. Craig*, 141 N. C. 602, 54 S. E. 408 (1906).

**An oral contract to give or devise real estate** is void by reason of the statute of frauds, and no action for a breach thereof can be maintained. *Daughtry v. Daughtry*, 223 N. C. 528, 27 S. E. (2d) 446 (1943). See *Neal v. Wachovia Bank & Trust Co.*, 224 N. C. 103, 29 S. E. (2d) 206 (1944).

A contract to devise real property comes within the provisions of this section, and performance of services by the promisee as consideration for the contract does not take the contract out of the provisions of the section, and the promisee cannot successfully maintain an action for specific per-

formance of the contract. *Grantham v. Grantham*, 205 N. C. 363, 171 S. E. 331 (1933). See *Coley v. Dalrymple*, 225 N. C. 67, 33 S. E. (2d) 477 (1945).

**Agreement to Bequeath Personalty.**—An agreement to devise realty is within the statute of frauds, and an agreement to bequeath personalty, simpliciter, is not. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764 (1947).

**An indivisible contract to devise real and personal property** comes within the statute of frauds. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561 (1948).

**Crops and Fruit.**—Crops which are produced annually are personal chattels, and a sale of them while growing is only a sale of goods, and not a contract or sale of land, or any interest in or concerning land, under this section. *Brittain v. McKay*, 23 N. C. 265 (1840).

Fruits on trees cannot be reserved by the vendor by a parol agreement. *Flynt v. Conrad*, 61 N. C. 190 (1867).

**Standing Timber.**—A contract conveying standing timber is a contract concerning realty. *Mizell v. Burnett*, 49 N. C. 249 (1857); *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539 (1903); *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884 (1905); *Ives v. Railroad*, 142 N. C. 131, 55 S. E. 74 (1906).

Growing trees are a part of the land, and a contract for the sale thereof comes within the meaning and intent of the statute of frauds. *Johnson v. Wallin*, 227 N. C. 669, 44 S. E. (2d) 83 (1947).

**A contract of the owner of land to sell at a stipulated price all logs which the owner should cut** from the tract is not a contract affecting realty within the meaning of this section, since the cutting and delivery of the logs would constitute a conversion of the standing timber from real property into personalty. *Walston v. Lowry*, 212 N. C. 23, 192 S. E. 877 (1937).

**Guaranty of Acreage.**—A vendor's guaranty of the number of acres need not be in writing. *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476 (1896); *Sterne v. Benbow*, 151 N. C. 460, 66 S. E. 445 (1909).

Also an agreement between vendor and purchaser that the latter shall have the land surveyed, and that if it falls short the vendor shall refund pro tanto, need not be in writing. *Sherrill v. Hagan*, 92 N. C. 345 (1885).

**Equitable Estates.**—A parol contract of sale of an equitable estate in land is void. *Holmes v. Holmes*, 86 N. C. 205 (1882).

**Mortgage Absolute in Form.**—For discussion of effect of this section upon mortgage deeds absolute in form, see 26 N. C. Law Rev. 405.

**Parol Release of Mortgage.**—An agreement to terminate the relationship of a mortgagor and mortgagee does not fall within the intent and meaning of this section. Hence a parol contract to release a part of the mortgaged property is valid and enforceable. *Hemmings v. Doss*, 125 N. C. 400, 34 S. E. 511 (1899); *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210 (1923). This is upon the theory that the mortgagee does not, by the mortgage, acquire an interest in land (but a mere lien in equity), and hence his release does not transfer back an "interest" in land.

Where a mortgagee agreed by parol to release the mortgage to a purchaser of the land from the mortgagor, the mortgagee was held estopped to deny the validity of the agreement under the statute of frauds. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210 (1923).

**Lease for One Year with Provision for Renewals.**—An oral lease of realty for one year, together with provision for annual renewals for four successive years, is but a single contract, the agreement for renewal being a part of and inseparable from lease for the original term, and holding for extended term would be under the original oral lease, and contract may not be divided so as to validate it for the initial period and disregard the other portion of the contract. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107 (1946).

**A parol lease for three years** is not within the statute. It must be for a term exceeding three years. *Smithdeal v. McAdoo*, 172 N. C. 700, 90 S. E. 907 (1916).

A parol lease agreement for more than three years is void. *Barbee v. Lamb*, 223 N. C. 211, 34 S. E. (2d) 65 (1945).

In order to determine whether a lease is for more than three years or not the computation must be made from the time of making the agreement to lease, and not from the time of its going into effect. Hence a parol agreement of lease for three years to commence in futuro is voidable by the lessor and renders the tenant a tenant at will. *Falkner v. Hunt*, 73 N. C. 571 (1875); *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372 (1920).

Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building, the lease for three years to take effect in the future comes within the provisions of the statute of frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was

executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized. *Sammox Inv. Co. v. Zindel*, 198 N. C. 109, 150 S. E. 704 (1929).

**Lease for Duration of Life Estate.**—An agreement by the remainderman to rent the locus in quo from the life tenant for the entire period of the life estate is for an indefinite term and one which may last beyond three years and therefore such agreement comes within this section. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680 (1946).

**Assignment of Lease.**—A verbal assignment of an unexpired lease to continue more than three years is void under this section. *Alexander v. Morris*, 145 N. C. 22, 58 S. E. 600 (1907).

**Negative Easement.**—A restriction on the use of land being in effect a negative easement is an interest in land required under this section to be contracted for in writing. *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697 (1925).

Where land in a development is sold by deeds containing certain restrictive covenants, the covenants are in the nature of an easement, and it would seem that ordinarily such easement may not be released by parol agreement. *Moore v. Shore*, 206 N. C. 699, 175 S. E. 117 (1934).

**Party Walls.**—The right to contribution for costs of a party wall is implied in law regardless of the promise; and hence enforceable notwithstanding that the agreement was not in writing. *Reid v. King*, 158 N. C. 85, 73 S. E. 168 (1911).

**Creation of Mill Dam.**—A permanent right to overflow land by the erection and maintenance of a mill dam cannot be created by parol. *Bridges v. Purcell*, 18 N. C. 492 (1836).

**Judicial Sales.**—Judicial sales were not within the contemplation of the legislature at the time of making this enactment. *Tate v. Greenlee*, 15 N. C. 149 (1833).

**Judgment.**—The statute of frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument. *Winberry v. Koonce*, 83 N. C. 351 (1880).

### III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

#### A. In General.

**No special form or instrument is required.** A letter, note, bill or draft is sufficient. *Neaves v. North State Min. Co.*, 90 N. C. 412 (1884).

**But Memorandum Must Show Essential Elements of Valid Contract.**—In order to

constitute an enforceable contract within the provisions of this section, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol. *Smith v. Joyce*, 214 N. C. 602, 200 S. E. 431 (1939).

**A promissory note for the purchase price** signed and given by the purchaser is not such a contract or memorandum thereof. *Burriss v. Starr*, 165 N. C. 657, 81 S. E. 929 (1914).

**The memorandum need not be contained in a single document** but may consist of several papers properly connected together. *Smith v. Joyce*, 214 N. C. 602, 200 S. E. 431 (1939).

**Letters addressed to third party may be used** against the writer as a memorandum of it. Such writings are sufficient evidence of the contract to warrant the court in giving effect to it. *Mizell v. Burnett*, 49 N. C. 249 (1857); *Nicholson v. Dover*, 145 N. C. 18, 58 S. E. 444 (1907).

**Series of Letters Construed Together.**—A series of letters, telegrams or other papers, documents, etc., signed as required by this section, will be construed together, and when the contract appears to be complete, the omission in some of the writings will be supplied by the others. *Simpson v. Burnett County Lumber Co.*, 193 N. C. 454, 137 S. E. 311 (1927).

**As to Seal.**—The statute of frauds does not require a contract for the sale of land to be under the seal of the party to be charged. *Simmons v. Spruill*, 56 N. C. 9 (1856); *Stephens v. Midyette*, 161 N. C. 323, 77 S. E. 243 (1913).

A seal is not necessary to the validity of a lease regardless of the length of the term, and the common law, which did not require leases to be in writing, is in full force and effect, modified only by the requirement of this section that a lease of more than three years be in writing. *Moche v. Leno*, 227 N. C. 159, 41 S. E. (2d) 369 (1947).

**Receipts for principal and interest and for taxes**, in which no mention is made of any agreement by the person signing same to sell or convey land, are insufficient under the provisions of this section. *Chason v. Marley*, 224 N. C. 844, 32 S. E. (2d) 652 (1945).

**The admissions of the parties in their pleadings** may stand for the writing. *Sandlin v. Kearney*, 154 N. C. 596, 70 S. E. 942 (1911).

**Mere Recital of Agreement in Pleading Is Not Waiver of Statute.**—A party is not estopped by his pleading from asserting the defense of the statute of frauds unless the pleading asserts the voidable contract as a necessary basis for the relief sought, and the mere recital of the parol agreement in the pleading does not adopt it or ratify it or waive the right to thereafter assert the statute in subsequent pleadings. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680 (1946).

**Time of Making Memorandum.**—The written memorandum required by this section need not necessarily be made at the time of the agreement. Even if made thereafter, if otherwise good, it will be valid. *Mizell v. Burnett*, 49 N. C. 249 (1857); *McGee v. Blankenship*, 95 N. C. 563 (1886); *Winslow v. White*, 163 N. C. 29, 79 S. E. 258 (1913); *McCall v. Lee*, 182 N. C. 114, 108 S. E. 390 (1921).

**Contract Partly Written and Partly Oral.**—A contract for the sale of land may be partly verbal and partly in writing, unless the writing purports to embrace all the contract. Thus where the vendor upon a conveyance by deed, verbally agreed that he would make good any deficiency in the acreage, it was held that this section did not require the agreement as to the quantity to be embraced by the written contract or deed. *McGee v. Craven*, 106 N. C. 351, 11 S. E. 375 (1890).

**What the Writing Must Contain.**—In order that a contract falling within the sphere of this section be enforceable it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement which must have been signed as required by the section. *Gwathmey v. Cason*, 74 N. C. 5 (1876); *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104 (1904).

**Writing Must Describe Subject Matter.**—In order to take an agreement relating to land out of the statute of frauds, the writing must describe the subject matter with certainty or refer to matters aliunde from which the description can be made certain. *Searcy v. Logan*, 226 N. C. 562, 39 S. E. (2d) 593 (1946).

**Memorandum Inconsistent with Contract.**—Where the memorandum of a contract partly in parol was inconsistent with the terms of the contract, it was held that the memorandum not being the contract between the parties, the plaintiff suing under the parol contract is not entitled to recover. *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729 (1923).

Even though the contract be informally and awkwardly expressed in the writing,

yet if its nature, scope and purpose clearly appear from it, there is a sufficient compliance with the requirements of this section. *Mayer v. Adrian*, 77 N. C. 83 (1877); *Farmer v. Batts*, 83 N. C. 387 (1880); *Thornburg v. Masten*, 88 N. C. 293 (1883); *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486 (1889).

The vendor of lands in substantial conformity with his parol agreement tendered the vendee a deed to the lands, which the latter refused because the amount of the agreed purchase price had been increased, and after the vendor had sold the lands the vendee brought an action for damages. It was held that the deed tendered was a sufficient writing within the statute of frauds to bind the vendor, and the vendee could recover damages sustained by defendant's breach of contract to convey. *Oxendine v. Stephenson*, 195 N. C. 238, 141 S. E. 572 (1928).

**Sufficiency of Description.**—This section does not render void a contract which contains a defective description merely. It only requires that the contract be in writing and signed by the party to be charged. *Improvement Co. v. Guthrie*, 116 N. C. 351, 21 S. E. 952 (1895).

A written contract to convey the grantor's entire tract of land consisting of 146 acres was, under the circumstances of the case, held to be sufficiently certain as to the land conveyed, so as to admit parol evidence in regard to the identity of the land without violating the statute of frauds. *Norton v. Smith*, 179 N. C. 553, 10 S. E. 14 (1920). See *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256 (1896), where it is said that a defective description cannot be aided by parol testimony because that would mean no substitute by parol an essential portion of a contract required by this section to be in writing; though mistakes can be corrected and ambiguities explained by parol.

Where the calls of a deed are sufficiently definite, the locations cannot be changed by parol agreement unless contemporaneous. *Haddock v. Leary*, 148 N. C. 378, 62 S. E. 426 (1908).

The following memorandum found in the books of the defendant's intestate was held too vague and uncertain to take the contract out of the statute: "1841, W. P. to H. C. O. Dr. To 4 loads of Rock, one lot at one year's credit, \$125." *Plummer v. Owens*, 45 N. C. 254 (1853).

The memorandum of a sale of standing timber must be sufficiently definite in its essential elements to comply with the requirements of the statute of frauds to enable the court to decree specific performance; but latent ambiguities may be ex-

plained by parol evidence. *Camp Mfg. Co. v. Jordan*, 292 F. 182 (1923). See also, *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729 (1923).

When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. *Norton v. Smith*, 179 N. C. 553, 103 S. E. 14 (1920); *Gilbert v. Wright*, 195 N. C. 165, 141 S. E. 577 (1928).

Agreement "to buy the vacant lot," from the vendor was held not unenforceable under this section where the evidence showed that it was the only lot owned by the vendor anywhere. *Gilbert v. Wright*, 195 N. C. 165, 141 S. E. 577 (1928).

A memorandum "Received of C. L. \$50.00 for home place where he now lives which he has no deed for" dated and signed by the owner of land is sufficiently definite to admit of parol evidence for the purpose of identifying the land, and memorandum being sufficient under statute of frauds, purchaser may introduce another receipt executed by owner, even though it does not purport to identify the land, and show by parol that it was part of the consideration for the land contracted to be conveyed. *Searcy v. Logan*, 226 N. C. 562, 39 S. E. (2d) 593 (1946).

**Deed Held to Be a Sufficient Writing.**—A deed duly executed and acknowledged and found among the valuable papers of the grantor after his death is a sufficient writing within the meaning of the statute of frauds of a contract of grantor to convey the lands to the grantees in consideration of grantees' taking care of grantor for the remainder of his life. *Austin v. McCollum*, 210 N. C. 817, 188 S. E. 646 (1936).

### B. The Signature.

**What Constitutes Signing.**—The signing of a paper-writing or instrument is the affixing of one's name thereto with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. *McCall v. Textile, etc., Co.*, 189 N. C. 775, 128 S. E. 349 (1925).

**Actual Signature—Position Immaterial.**—Although the place of the signature upon the writing of the party to be charged is immaterial, and such party need not necessarily "subscribe" the writing, yet there must be a writing in which such party must have put his name with the intention

of signing it. Thus where the plaintiff, the purchaser, gave for the purchase price a note to the defendant which was filled in by the latter payable to his own name, it was held that the note was not signed by the defendant, since filling in the note with his own name was not equivalent to signing it. *Burriss v. Starr*, 165 N. C. 657, 81 S. E. 929 (1914).

This section is satisfied when the writing contains the signature anywhere in the instrument. *Flowe v. Hartwick*, 167 N. C. 448, 83 S. E. 841 (1914).

**Subscribing or Signing.**—This section does not require that the memorandum of sale be "subscribed," it only requires that it be signed. Hence the signing by the auctioneer of the name of the highest bidder on the side of a printed advertisement is a sufficient signing of the contract. *Devereux v. McMahan*, 108 N. C. 134, 12 S. E. 902 (1891); *Proctor v. Finley*, 119 N. C. 536, 26 S. E. 128 (1896).

**Mark Sufficient.**—When written by the party to be charged, a mark of an illiterate person is a sufficient signature to fulfill the requirement of the statute. *Devereux v. McMahan*, 108 N. C. 134, 12 S. E. 902 (1891).

**The phrase "the party to be charged"** does not necessarily refer to the vendor, it may refer to the vendee. The party to be charged, within the meaning of the section is the defendant in the action, whoever he may be. *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104 (1904).

In a suit for the specific performance of a contract to convey land the "party to be charged" is the vendor, and hence the contract must have been signed by him. The vendee does not fulfill the condition imposed on him to show that the statute has been complied with, by a writing by which he alone is bound. *Clegg v. Bishop*, 188 N. C. 564, 125 S. E. 122 (1924).

The "party to be charged" under this section is the one against whom the relief is sought; and if the contract is sufficient to bind him, he can be proceeded against, though the others could not be held because, as to them, the statute is not fully complied with. *Lewis v. Murray*, 177 N. C. 17, 97 S. E. 750 (1919).

Thus a contract in writing to sell land, signed by the vendor is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser. *Mizell v. Burnett*, 49 N. C. 249 (1857).

The statute requires that the writing be signed by the party to be charged. So, if A contract in writing to sell land to B, the former's promise being in writing and

signed, but the latter's not, A would be bound to perform, but B would not. *Mizell v. Burnett*, 49 N. C. 249 (1857); *Durham Consol. Land, etc., Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952 (1895).

**Member of Corporation or Partner May Sign.**—Under the clause "or by some other person by him thereto lawfully authorized" a member of a corporation or a partner is a competent agent to sign for the corporation or partnership. *Neaves v. Mining Co.*, 90 N. C. 412 (1884).

**Signature of Agent.**—If signed by one who is proved or admitted by the principal to have been authorized as agent, it is a sufficient compliance with the statute if the agent sign his own name instead of that of his principal by him. *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16 (1892).

Where the agent is the one by whom the contract or the memorandum is signed, the authority of the agent to sign it for his principal need not have been given in writing. And even a subsequent ratification of an unauthorized signing will suffice. *Johnston v. Sikes*, 49 N. C. 70 (1856).

It is not necessary that the name of the principal or his relation to the transaction shall appear upon the writing itself or in the form of the signature. *Neaves v. Mining Co.*, 90 N. C. 412 (1884).

**Ordinance, Resolution or Vote.**—An ordinance, resolution or vote of a municipal corporation, accepting a lease or contract tendered, does not constitute a signing within the meaning of the statute. *Wade v. New Bern*, 77 N. C. 460 (1877).

#### C. Statement of Consideration.

**Contract Must Fix the Price.**—A contract for the sale of land or any interest therein, must fix the price, and where it does not, plaintiff cannot establish by parol evidence a change as to one of the essential terms of the contract as this would open the door to "all the mischiefs which the statute was intended to prevent." *Harvey v. Linker*, 226 N. C. 711, 40 S. E. (2d) 202 (1946).

**Whether oral or in writing,** the contract must have a consideration to support it. *Draughan v. Bunting*, 31 N. C. 10 (1848); *Stanly v. Hendricks*, 35 N. C. 86 (1851); *Combs v. Harshaw*, 63 N. C. 198 (1869); *Haun v. Burrell*, 119 N. C. 544, 26 S. E. 111 (1896). But if in writing, the consideration need not appear in the writing, and may be shown by parol. *Nichols v. Bell*, 46 N. C. 32 (1853); *Haun v. Burrell*, 119 N. C. 544, 26 S. E. 111 (1896); *Peele v. Powell*, 156 N. C. 553, 73 S. E. 234 (1911); *Bateman v. Hopkins*, 157 N. C. 470, 73 S.

E. 133 (1911); *Lewis v. Murray*, 177 N. C. 17, 97 S. E. 750 (1919).

But see *Hall v. Misenheimer*, 137 N. C. 183, 49 S. E. 104 (1904), where it is said that a memorandum of a contract for the sale of land is not good as against the vendee unless it shows the price to be paid.

**Change of Purchase Price in Option.**—Where purchase price of land was changed in an option it constituted a new contract, unenforceable unless signed by the parties to be charged. *Harvey v. Linker*, 226 N. C. 711, 40 S. E. (2d) 202 (1946).

#### IV. PART PERFORMANCE.

**In General.**—The doctrine which prevails in many states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in land exempts such agreement from the operation of the statute of frauds, is not recognized in this State under this section which declares such agreements to be void and of no effect. *Ellis v. Ellis*, 16 N. C. 342 (1829); *Kivett v. McKeithan*, 90 N. C. 106 (1884). In such a case, however, the party who has advanced the purchase price or has made improvements shall be refunded his advances. *Kivett v. McKeithan*, supra; *Barnes v. Brown*, 71 N. C. 507 (1874); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900); *Smithdeal v. McAdoo*, 172 N. C. 700, 90 S. E. 907 (1916). But see the dissenting opinion of Judge Douglas, in *Luton v. Badham*, supra. See also *Albea v. Griffin*, 22 N. C. 9 (1838); *Dunn v. Moore*, 38 N. C. 364 (1844); *Plummer v. Owens*, 45 N. C. 254 (1853), where cases were held not within statute.

#### V. PLEADING AND PRACTICE.

**Estoppel by Pleading.**—See *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680 (1946).

**When Statute Is Pleaded, Parol Evidence Is Incompetent.**—When the statute of frauds is specifically pleaded, testimony of a contract or promise to lease land exceeding in duration three years from making thereof, resting entirely in parol, is incompetent. *Wright v. Allred*, 226 N. C. 113, 37 S. E. (2d) 107 (1946).

**Defendant's failure to object to parol evidence** offered to show the existence of the contract is not a waiver of his defense of the statute of frauds, a fortiori if the evidence admitted without objection does not tend to show the existence of the contract but tends only to support a recovery on implied assumpsit, since the denial of the contract casts the burden on plaintiff to

establish his cause of action by legal evidence. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561 (1948).

**Complaint Good in Ejectment Independent of Contract.**—Where plaintiff alleged that he was life tenant of realty and defendant, remainderman, was in possession under parol agreement to pay a stipulated sum yearly rental to the life tenant, with proviso that the amount should be increased as his necessities might require, that he had demanded an increased rental which defendant had refused to pay, and that he had thereupon demanded possession and defendant admitted allegations except increase of rental, it was held that complaint was good in action in ejectment independently of rental contract, and plaintiff was not estopped from pleading the statute of frauds in his reply. *Davis v. Lovick*, 226 N. C. 252, 37 S. E. (2d) 680 (1946).

**General Issue or General Denial.** — A party may rely on the statute of frauds under the general issue or a general denial. *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900); *Winders v. Hill*, 144 N. C. 614, 57 S. E. 456 (1907).

In a suit to enforce specific performance of an oral contract to convey land, the denial of the contract in the answer raises the defense of the statute of frauds. *Grady v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760 (1944).

In an action on a contract to convey land, the defense being that the contract is not in writing as required by this section the parties sought to be charged may simply deny the contract or plead the statute of frauds, or they may do both, and if either plea is made good the contract cannot be enforced. *Chason v. Marley*, 224 N. C. 844, 32 S. E. (2d) 652 (1945).

Denial of the contract as alleged is sufficient to raise the defense of the statute of frauds, since it places the burden upon plaintiff of establishing the contract by competent evidence, and if the contract be within the statute, the writing itself is the only competent evidence to prove its existence. *Jamerson v. Logan*, 228 N. C. 540, 46 S. E. (2d) 561 (1948).

A denial of the contract as alleged is equivalent to a plea of the statute. *McCall v. Textile Ind. Inst.*, 189 N. C. 775,

128 S. E. 349 (1925).

But see *Curtis v. Piedmont, etc.*, Min. Co., 109 N. C. 401, 13 S. E. 944 (1891), where it is held that in an action on a contract for lumber the defendant in order to avail himself of the defense of the statute of frauds should plead it specifically. See also, *Ebert v. Disher*, 216 N. C. 36, 3 S. E. (2d) 301 (1939).

**Demurrer.**—The statute of frauds cannot be taken advantage of by demurrer, since that admits the contract. The contract is valid and binding unless the invalidity, by reason of the statute, is set up by the answer. *Hemmings v. Doss*, 125 N. C. 400, 34 S. E. 511 (1899); *Stevens v. Midyette*, 161 N. C. 323, 77 S. E. 243 (1913).

The provisions of this section may not be taken advantage of by demurrer. *McCampbell v. Valdese Bldg., etc., Ass'n*, 231 N. C. 647, 58 S. E. (2d) 617 (1950).

Procedurally, the defense of the statute of frauds cannot be taken advantage of by demurrer; it can only be raised by answer. This may be done in either of two ways: The defendant may plead the statute, in which case when it develops on the trial that the contract is in parol, it must be declared invalid; or the defendant may enter a general denial, and on trial may object to the parol evidence to establish the contract, which will be equally fatal to the maintenance of the action. *Embler v. Embler*, 224 N. C. 811, 32 S. E. (2d) 619 (1945).

**Record on Appeal.** — Where upon appeal, the insufficiency of letters to constitute a valid contract under this section is sought to be raised, the contents of the letters must appear upon the record. *Layton v. Godwin*, 186 N. C. 312, 119 S. E. 495 (1923).

**Oral Arbitration.**—An oral agreement of arbitration as to real property cannot be enforced. *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685 (1892).

**Issues as to title of land** cannot be shown by parol. *Cox v. Ward*, 107 N. C. 507, 12 S. E. 379 (1890); *Presnell v. Garrison*, 129 N. C. 595, 29 S. E. 839 (1898).

**Discharge by Matter in Pais.**—A written contract for the sale of land can be discharged by matter in pais. *Miller v. Pierce*, 104 N. C. 389, 10 S. E. 554 (1889).

**§ 22-3. Contracts with Cherokee Indians.**—All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe

the same: Provided, that this section shall not apply to any person of Cherokee Indian blood or any Cherokee Indian who understands the English language and who can speak and write the same intelligently. (R. C., c. 50, s. 16; Code, s. 1553; Rev., s. 975; 1907, c. 1004, s. 1; C. S., s. 989.)

**Defense Concluded by Judgment.** — While, under this section, there may be defenses available against a contract, if they are not availed of before a judgment is rendered, the judgment is *res adjudicata*. *Rogers v. Kimsey*, 101 N. C. 559, 8 S. E. 159 (1888).

**One Party White.**—This section applies as well where the contract is between two Indians as where one of the parties is white. *Lovingood v. Smith*, 52 N. C. 601 (1860); *State v. Ta-Cha-Na-Tah*, 64 N. C. 614 (1870).

§ 22-4. **Promise to revive debt of bankrupt.**—No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise is in writing and signed by the party to be charged therewith. (1899, c. 57; Rev., s. 978; C. S., s. 990.)

**Editor's Note.**—See 13 N. C. Law Rev. 60, for possible construction of this section.

Whether this section is applicable to a promise made subsequent to the filing of

the petition in bankruptcy but before the order of discharge is entered, *quaere*. *Westall v. Jackson*, 218 N. C. 209, 10 S. E. (2d) 674 (1940).



## Chapter 23. Debtor and Creditor.

### Article 1.

#### Assignments for Benefit of Creditors.

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### ARTICLE 1.

#### *Assignments for Benefit of Creditors.*

- § 23-1. Debts mature on execution of assignment; no preferences.

—Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated. (1893, c. 453; Rev., s. 967; 1909, c. 918, s. 1; C. S., s. 1609.)

**Cross References.** — As to homestead and exemptions, see § 1-369 and notes. As to preferences in the absence of assignment, see notes to § 39-15—analysis line, "Rights and Remedies of Creditors."

**Definition.**—An assignment for the benefit of creditors has been defined as "an assignment whereby a debtor, generally an insolvent, transfers to another his property, in trust to pay his debts or apply the property upon their payment." Black's Law Dict.

**What Constitutes an Assignment.**—The Supreme Court has held that where a person, who is insolvent, makes an assignment of practically all his property to secure a pre-existing debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result. *Nat'l Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2 (1895); *Nat'l Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333 (1895); *Glanton v. Jacobs*, 117 N. C. 427, 23 S. E. 335 (1895); *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417 (1898); *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475 (1898); *Brown v. Nimocks*, 124 N. C. 417, 32 S. E. 743 (1899); *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197 (1900); *Odom v. Clark*, 146 N. C. 544, 60 S. E. 513 (1908); *Powell Bros. v. Lumber Co.*, 153 N. C. 52, 68 S. E. 926 (1910); *Bank v. Tobacco Co.*, 188 N. C. 177, 124 S. E. 158 (1924).

**Same—Deed to Secure Advancements.**—Where the purpose of a deed is to secure payment not only of pre-existing debts but also of debts to be contracted for advancements to aid grantors in carrying on their business then said deed is not a voluntary deed of assignment for the benefit of creditors, within the meaning of this and the following section. *Commissioner of Banks v. Turnage*, 202 N. C. 485, 163 S. E. 451 (1932).

**Same—Mortgage.**—Where a mortgage is made of the entirety of a large estate for pre-existing debts (omitting only an insignificant remnant of property) the mortgage is in effect an assignment for the benefit of creditors secured therein. *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2

(1895); *National Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333 (1895).

**Same—Chattel Mortgages.**—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a pre-existing debt on practically all of its property, will be treated as an assignment and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. *Banking, etc., Co. v. Tobacco Co.*, 188 N. C. 177, 124 S. E. 158 (1924).

But a chattel mortgage on a stock of goods, securing the purchase price, cannot be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155 (1925).

A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of this section as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent. *Vanderwal v. Vanco Dairy Co.*, 200 N. C. 314, 156 S. E. 512 (1931).

**By Whom Made—Corporations.**—A corporation, through its proper officers, may make an assignment for the benefit of creditors. *Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135 (1892).

**Same—Partnership.**—In *Tracy v. Tuffly*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879 (1890), it is held that a partnership, whether general or limited, may, through its proper officers, make an assignment for the benefit of creditors.

**Same—Trustees.**—In accordance with the rule that trustees must unite to pass any title to property jointly held by them, where there are two or more trustees of the property of insolvents, all should join therein. *Wilber v. Almy*, 12 How. (53 U. S.) 180, 13 L. Ed. 944 (1851).

**Applies to Sureties.**—The provision that all debts of the maker become due at once applies to the sureties upon a note of the assignor. *Pritchard v. Mitchell*, 139 N. C. 54, 51 S. E. 783 (1905).

**Effect of Void Assignment.**—If a deed

of assignment for the benefit of creditors becomes void as to creditors its primary and essential purpose is defeated, and it is totally invalid. The assignee does not take the property for his own benefit, but for the benefit of the creditors, and while he holds the legal title they are really the equitable owners to the extent of their claims. Whatever defeats their interest defeats the object of the trust and, consequently, the trust itself. *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417 (1898).

**Same—Fraud Need Not Be Shown.**—A voluntary conveyance, declared invalid for not complying with the provisions of this and the following sections, is not only void as to bona fide unsecured creditors, but inter partes; and hence it would be unnecessary for such creditors to show fraud in its procurement in order to set it aside. *Powell Brothers v. Lumber Company*, 153 N. C. 52, 68 S. E. 926 (1910).

**What Constitutes a Preference.** — No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors. *Mascot Stove Mfg. Co. v. Turnage*, 183 N. C. 137, 110 S. E. 779 (1922).

**Same—When Certain Creditors Omitted.** — An assignment for the benefit of creditors, omitting certain other creditors, is invalid as a preference. *Taylor v. Lauer*, 127 N. C. 157, 37 S. E. 197 (1900).

**Effect of Subsequent Bankruptcy.** — Where an assignment for the benefit of creditors was made under this section more than four months before the debtor was adjudged a bankrupt under the federal law, the assignment was valid and whatever was done under it was valid. The court of bankruptcy cannot take retroac-

tive cognizance of trusts beyond four months and hence will merely administer the estate as it exists at the time of the adjudication. In *re Carver*, 113 F. 138 (1902).

**Assignment Irrevocable.** — It has been held in *Barings v. Dabney*, 19 Wall. (86 U. S.) 1, 22 L. Ed. 90 (1873), that a voluntary assignment for the benefit of creditors, if assented to by the creditors, or a considerable portion of them, becomes irrevocable.

**Former Provisions.**—This section formerly contained the following paragraph: "A schedule of all preferred debts shall be filed under oath by the assignor in the office of the clerk of the superior court of the county in which such assignment is made, stating the names of the preferred creditors, the amount due each, when the debt was made, and the circumstances under which the said debt was contracted, and the said schedule shall be filed within five days of the registration of such deed of assignment."

The object of the act was to give the creditors a convenient opportunity of ascertaining the nature of the preferences, and to put such information, verified by the oath of the assignor, in such form and place as to be equally accessible to all. The provision was construed as mandatory. *Frank v. Heiner*, 117 N. C. 79, 23 S. E. 42 (1895); *National Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333 (1895); *Glantou v. Jacobs*, 117 N. C. 427, 23 S. E. 335 (1895); *Brown & Co. v. Nimocks*, 124 N. C. 417, 420, 32 S. E. 743 (1899).

For other cases construing this provision, see *Brannock v. Brannock*, 32 N. C. 428 (1849); *Cooper v. McKinnon*, 122 N. C. 447, 29 S. E. 417 (1898).

**§ 23-2. Trustee to file schedule of property.**—Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, an inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and when further property of any kind not included in any previous return comes to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof. (1893, c. 453, s. 2; Rev., s. 968; C. S., s. 1610.)

**Section Mandatory.**—An assignment for the benefit of creditors is void unless the formalities of this section are complied with as to filing an inventory of the property, and will be set aside at the suit of a creditor whose debt is not therein provided for. *Odum v. Clark*, 146 N. C. 544, 60 S. E. 513 (1908).

If the provisions of this section are not complied with, the deeds of trust are void. *Virginia Trust Co. v. Pharr Estates*, 206 N. C. 894, 175 S. E. 186 (1934).

**Cited in** *Flowers v. American, etc., Chemical Co.*, 199 N. C. 456, 154 S. E. 736 (1930).

**§ 23-3. Trustee to recover property conveyed fraudulently or in preference.**—It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a pre-existing debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer. (1909, c. 918, s. 2; C. S., s. 1611.)

**Editor's Note.**—For a discussion of preference under the Bankruptcy Act, see *Wilson v. Taylor*, 154 N. C. 211, 70 S. E. 286 (1911).

**General Effect of Section.**—On proper consideration of this section, its terms and purpose, it is clear that the legislature intended to prohibit and avoid, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt and within four months of a general assignment by his debtor, acquires title to such debtor's property or any interest therein or lien thereon, when he knew or had reasonable ground to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11 (1912); *Teague v. Howard Grocery Co.*, 175 N. C. 195, 95 S. E. 173 (1918).

**Preferences Valid at Common Law.**—A debtor unable to pay his indebtedness in full, has an undoubted right, in the absence of a statute, to make preferences in the distribution of his property among the creditors, when the appropriation is absolute and with no reservation for his own benefit to the injury of creditors unprovided for. *Guggenheimer v. Brookfield*, 90 N. C. 232 (1884).

At common law a debtor may, in the exercise of the power arising from the ownership of property, if acting conscientiously and without collusion, prefer certain of his creditors to the detriment or exclusion of the others. *United States Rubber Co. v. American Oak Leather Co.*, 181 U. S. 434, 21 S. Ct. 670, 45 L. Ed. 938 (1901).

**Real and Personal Property Included.**—This section requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in preference, within the four months' period, includes within their meaning both real and personal property, and the general methods by which the title is passed or interest therein created and extends to an executed contract

of sale. *Teague v. Howard Grocery Co.*, 175 N. C. 195, 95 S. E. 173 (1918).

**The Four Months' Period.**—The four months' period mentioned in this section is to be counted from the time the transfer or conveyance was made, and not from the time of its registration. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11 (1912).

**Effect of Preference in Deed.**—A deed of general assignment for the benefit of creditors, by expressly making a prior mortgage of the grantor's property, wherein an unlawful preference is given, subject thereto, will not, of itself, prevent a recovery of the property conveyed in the mortgage by the trustee in the deed in trust for the general creditors. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11 (1912).

**A chattel mortgage on a stock of goods** to secure the purchase price, the mortgagor retaining possession, is not a preference within this section. *Cowan v. Dale*, 189 N. C. 684, 128 S. E. 155 (1925).

**Judgment Not a Preference Prohibited by This Section.**—A judgment duly rendered by a court of competent jurisdiction against a debtor assigning his property to a trustee for the benefit of creditors is not a transfer or conveyance of property by the assignor, although the judgment is rendered within four months prior to the assignment to the trustee, and the judgment is not a preference prohibited by this section, and will not be declared void upon suit of the trustee. *Pritchett v. Tolbert*, 210 N. C. 644, 188 S. E. 71 (1936).

**Execution on Personalty Prior to Registration of Deed of Assignment Creates Prior Lien.**—Where a valid judgment is rendered within four months prior to an assignment for benefit of creditors by the judgment debtor, and execution is issued thereon and personal property of the debtor levied upon prior to the registration of the deed of assignment, the judgment is a lien upon the personal property levied upon prior to the title of the trustee in the deed of assignment. *Pritchett v. Tolbert*, 210 N. C. 644, 188 S. E. 71 (1936).

**Meaning of Insolvent.**—Insolvent means

unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. *Silver Valley Mining Company v. North Carolina Smelting Company*, 119 N. C. 417, 25 S. E. 954 (1896).

**Same—Applied to Corporation.**—A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property sufficient, if converted into money at market prices, to meet its liabilities. *Silver Valley Mining Company v. North Carolina Smelting Company*, 119 N. C. 417, 25 S. E. 954 (1896).

**Debtor Whose Assets Exceed His In-**

**§ 23-4. Substitute for incompetent trustee appointed in special proceeding.**—When a trustee named in a deed of assignment for the benefit of creditors has died or resigned or has in any way become incompetent to execute the trust, the clerk of the superior court of the county wherein said deed of assignment has been registered is authorized and empowered, in a special proceeding in which all persons interested have been made parties, to appoint some discreet and competent person to act as such trustee and to execute all the trusts created in the original deed of assignment, according to its true intent and as fully as if originally appointed trustee therein. (1915, c. 176, s. 1; C. S., s. 1612.)

**Cross Reference.**—As to appointment of successor to incompetent trustee, see § 45-9.

**§ 23-5. Insolvent trustee removed unless bond given; substitute appointed.**—Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent, and asking that he be required to give bond or be removed, it is the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear the complaint. If upon such hearing the clerk is satisfied that such trustee is insolvent, he shall remove such trustee and appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with the clerk a good and sufficient bond, to be approved by him, in a sum double the value of the property in the deed of trust, payable to the State of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust. (1893, c. 453, s. 3; Rev., s. 969; C. S., s. 1613.)

**In General.**—While formerly it was entirely competent for a debtor to assign his property to an insolvent person who was otherwise qualified to execute the provisions of the deed of trust for the benefit of creditors, the policy of the law has since

**debtedness.**—Where a solvent debtor conveys practically all of his property to secure a pre-existing debt, having other creditors at the time, it does not create a preference within the intent and meaning of this section. *Flowers v. American, etc., Chemical Co.*, 199 N. C. 456, 154 S. E. 736 (1930).

**Right and Duty to Defend Suits.**—It is the duty of assignees for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction and the facts and circumstances of the case will admit or warrant, to defend suits to set aside the assignments. *Chittenden v. Brewster*, 2 Wall. (69 U. S.) 191, 17 L. Ed. 839 (1864).

been declared by this section to throw greater safeguards around such transactions by requiring every trustee of this kind to give bond when proper application for that purpose is made to the clerk. *Preiss v. Cohen*, 112 N. C. 278, 17 S. E. 520 (1893).

**§ 23-6. Trustee removed on petition of creditors; substitute appointed.**—Upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims aggregate more than fifty per cent of the total indebtedness of said grantor or assignor, the clerk of the superior court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove

said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment. (1909, c. 918, s. 3; C. S., s. 1614.)

**§ 23-7. Substituted trustee to give bond.**—Upon the removal or resignation of any trustee it is the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by him in a sum double the value of the property in said deed of trust, payable to the State of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust. (1893, c. 453, s. 3; Rev., s. 970; 1909, c. 918, s. 4; 1915, c. 176, s. 2; C. S., s. 1615.)

**§ 23-8. Only perishable property sold within ten days of registration.**—It is unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust. (1893, c. 453, s. 4; Rev., s. 971; C. S., s. 1616.)

**§ 23-9. Creditors to file verified claims with clerk; false swearing misdemeanor.**—All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief. Any creditor who shall knowingly swear falsely in such statement shall be guilty of a misdemeanor. (1893, c. 453, ss. 6, 7; Rev., ss. 972, 3617; C. S., s. 1617.)

**Creditors Claiming Estoppel.**—Creditors, who claim under a deed of trust and file their claims to share in the proceeds of sale, cannot be heard to impeach its provisions. *Chard v. Warren*, 122 N. C. 75, 29 S. E. 373 (1898).

**§ 23-10. Priority of payments by trustee.**—The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable. (1909, c. 918, s. 5; C. S., s. 1618.)

**No Discrimination Except as Provided.**—Except for the two classes mentioned in this section all discrimination among creditors is forbidden. *Wooten v. Taylor*, 159 N. C. 604, 76 S. E. 11 (1912).

**§ 23-11. Trustee to account quarterly; final account in twelve months.**—The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, and at each succeeding period of three months, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and within twelve months he shall file his final account of his administration of his trust. The clerk may upon good cause shown extend the time within which the quarterly and final accounts herein provided for are to be filed. (1893, c. 453, s. 5; Rev., s. 973; C. S., s. 1619.)

**§ 23-12. Trustee violating duties guilty of misdemeanor.**—If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such

property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final account, or shall knowingly fail to include any property, money or disbursement in such quarterly or final account, he shall, in either case, be guilty of a misdemeanor. (1893, c. 453, s. 8; Rev., s. 3689; C. S., s. 1620.)

## ARTICLE 2.

### *Petition of Insolvent for Assignment for Creditors.*

§ 23-13. **Petition; schedule; inventory; affidavit.**—Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account, or otherwise.

2. A full and true inventory of his estate, real and personal, with the encumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I, . . . . ., do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge: so help me, God. (1868-9, c. 162, ss. 1, 2, 3; Code, ss. 2942, 2943, 2944; Rev., s. 1930; C. S., s. 1621.)

**Cross References.**—As to prohibiting imprisonment for debt, see Const., Art. I, §§ 16, 17. As to provisional remedies by arrest and bail, see § 1-409 et seq. See also, § 1-311 as to execution against the person.

**Constitutional Provisions.**—The Constitution gives, in express terms, to the legislature the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debt. *Crain v. Long*, 14 N. C. 371 (1832).

**When Debtor Not under Arrest.**—A petitioner not under arrest must show that he has complied with the provisions of

this section and obtain an order of discharge under §§ 23-14, 23-15. *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207 (1911).

**Facts Set Out.**—Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out the facts showing what right, title, estate and interest he held in the real estate. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

**Defendant in Alienation Suit.**—A suit by one charging the defendant with alienating the affections of his wife, and arresting and holding him for bail under the affidavits required, is one entitling the defendant to the benefit of this section for the relief of insolvent debtors. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

§ 23-14. **Clerk to give notice of petition.**—On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within

thirty days after publication of the order, why the prayer of the petitioner should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county. (1868-9, c. 162, ss. 4, 5; Code, ss. 2945, 2946; Rev., s. 1931; C. S., s. 1622.)

§ 23-15. **Order of discharge and appointment of trustee.**—If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hearing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent. (1868-9, c. 162, s. 6; Code, s. 2947; Rev., s. 1932; C. S., s. 1623.)

§ 23-16. **Terms and effect of order of discharge.**—The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge. (1868-9, c. 162, s. 9; Code, s. 2950; Rev., s. 1933; C. S. s. 1624.)

**Cross Reference.** — See cross reference note under § 23-13.

**Property Subsequently Acquired Liable.**—This section protects from future arrests for the same debt such as have surrendered their property; though after-acquired property may be subject to execution and sale,

in proper cases. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891). See also *Brown v. Long*, 22 N. C. 138 (1838) which holds that the subsequently acquired property of a discharged debtor may be reached in equity.

§ 23-17. **Suggestion of fraud by opposing creditor.**—Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases. (1868-9, c. 162, s. 7; Code, s. 2948; Rev., s. 1934; C. S., s. 1625.)

**In Bastardy Proceeding.**—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of 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).

**Same—As to Fine and Costs.**—When defendant in bastardy proceedings has been ordered to pay a fine and costs and allowance to the mother, only the State can suggest fraud as to the fine and costs. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894).

**Answer Does Not Suggest Fraud.**—One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud under this section by answering the petition for discharge, and denying a state-

ment therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

**All Creditors Notified May Be Joined.**—Where a debtor is arrested under different ca. sa.'s at the instance of several creditors, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, he has a right to require that all the creditors he may notify shall join in the trial of one issue, and the court will so direct. *Williams v. Floyd*, 27 N. C. 649 (1845).

**Same—Where Privilege Waived.**—But this is for the ease of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in



his favor in one case will not discharge another creditor. *Williams v. Floyd*, 27 N. C. 649 (1845).

### ARTICLE 3.

#### *Trustee for Estate of Debtor Imprisoned for Crime.*

§ 23-18. **Persons who may apply for trustee for imprisoned debtor.**—When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months, application by petition may be made by any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor. (1868-9, c. 162, s. 40; Code, s. 2974; Rev., s. 1943; C. S., s. 1626.)

§ 23-19. **Superior court appoints; copy of sentence to be produced.**—The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum, the clerk or the judge may immediately appoint a trustee of the estate of such debtor. (1868-9, c. 162, ss. 41, 42; Code, s. 2975; Rev., s. 1944; C. S., s. 1627.)

§ 23-20. **Duties of trustee; accounting; oath.**—The trustee of the imprisoned debtor shall pay his debts pro rata. After paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of the debtor, under the direction of the superior court. When the imprisoned debtor is lawfully discharged from his imprisonment, the trustee shall deliver to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor. The trustee shall make his returns and have his accounts audited and settled by the clerk of the superior court of the county where the proceeding was had, in like manner as provided for personal representatives. Before proceeding to the discharge of his duty, the trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding. The oath must be filed with the clerk of the superior court. (1868-9, c. 162, ss. 43, 45, 46; Code, ss. 2976, 2978, 2979; Rev., ss. 1945, 1946, 1947; C. S., s. 1628.)

§ 23-21. **Court may appoint several trustees.**—The court has power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law. (1868-9, c. 162, s. 47; Code, s. 2980; Rev., s. 1948; C. S., s. 1629.)

§ 23-22. **Court may remove trustee and appoint successor.**—In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance. (1868-9, c. 162, s. 48; Code, s. 2981; Rev., s. 1949; C. S., s. 1630.)

### ARTICLE 4.

#### *Discharge of Insolvent Debtors.*

§ 23-23. **Insolvent debtor's oath.**—Prisoners in order to be entitled to discharge from imprisonment under the provisions of this article shall take the following oath:

I, . . . . ., do solemnly swear (or affirm) that I have not the worth of

fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit, or to defraud any of my creditors: so help me, God. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 31; 1881, c. 76; Code, s. 2972; Rev., s. 1918a; C. S., s. 1631.)

**Constitutionality.** — This section does not contravene the constitutional provision in regard to homestead and personal property exemptions as the prisoner can discharge himself from custody by paying the fine and costs or by complying with the provisions of this article and taking the oath prescribed. *State v. Williams*, 97 N. C. 414, 2 S. E. 370 (1887).

**Liberal Construction.** — In *Wood v. Wood*, 61 N. C. 538 (1868) it is stated that ch. 59 of the Rev. Code (the provisions of which are contained in this and the following sections) has always received a liberal

interpretation.

**Debtor Must Follow Provisions.**—The Constitution gives, in express terms, to the legislature, the power to regulate the manner in which a debtor shall surrender his property for the use of his creditors, and he must pursue the regulations which may be thus prescribed, in order to secure his person from arrest for his debts. *Crain v. Long*, 14 N. C. 371 (1832); *Griffin v. Simmons*, 50 N. C. 145 (1857).

**Cited in** *Moorefield v. Roseman*, 198 N. C. 805, 153 S. E. 399 (1930).

**§ 23-24. Persons imprisoned for nonpayment of costs in criminal cases.**—The following persons may be discharged from imprisonment upon complying with this article and § 153-194:

Every person committed for the fine and costs of any criminal prosecution. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 26; Code, s. 2967; Rev., s. 1915; C. S., s. 1632; 1933, c. 228, s. 9.)

**Editor's Note.** — Prior to the 1933 amendment this section contained a provision which read as follows: "Every putative father of a bastard committed for failure to give bond, or to pay any sum of money ordered to be paid for its maintenance."

**Purpose.**—This section was manifestly intended to be construed as permitting a defendant convicted in a criminal proceeding, or found to be the father of a bastard child, to file a petition before the clerk designating the time when he wished to apply for a discharge. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894).

**Construed with §§ 153-191 and 153-194.**—This section does not repeal those enacted much later (§§ 153-191, 153-194) but the latter modify it. *State v. Manuel*, 20 N. C. 144 (1838). All three sections being re-enacted into the Revisal at the same time, they must be construed together. *State v. Morgan*, 141 N. C. 726, 53 S. E. 142 (1906).

**Where Workhouse Established.**—One committed for the fine and costs of a criminal prosecution, after remaining in jail twenty days, may be discharged upon complying with provisions of the next section. *State v. Davis*, 82 N. C. 610

(1880); and this is so, although a workhouse has been established by the county commissioners in accordance with the provisions of § 153-209. *State v. Williams*, 97 N. C. 414, 2 S. E. 370 (1887).

**Where Three Indictments Exist.** — There were three indictments against a prisoner to one of which he pleaded guilty, and judgment was suspended on the payment of costs, and he was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed and applied for his discharge; it was held, that he was entitled to his discharge in all three cases. *State v. McNeely*, 92 N. C. 829 (1885).

**Placed in Custody of Sheriff.** — An order in bastardy proceedings, placing the defendant in custody of the sheriff was, by necessary implication, an order to imprison upon failure to pay the fine, allowance and costs; and the defendant was properly discharged under this section. *State v. Burton*, 113 N. C. 655, 18 S. E. 657 (1893).

**Cited in** *State v. Bradshaw*, 214 N. C. 5, 197 S. E. 564 (1938).

§ 23-25. **Petition; before whom; notice; service.**—Every such person, having remained in prison for twenty days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause ten days' notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, ss. 27, 28; 1873-4, c. 90; 1874-5, c. 11; Code, ss. 2968, 2969; 1891, c. 195; Rev., s. 1916; C. S., s. 1633.)

**A Proceeding in the Cause.**—The application of an insolvent confined for the nonpayment of costs is a proceeding in the cause in which he was convicted, and should be made by petition to the court wherein the judgment against him was entered. *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887).

**Where Clerk Refuses to Give Oath.**—If the clerk should refuse to allow the prisoner to take the oath, the remedy is by an appeal to the judge holding the courts of that district and it is intimated that it is irregular for the judge of an adjoining district to release the prisoner on a writ of habeas corpus. *State v. Miller*, 97 N. C. 451, 1 S. E. 776 (1887).

**Twenty Day Provision Mandatory.** — Whether a defendant has property or not, he must remain in jail the twenty

days, or pay the fine and costs, since the officers could not waive the imprisonment, nor had the judge the power to dispense with it. *State v. Davis*, 82 N. C. 610 (1880).

Neither the judge nor solicitor has the right to allow a defendant in bastardy proceedings to take the insolvent's oath and obtain his discharge without remaining in prison for twenty days. *State v. Bryan*, 83 N. C. 611 (1880).

**Effect of Discharge.**—The discharge of a debtor from prison, under this section, does not protect the debtor from arrest at the instance of any other creditor than the one at whose suit he was in prison, though such other creditor had notice of the debtor's application to be discharged. *Griffin v. Simmons*, 50 N. C. 145 (1857).

§ 23-26. **Warrant issued for prisoner.**—The clerk of the superior court, or justice of the peace, before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 29; Code, s. 2970; Rev., s. 1917; C. S., s. 1634.)

§ 23-27. **Proceeding on application.**—At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this article, the clerk of the superior court, or justice of the peace, before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment, of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed. (1773, c. 100, s. 1, P. R.; 1808, c. 746, s. 2, P. R.; 1810, cc. 797, 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 30; Code, s. 2971; Rev., s. 1918; C. S., s. 1635.)

**Cross Reference.** — See generally the annotations under § 23-24.

**Improperly Discharged.** — Where a debtor arrested and imprisoned for fraud did not tender the oath required by § 23-

23, nor surrender his homestead and personal property exemptions, nor file the petition, nor give the notice required by § 23-25, he was improperly discharged upon an affidavit that he had theretofore

made an assignment of all his property for the benefit of creditors and that he was at the date of the affidavit insolvent and not worth more than the exemptions

allowed him by law as set apart to him. *Raisin Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894).

**§ 23-28. Suggestion of fraud.**—The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the insolvent debtor's oath above prescribed, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment. (1868-9, c. 162, s. 32; Code, s. 2973; Rev., s. 1919; C. S., s. 1636.)

**§ 23-29. Persons taken in arrest and bail proceedings, or in execution.**—The following persons also are entitled to the benefit of this article as hereinafter provided:

1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever. (1868-9, c. 162, s. 10; Code, s. 2951; Rev., s. 1920; C. S., s. 1637.)

**Cross Reference.**—As to arrest and bail, see §§ 1-409 through 1-439.

**Construed with §§ 1-417 and 1-419.**—This section should be construed with §§ 1-417 and 1-419, and, so construed, the remedies given by this section are in addition to those given by the other sections mentioned. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

**Broad Terms.**—The terms of this section are as broad and sweeping as they well can be. They do not, in any view of them as to the purpose intended, imply limitation or discrimination. They plainly embrace "every person" taken or charged to be arrested by virtue of "any order of arrest," not specially for a tort, or for fraud, or other particular cause of action as to which a person may be arrested, but for any cause of action, no matter what may be its nature, if the person is arrested in a case wherein he may lawfully be so arrested. They, in plain, strong terms, embrace any such arrest made or ordered to be made in any action whatever—that is, an action in which a person—a party—may be so arrested. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

**Same—Tort Actions Included.**—The benefits of the statute extend as well to those arrested for torts as for debt, and the debt growing out of one is no more a debt and no more entitled to an extraordinary process for its collection than the other. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

**Any Cause Specified in § 1-410.**—The provisions of this section extend to and embrace every person arrested or to be arrested in a civil action on account of any cause of action specified in § 1-410. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222

(1891).

**Nonresidents Included.**—The benefits of the section are not confined to residents of this State. There is no provision in it, or any other statute, within our knowledge, that in terms or by reasonable implication declares that a nonresident shall not be discharged from arrest in a civil action, if he makes the complete surrender of his estate as prescribed. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

**Where Motion to Vacate Denied.**—Where a party is under arrest in a civil action and his motion to vacate the arrest has been denied, he may seek his discharge under the provisions of this section. *Wing v. Hooper*, 98 N. C. 482, 4 S. E. 463 (1887).

**Effect on Exemptions.**—A judgment debtor against whose person execution has been issued cannot be discharged except by payment, or giving notice and surrender of all property in excess of \$50, and the effect of the execution against the person is to deprive him of his homestead and his personal property exemption over and above \$50. *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063 (1916).

**Meaning of "Debtor and Creditor."**—The term "debtor and creditor," employed generally and without precision in the statute as to persons arrested in civil actions, must be taken as meaning and applying to the plaintiff and defendant in the action in which the defendant shall be so arrested. They imply the plaintiff's claiming and suing for damages for which the defendant is liable to him. Such interpretation is allowable and reasonable, with a view to effectuate the intention of the statute as to persons so arrested. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

§ 23-30. **When petition may be filed.**—Every person taken or charged as in the preceding section specified may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter. (R. C., c. 59, s. 3; 1868-9, c. 162, s. 11; Code, s. 2952; Rev., s. 1921; C. S., s. 1638.)

**Persons Included.** — This section in broadest terms embraces "every person taken or charged as in the preceding section specified." *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

**Cause of Action Immaterial.** — The debtor is entitled to be discharged upon

the honest surrender of his property in the way prescribed, whether the cause of action on account of which he was arrested was a fraudulent debt, or a tort, or of other nature as to which he might be arrested. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

§ 23-31. **Petition; contents; verification.**—The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it on oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I, . . . . ., the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon, are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors: so help me, God. (R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13; Code, ss. 2953, 2954; Rev., s. 1922; C. S., s. 1639.)

§ 23-32. **Notice; length of notice and to whom given.**—Twenty days notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the State, and has no agent or attorney in the State, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the State. (1773, c. 100, s. 8, P. R.; R. C., c. 59, ss. 3, 20; 1868-9, c. 162, s. 14; Code, s. 2955; Rev., s. 1923; C. S., s. 1640.)

**Effect of Notice.** — The party arrested and so seeking relief must notify the creditors of plaintiff at whose suit he is arrested, but he may or may not notify other creditors of his application to surrender

his property and be discharged from arrest, and only such creditors as may be so notified will be affected by his discharge. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

§ 23-33. **Who may suggest fraud.**—Every creditor upon whom the notice directed in § 23-32 is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases. (1822, c. 1131, s. 4, P. R.; 1835, c. 12; R. C., c. 59, s. 13; 1868-9, c. 162, s. 15; Code, s. 2956; Rev., s. 1924; C. S., s. 1641.)

**Petitioner May Demand Oath and Jury Trial.**—A petitioner is entitled to insist that suggestions of fraud, made by a creditor, shall be verified by the oath of the creditor and tried by a jury; and it is error

in a judge to decide upon such suggestions, without submitting them in an issue to a jury. *Purvis v. Robinson & Co.*, 49 N. C. 96 (1856). See also, *State v. Carroll*, 51 N. C. 458 (1859).

§ 23-34. **Where no suggestion of fraud, discharge granted.**—If no creditor suggests fraud or opposes the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed. (1773, c. 100, P. R.; 1808, c. 746, s. 2, P. R.; 1810, c. 797, c. 802, P. R.; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; R. C., c. 59, s. 1; 1868-9, c. 162, s. 16; Code, s. 2957; Rev., s. 1925, C. S., s. 1642.)

**Proper Remedy to Secure Damages.**—The proper remedy of the party seeking to establish and secure his damages for tort is to have a trustee appointed, under

this section, to hold and distribute among creditors when and as soon as all debts are ascertained. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

§ 23-35. **Continuance granted for cause.**—When it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged. (1822, c. 1131, s. 1, P. R.; R. C., c. 59, s. 10; 1868-9, c. 162, s. 18; Code, s. 2959; Rev., s. 1926; C. S., s. 1643.)

**Cross Reference.**—As to the insolvent's bond, see § 23-40 and annotations.

**When Sickness Excuses.**—The extreme sickness of the principal would excuse his nonappearance, and entitle him and his surety to a continuance if that appeared to the court. But where it was not made

to appear, the court could not properly continue it. *Buis v. Arnold*, 53 N. C. 233 (1860).

**Sickness of Surety No Excuse.**—Under this section the sickness of the surety is no excuse for the default of the principal. *Speight v. Wooten*, 14 N. C. 327 (1832).

§ 23-36. **Where fraud in issue, discharge only after trial.**—After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent. (R. C., c. 59, s. 17; 1868-9, c. 162, s. 21; Code, s. 2962; Rev., s. 1927; C. S., s. 1644.)

**When Applicable.**—The provisions of this section only apply to cases where the defendant is in lawful custody and by vir-

tue of an authority competent to order it. *Houston & Co. v. Walsh*, 79 N. C. 35 (1878).

§ 23-37. **If fraud found, debtor imprisoned.**—If, on the trial, the jury finds that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor. (1822, c. 1131, s. 4, P. R.; 1835, c. 12; R. C., c. 59, s. 14; 1868-9, c. 162, s. 20; Code, s. 2961; Rev., s. 1928; C. S., s. 1645.)

**Must Surrender Whole Property.**—An insolvent debtor included in his schedule "all his interest in certain property assigned to S. C." On an issue found, the jury found the deed assigning such property fraudulent. It was held, that the debtor should be imprisoned until he should make a surrender of the whole of such property. *Hutton v. Self*, 28 N. C. 285 (1846).

**Not in Execution as to Others.**—A debtor convicted of fraudulent concealment of his effects, upon an issue between him and A, and ordered into custody thereupon, according to this section, is not in execution at the suit of B, another creditor, in whose case no such concealment was found or suggested. *Folsom v. Gregory*, 12 N. C. 233 (1827).

§ 23-38. **Effect of order of discharge.**—The order of discharge under

the last four articles of this chapter, whether granted upon a nonsuggestion of fraud, upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in § 23-16; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk. (1822, c. 1131, s. 4, P. R.; 1835, c. 12; R. C., c. 59, s. 11; 1868-9, c. 162, s. 19; Code, s. 2960; Rev., s. 1929; C. S., s. 1646.)

**Debt Not Discharged.**—The discharge of the principal, under the insolvent debtor's law, is not a discharge of the debt. *Norment v. Alexander*, 32 N. C. 71 (1849).

**Protects against Those Notified.**—The discharge of an insolvent protects him

from arrest by those creditors only who had notice of his intention to apply for a discharge. *Crain v. Long*, 14 N. C. 371 (1832); *Norment v. Alexander*, 32 N. C. 71 (1849); *Rountree v. Waddill*, 52 N. C. 309 (1859).

ARTICLE 5.

*General Provisions under Articles 2, 3, and 4.*

§ 23-39. **Superior court tries issue of fraud.**—In every case where an issue of fraud is made up as provided in this chapter, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure. (1868-9, c. 162, s. 8; Code, s. 2949; Rev., s. 1935; C. S., s. 1647.)

**In General.**—Upon the suggestion of fraud an issue is raised which should be entered upon the trial docket of the superior court and stand for trial as other causes. *State v. Parsons*, 115 N. C. 730, 20 S. E. 511 (1894).

**When Issue Can Be Made Up.**—When one who applies to take the insolvent debtor's oath, upon rendering a schedule, sets forth in his schedule that he has made a deed in trust of certain property to satisfy certain creditors, and surrenders all his interests in the property mentioned in such deed, it is still competent for the opposing creditor to have an issue made up

whether the said deed is not fraudulent, and if found fraudulent by a jury, to cause the debtor to be imprisoned until he surrenders the property itself. *Adams v. Alexander*, 23 N. C. 501 (1841).

**When Jury Finds Deed Fraudulent.**—Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned until he makes a surrender of the whole property so conveyed. *Hutton v. Self*, 28 N. C. 285 (1846).

§ 23-40. **Insolvent released on giving bond.**—Every debtor entitled under the provisions of this chapter to discharge as an insolvent may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody. (R. C., c. 59, s. 27; 1868-9, c. 162, s. 17; Code, s. 2958; Rev., s. 1936; C. S., s. 1648.)

**Cross Reference.**—As to giving bond in surety company, see § 109-17.

**When Bond May Be Given.**—The insolvent may give bond during the pendency of and until the final determination

of the proceedings. *Howie v. Spittle*, 156 N. C. 150, 72 S. E. 207 (1911).

**Sufficient Compliance.**—A condition "to appear and claim the benefit of the act, etc., and not depart without leave," is sub-

stantially the same as that prescribed by the act. *Mooring v. James*, 13 N. C. 254 (1829).

**Who Prepares Bond.**—Whether it is the duty of the officer or the defendant to prepare the bond to be given for the defendant's appearance, *quaere*. *Winslow v. Anderson*, 20 N. C. 2 (1838).

**Return Day Must Be Certain.** — The bond for the defendant's appearance, under this section connected with the execution, is in the nature of process to compel an appearance, and the return day thereof must be certain. *Winslow v. Anderson*, 20 N. C. 2 (1838).

**Where Date in Bond Erroneous.** — Where a bond was conditioned for the defendant's appearance at the next term of court to be held upon a stated day, and, at the next term which sat at a date earlier than that mentioned in the bond, the defendant did not appear, it was error to take a judgment against him and his surety for default since there was no default of appearance according to the bond. *Winslow v. Anderson*, 20 N. C. 2 (1838).

**Amount of Bond.**—A bond given under this section for the appearance of an insolvent to court, is good if it is for double the original debt, exclusive of interest and costs, and judgment, on motion, may be

rendered on it. *Williams v. Yarbrough*, 13 N. C. 12 (1828).

**Defendant Cannot Object to Bond.**—A defendant who has given bond under this section cannot object to the informality of the bond, and pray a discharge on account thereof. *Page v. Winningham*, 18 N. C. 113 (1834).

**Where Ca. Sa. Voidable.**—Where a defendant gave bond under the insolvent act, and while he is at large by virtue thereof, he is not entitled to his discharge on account of the fact that the ca. sa. is voidable; nor can he move, under such circumstances, to quash the proceedings on that account. *Bryan v. Brooks*, 51 N. C. 580 (1859).

**Defendant Bound to Attend.**—The defendant in a ca. sa. bond, given under this section is bound to attend at every term until the cause is finally disposed of. *Arrington v. Bass*, 14 N. C. 95 (1831).

**When Condition in Bond Broken.** — Where the defendant in the ca. sa. appeared at the return day of the writ, and upon an issue being made up, the cause was continued, and afterwards the defendant made a default; it was held, that the condition of the bond was broken, and the plaintiff entitled to judgment. *Mooring v. James*, 13 N. C. 254 (1829).

§ 23-41. **Surety in bond may surrender principal.**—The surety in any bond conditioned for the appearance of any person under this chapter may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, article Arrest and Bail. (1793, c. 100, s. 7, P. R.; 1793, c. 380, s. 1, P. R.; 1822, c. 1131, s. 3, P. R.; R. C., c. 59, s. 23; 1868-9, c. 162, s. 22; Code, s. 2963; Rev., s. 1937; C. S., s. 1649.)

**Cross References.**—As to exoneration of bail in arrest and bail, see § 1-433. As to arrest of defendant by bail, see § 1-435. As to surrender of defendant by bail, see § 1-434.

**Right of Person Surrendered.**—A person who is surrendered in discharge of his bail is entitled to the benefit of this chapter for the relief of insolvent debtors. *Smallwood v. Wood*, 19 N. C. 356 (1837).

**Where Surrender to Be Made.**—Sureties to a ca. sa. bond taken under this section to protect themselves by a surrender of their principal, must make it in the court to which the ca. sa. is returnable, or to the sheriff of that county; where the writ issues to another county, a surrender to the sheriff of it is a nullity. *Mooring v. James*, 13 N. C. 254 (1829).

**Invalid Surrender.** — Where a prisoner was brought into open court by his bail, and it was announced, publicly, that he

was surrendered, but was unknown to the sheriff, to the plaintiff, and to the plaintiff's counsel, and he was a stranger to all present, except to the bail and the presiding judge, and upon being ordered in custody, he fled from the courtroom and escaped, without having been in the custody of the sheriff, it was held that these facts did not amount to a valid surrender. *Roundtree v. Waddill*, 52 N. C. 309 (1859).

**Effect of Judgment against Surety.**—When the principal obligor in a bond is regularly called at court, and, failing to appear, judgment is rendered against him and his surety, the surety has no right *ex debito justicie* to come in on a subsequent day of the term and have the judgment set aside, in order to allow him to make a surrender of his principal. *Reynolds v. Boyd*, 23 N. C. 106 (1840).



§ 23-42. **Creditor liable for jail fees.**—When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the prisoner requires it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor is unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fails to give such security then the sheriff may discharge the debtor out of custody. (1773, c. 100, ss. 8, 9, P. R.; 1821, c. 1103, P. R.; R. C., c. 69, s. 5; 1868-9, c. 162, s. 24; Code, s. 2965; Rev., s. 1938; C. S., s. 1650.)

**Common-Law Provision.**—By the common law an imprisoned debtor was obliged to support himself, and, if unable to do so, was dependent upon the humanity of the jailer or of others. *Veal v. Flake*, 32 N. C. 417 (1849).

**Effect of Section.**—Where a man has been arrested and the issue has been continued from term to term, and his sureties have from time to time surrendered him and the issue has been decided against him and he has been committed to prison in all these cases, at the instance of the creditor, it was held, that under this section the creditor is responsible to the jailer for his fees or allowance for the food furnished to the prisoner during the whole time he was confined in jail. *Veal v. Flake*, 32 N. C.

417 (1849).

**Where Prison Bounds Allowed.**—When a debtor is committed to prison, and is permitted to take the prison bounds, the jailor is not under any obligation, while he continues in the bounds, to furnish him provisions for his support, nor, of course, can the creditor, at whose suit he is confined, be compelled to reimburse the jailor for any sum so expended. *Phillips v. Allen*, 35 N. C. 10 (1851).

**Sheriff Cannot Bring Action.**—The action against the creditor for the jail fees of an insolvent debtor, given by this section to the jailor, cannot be maintained by the sheriff as the jailor's principal. *Bunting v. McIlhenny*, 61 N. C. 579 (1868).

§ 23-43. **False swearing; penalty.**—If any insolvent or imprisoned debtor takes any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury is convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged. (1793, c. 100, s. 10, P. R.; R. C., c. 59, s. 25; 1868-9, c. 162, s. 23; Code, s. 2964; Rev., ss. 1940, 3614; C. S., s. 1651.)

**Cross Reference.**—As to punishment for perjury, see § 14-209.

§ 23-44. **Powers of trustees hereunder.**—Any trustee appointed under the last four articles of this chapter, as therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authority, and subject to the control, obligations and responsibilities prescribed by law in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees pro rata. (1773, c. 100, ss. 5, 6, P. R.; 1827, c. 44; 1830, c. 26, s. 2; R. C., c. 59, ss. 21, 22; 1868-9, c. 162, s. 44; Code, s. 2977; Rev., s. 1941; C. S., s. 1652.)

§ 23-45. **Jail bounds.**—Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.
2. Any debtor who, for other cause, is adjudged to be imprisoned until he makes a full and fair disclosure or account of his property. (1818, c. 964, P.

R.; R. C., c. 59, s. 27; 1868-9, c. 162, s. 25; Code, s. 2966; Rev., s. 1942; C. S., s. 1653.)

**Cross Reference.**—As to regulations regarding prison bounds, see § 153-54.

#### ARTICLE 6.

##### *Practice in Insolvency and Certain Other Proceedings.*

§ 23-46. **Unlawful to solicit claims of creditors in proceedings.**—It shall be unlawful for any individual, corporation, or firm or other association of persons, to solicit of any creditor any claim of such creditor in order that such individual, corporation, firm or association may represent such creditor or present or vote such claim, in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors. (1931, c. 208, s. 1.)

**Cross Reference.**—As to restrictions on appearance for creditor in insolvency proceedings, etc., see § 84-9.

**Editor's Note.**—See 9 N. C. Law Rev. 348.

§ 23-47. **Violation of preceding section a misdemeanor.**—Any individual, corporation, or firm or other association of persons violating any provision of § 23-46 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

#### ARTICLE 7.

##### *Bankruptcy of Taxing, etc., Districts, Counties, Cities, Towns and Villages.*

§ 23-48. **Local units authorized to avail themselves of provisions of bankruptcy law.**—With the approval of the Local Government Commission of North Carolina and with the consent of the holders of such percentage or percentages of its indebtedness as may be required by Public Act Number three hundred two of the Seventy-fifth Congress, First Session, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July first, one thousand eight hundred ninety-eight and Acts amendatory thereof and supplementary thereto," approved August sixteenth, one thousand nine hundred thirty-seven, as amended, any taxing district, local improvement district, school district, county, city, town or village in the State of North Carolina is authorized to avail itself of the provisions of said act of Congress as said act now exists or may be hereafter amended. (1939, c. 203.)

**Editor's Note.**—For comment on this enactment, see 17 N. C. Law Rev. 343.

## Chapter 24. Interest.

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| <p>Sec.<br/>24-1. Legal rate is six per cent.<br/>24-2. Penalty for usury; corporate bonds may be sold below par.<br/>24-3. Time from which interest runs.<br/>24-4. Obligations due guardians to bear compound interest; rate of interest.</p> | <p>Sec.<br/>24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.<br/>24-6. Judgment by default final, clerk ascertains.<br/>24-7. Interest from verdict to judgment added as costs.</p> |
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§ 24-1. **Legal rate is six per cent.**—The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more. (1876-7, c. 91; Code, s. 3835; 1895, c. 69; Rev., s. 1950; C. S., s. 2305.)

**Editor's Note.**—The distinction between the "legal rate" of interest, and the "lawful rate" of interest, which is maintained in some states, and which appears in some of the older cases of this State, has not been preserved. Legal rate of interest implied the maximum rate at which interest could be charged upon an obligation in the absence of stipulation as to the rate; and a lawful rate of interest implied that rate of interest which could be lawfully stipulated without incurring the penalty of law. The former was six per cent, the latter eight. See *Burwell v. Burgwyn*, 100 N. C. 389, 6 S. E. 409 (1888). This distinction is now abolished; as the maximum rate at which interest may be charged, with or without stipulation of the rate, cannot exceed six per centum per annum, under the provisions of this and the succeeding section.

This section declares the policy of the State with regard to usury. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

**Definition.** — Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, as damages for its detention. *Brown v. Hialts*, 15 Wall. (82 U. S.) 177, 21 L. Ed. 128 (1872).

**Within the Province of Legislature.**—It is within the exclusive province of the

lawmaking power to prescribe upon what conditions and at what rate interest can be allowed or contracted for, and what shall be a forfeiture of the right to collect it. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

**Where Interest Rate Not Specified.**—Where the statute providing for recovery of taxes does not specify the rate of interest to be employed, it is likely that the "legal rate," six per cent per annum, applies. See 12 N. C. Law Rev. 39.

**A contract will be declared usurious** when it appears that it was the purpose and intent of the lender to charge and receive a greater rate of interest than that allowed by law under this section. *Polikoff v. Finance Service Co.*, 205 N. C. 631, 172 S. E. 356 (1934).

**Insurance Companies Not Authorized to Charge Interest in Excess of Legal Rate.**—Section 58-32 dealing with loans by insurance companies secured by insurance policies does not authorize insurance companies to charge interest in excess of the legal rate prescribed in this section. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812 (1936).

**Applied in** *Hackney v. Hood*, 203 N. C. 486, 166 S. E. 323 (1932); *White v. Disher*, 232 N. C. 260, 59 S. E. (2d) 798 (1950).

§ 24-2. **Penalty for usury; corporate bonds may be sold below par.**—The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire in-

terest. Nothing contained in this section or in § 24-1, however, shall be held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. (1876-7, c. 91; Code, s. 3836; 1895, c. 69; 1903, c. 154; Rev., s. 1951; C. S., s. 2306.)

- I. General Consideration.
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  - A. General Doctrine.
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#### Cross References.

As to party seeking to recover on any usurious contract not allowed costs, see § 6-25. As to usurious loans on household and kitchen furniture or assignments of wages made a misdemeanor, see § 14-391. As to applicability of usury provisions to pawnbrokers, see § 91-7. As to limitation of actions to recover penalty and forfeiture of interest for usury, see § 1-53.

#### I. GENERAL CONSIDERATION.

**Editor's Note.** — The former statute (Rev. Code, ch. 114; Rev. Stat., ch. 117) denounced a usurious contract as void as to the whole debt, principal and interest. This section, it will be noted, makes it void, not as to principal, but as to the interest only. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

See 12 N. C. Law Rev. 279 for note in reference to this section.

**At Common Law and in This Country.** — At common law the taking of any interest was an indictable offense (11 Am. & Eng. Enc., 379); hence, interest is now purely statutory, being chargeable in such cases and to such extent only as is expressly allowed by statute. The penalties for usury were formerly much severer in this State, and are still so in some other jurisdictions, notably in New York, where in certain cases the charging of interest above six per cent has been recently made indictable. The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will. *Smith v. Building, etc., Association*, 119 N. C. 249, 26

S. E. 41 (1896).

#### Effect of Usury Formerly and Now.—

By the former law, the taint of usury made the contract void both as to principal and interest into whose hands it might come, and so likewise any appearance, shift or device whereupon or whereby an illegal rate of interest was received or taken was declared to be void. By the preceding section six per cent is fixed as the legal rate of interest, and in case more than the rate allowed is taken, received, reserved, or charged, the contract is not invalidated as to the principal, but the entire interest carried by the note or other evidence of debt, or otherwise agreed to be paid thereon, is, under this section, forfeited; and in case such greater rate has been paid, a remedy is given to the party paying the same to recover by action of debt twice the amount of the interest paid. *Moore v. Woodward*, 83 N. C. 531 (1880).

The forfeiture provided by this section will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. *Waters v. Garis*, 188 N. C. 305, 124 S. E. 334 (1924); *Sloan v. Ins. Co.*, 189 N. C. 690, 128 S. E. 2 (1925); *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

In *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177 (1892), it was said that the provisions of the law forbidding usury are very clear and explicit. No one can possibly misunderstand them. If moved by avarice a party deliberately violates this law, he has no ground to complain that his punishment has been in the very respect which caused him to sin, and that in grasping after illegitimate interest he has lost also the legitimate interest which the law would have given a law-abiding citizen.

A note otherwise valid is not rendered void either as to principal or interest by the taint of usury, but is subject only to

the penalties and forfeitures of this section, one of which is the forfeiture of all interest when usury is properly pleaded and proven. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939), overruling in this respect, *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 695, 24 L. R. A. 280 (1893); *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927), approving *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388, 13 A. L. R. 1207 (1920).

**Our statute is copied from the National Banking Act**, and has gone into the laws of many states in exactly the same form. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

**The usury statute will be strictly construed, and usury must be pleaded.** *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933).

**Purpose of Statute—Distinction between the New and the Old Statute.**—Both the former and the present statutes were enacted in restraint of excessive interest for the same general policy, and especially on the idea of protecting the borrower against the oppression of the lender, the chief difference being that a violation under the old statute invalidated the contract, working a forfeiture of the sum lent as well as of the interest, whereas the present law leaves the contract valid for the principal, but makes the interest forfeitable. *Moore v. Woodward*, 83 N. C. 531 (1880).

**Created for the Benefit of Borrower.**—Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388 (1920).

**Duty of Court to Carry out Legislative Intent.**—The forfeiture of the entire unpaid interest and recovery back of twice the interest paid is in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent. *Moore v. Woodward*, 83 N. C. 531 (1880).

**Enforceability in the Absence of Penalty.**—Even in the absence of a penalty on charging usurious interest, such as contained in this section, a rate of interest above the one prescribed by law would not be enforceable. *Hughes v. Boones*, 102 N. C. 137, 9 S. E. 286 (1889).

**Four Requisites of Usurious Transaction.**—In order to constitute a usurious transaction, four requisites must appear: (1) there must be a loan, express or implied; (2) there must be an understanding between the parties that the money lent shall be returned; (3) that for such loan a

greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. \* \* \* A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is a violation of the usury laws, it matters not what form or disguise it may assume. *Doster v. English*, 152 N. C. 339, 67 S. E. 754 (1910), approved in *Monk v. Goldstein*, 172 N. C. 516, 90 S. E. 519 (1916); *Loan, etc., Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102 (1917); *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388 (1920).

**Forbearance of Indebtedness or Loan of Money Essential.**—It is universally held that in order that a transaction shall fall within the prohibition of the statutes against usury it is essential that there should be a contract for the forbearance of an existing indebtedness or a loan of money. *Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216 (1887). See 29 Am. and Eng. Enc., p. 464, § 4, and note 5, where a large number of cases are cited in support of the text. There is no exception to this universal rule, that there must be an extension of credit and an illegal compensation for it, knowingly taken, in order to constitute usury. This is recognized in the earliest cases on the subject up to the present time. *Smithwick v. Whitley*, 152 N. C. 366, 67 S. E. 914 (1910).

**Intent to Charge Usurious Interest.**—To constitute a usurious transaction, corrupt intent to take more than the legal rate of interest is an essential element. *Bailey v. Inman*, 224 N. C. 571, 31 S. E. (2d) 769 (1944).

Where the lender of money intentionally charges the borrower a greater rate of interest than the law allows, and his purpose stands clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997 (1911).

**Effect of Charging and Collecting Usury.**—Where a usurious rate of interest on money has been paid by the borrower of money, the statutory penalty is double the amount of the usury, but where it is only charged, and not collected, the statute eliminates the usury and forfeits the interest on the amount of the loan. *Ragan v. Stephens*, 178 N. C. 101, 100 S. E. 196 (1919).

**Where Person Is Not Entitled to Statutory Penalty.**—Where a debtor seeks the aid of a court of equity on the ground that his debt is tainted with usury, he may have the usurious element, if any, eliminated from his debt only upon his paying the principal of his debt, with interest at the legal rate. In such case he is not entitled to the benefit of the statutory penalties for usury. *Smith v. Bryant*, 209 N. C. 213, 183 S. E. 276 (1936). See *Bailey v. Inman*, 224 N. C. 571, 31 S. E. (2d) 769 (1944).

And where there is no evidence that any holder of the note executed by plaintiffs has charged or received interest thereon in excess of six per cent, in an action on the note plaintiffs may not invoke the forfeiture of interest for usury. *Smith v. Bryant*, 209 N. C. 213, 183 S. E. 276 (1936).

And where the creditors of the mortgagor seek to enjoin the foreclosure of a deed of trust on their creditor's property, and pray for an accounting to ascertain the amount of the debt upon allegations that usurious interest was charged thereon, upon sale of the property under orders of the court, the mortgagee is entitled to the principal amount of his debt, plus six per cent interest thereon, since the plaintiffs, seeking equitable relief, must do equity, and the mortgagee is entitled to the amount of the debt, plus the legal interest, unaffected by the forfeiture or penalty for usury. *Kenny Co. v. Hinton Hotel Co.*, 208 N. C. 295, 180 S. E. 697 (1935).

The statutory penalty for usury may not be recovered against the payee of notes secured by deed of trust upon evidence showing that a certain sum was paid the trustee in the deed of trust, but not paid to or received by the payee of the notes. *Hunter v. McClung Realty Co.*, 210 N. C. 91, 185 S. E. 461 (1936).

**Insurance Companies Subject to Penalty.**—An insurance company which charges, retains, or receives interest on a loan made by it in this State, to a policyholder or other person, at a rate in excess of six per centum per annum, is subject to the penalties prescribed by this section notwithstanding the provisions of § 58-32 as to the premiums paid on policies. *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812 (1936).

**Payment Necessary for Recovery—Payment by Renewal of Note.**—Before the plaintiff can maintain the action he must pay the usury in money or money's worth. It is well settled that the penalty is not incurred by the charging of usurious interest; it is by taking the usury that the party incurs the penalty, and no action lies therefor until it is paid. *Stedman v. Bland*, 26 N. C. 296 (1844); *Godfrey v. Leigh*, 28

N. C. 390 (1846); *Rushing v. Bivens*, 132 N. C. 273, 43 S. E. 798 (1903). A renewal of the note does not constitute such payment of the original debt. *Ragan v. Stephens*, 178 N. C. 101, 100 S. E. 196 (1919).

**Recovery after Payment—Former Rule.**—Formerly, the debtor although he could defeat the claim of the creditor to recover usurious interest, he could not, after having paid it, recover it back. *Merchant Bank v. Lutterloh*, 81 N. C. 143 (1879). But this doctrine is now changed by the express terms of this section. See also, *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

**Recovery of Double the Entire Interest.**—Under the clear terms of this section the plaintiff is entitled to recover back double the entire interest paid, not merely double the usurious excess. *Tayloe v. Parker*, 137 N. C. 418, 49 S. E. 921 (1905).

**Waiver.**—The borrower may waive his rights under this section. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388 (1920).

**Same — Consent Judgment.**—By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388 (1920).

**Entire Interest Declared a Forfeiture.**—The statute makes the "taking, receiving, reserving or charging usury," when knowingly done, i. e., intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, or which has been agreed to be paid thereon. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

All interest is forfeited when usury is knowingly exacted. *Guaranty Bond, etc., Co. v. Fair Promise A. M. E. Zion Church*, 219 N. C. 395, 14 S. E. (2d) 37 (1941).

**Mere Entry Does Not Constitute Charging.**—The mere entry on account and subsequent presentation of a usurious claim is not a "charging" within the meaning of that statute. *Grant v. Morris & Sons*, 81 N. C. 150 (1879).

**Recovery of Penalty Where Plaintiff in Pari Delicto.**—A borrower who has paid usurious interest may, under this section recover of the lender twice the amount of usurious interest so paid, notwithstanding that he is in *pari delicto* in the transaction. *Hollowell v. Building, etc., Association*, 120 N. C. 286, 26 S. E. 781 (1897).

**Overpayment by Mistake.**—In an action to recover for overpayment of interest, made by mistake, recovery can not be had for the forfeiture of double the interest as a penalty for usury, since, upon the allegation of such overpayment by mistake, no legal implications arise that the plaintiff is suing for the forfeiture. *Gillam v. Life Insurance Company*, 121 N. C. 369, 28 S. E. 470 (1897).

**Usurious Interest Accused upon Bonds Other Than the One Sued upon.**—In an action of claim and delivery for certain property conveyed by a chattel mortgage, the defendant can set up the defense of usury upon the allegation that the sole consideration of the bond secured by the mortgage was usurious interest, which had accrued upon certain other bonds executed by the defendant to the plaintiff. *Moore v. Woodward*, 83 N. C. 531 (1880).

**Promise of Interest Void—Note Valid.**—A note executed and delivered as evidence of the promise of the maker to pay to the payee or his order a sum of money which has been loaned by the payee to the maker, is not void, although the payee has, knowingly, taken, received, reserved, or charged interest on the note at a greater rate than six per cent per annum, which is the legal rate in this State; only the promise, in such case, to pay interest is void. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185 (1934).

**Identity with Provisions of National Bank Act.**—Our penalties for usury are identical with those prescribed in the National Bank Act, U. S. Rev. St., § 5198. *Smith v. Building and Loan Association*, 119 N. C. 249, 26 S. E. 41 (1896).

**Effect of Repeal of Old Law.**—A contract absolutely void under the old law for being usurious, is not validated by the repeal of that law and the enactment of this section which does not invalidate the principal of a usurious contract. *Pond v. Horne*, 65 N. C. 84 (1871).

**Applied in** *White v. Disher*, 232 N. C. 260, 59 S. E. (2d) 798 (1950).

**Cited in** *Bundy v. Commercial Credit Company*, 198 N. C. 339, 151 S. E. 626 (1930); *McNeill v. Suggs*, 199 N. C. 477, 154 S. E. 729 (1930); *Fletcher v. Parlier*, 206 N. C. 904, 173 S. E. 343 (1934); *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751 (1947).

## II. SUBSTANCE CONTROLS NATURE OF TRANSACTION.

### A. General Doctrine.

**Form of Transaction Cannot Conceal Its Usurious Nature.**—An express or implied

loan, upon the understanding that the money shall be returned at a greater interest rate than the statute allows, whatever the form of the transaction, and with corrupt intent on the part of the lender, is usury under this section, the corrupt intent consisting in "taking, receiving, reserving, or charging" a greater rate than that allowed by law. *Loan & Trust Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102 (1917).

Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

The courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and in reality usurious. In *Bank v. Wysong*, 177 N. C. 380, 99 S. E. 199 (1919), Justice Walker, speaking of a transaction alleged to be usurious, says: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable." *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. *McRackan v. Bank*, 164 N. C. 24, 80 S. E. 184 (1913); *Loan Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102 (1917).

The nature and terms of the contract determine its character and purpose, and if usurious in itself it must be so understood to have been intended by the parties, and they cannot be heard to the contrary. So the parties to a contract usurious upon its face, understandingly entered into, must be deemed to have intended to provide for the

payment of a rate of interest in excess of that allowed by law, and that is itself a usurious contract. *Burwell v. Burgwyn*, 100 N. C. 389, 6 S. E. 409 (1888).

In construing a transaction with regard to our usury statutes the court will look to its substance and not to its form. *Pratt v. Mortgage Company*, 196 N. C. 294, 145 S. E. 396 (1928).

### B. Specific Instances.

#### Between Bank and Its Customer.—

Where the bank has followed an arrangement made by its depositor that the latter keep a certain per cent of the money borrowed upon his own paper and paper of its customers upon which he remains responsible, and which is good and collectible by the bank without trouble to it, and thus collects on the series of transactions a rate of interest in excess of the legal rate, the interest thus received is usurious and comes within the intent and meaning of the statute forbidding it. *English Lumber Co. v. Wachovia Bank & Trust Co.*, 179 N. C. 211, 102 S. E. 205 (1920).

Where an association charges a stockholder certain fines under § 54-15, such fines cannot be alleged as interest paid on the loan from the corporation. *Moore v. Mutual Building, etc., Ass'n*, 203 N. C. 592, 166 S. E. 597 (1932).

**Sum Deducted Must Be Reserved as Interest.**—Where the borrower executed notes for the principal sum borrowed and notes for the interest on the principal notes from the time of their execution until their respective maturities, and the lender paid the borrower the principal sum borrowed less an amount deducted and retained by the lender, in the absence of an agreed fact or a finding by the court that the sum deducted was reserved by the lender as interest, the transaction did not constitute usury, and therefore the notes were not tainted with usury in the hands of the purchaser. *Ray v. Atlantic Life Ins. Co.*, 207 N. C. 654, 178 S. E. 89 (1935).

**Conditional Sale.**—An action to recover alleged usurious interest paid cannot be maintained upon evidence disclosing that the transaction alleged was not a loan but was a sale with deferred payment secured by conditional sale contract. *Hendrix v. Harry's Cadillac Co.*, 220 N. C. 84, 16 S. E. (2d) 456 (1941).

**Loan by Finance Corporation for Purchase of Automobiles.**—Where a finance corporation loans money for the purchase of automobiles sold in this State to be paid for at a greater rate of interest than six per cent, the transaction is a usurious one coming within the inhibition of our statute

and the penalty it imposes, though the contract is couched in the language of bargain and sale in order to evade our usury law. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

**A junior mortgagee enjoining the sale under a senior lien** is entitled to have the senior debt stripped of usury and the amount of the debt ascertained at the amount advanced plus interest thereon at the legal rate of six per cent, this being the relief to which the mortgagor would be entitled, and equity requiring that the same rule should be applicable to the junior lienor. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

**Name of Charge Immaterial.**—Any charges made by a building and loan association against a borrowing member, in excess of the legal rate of interest, whether such charges are called "fines," "dues" or "interest," are usurious. *Hollowell v. Building, etc., Association*, 120 N. C. 286, 26 S. E. 781 (1897).

**Stipulation That Laws of Another State Should Apply.**—Where the court finds that the stipulation in a contract that the laws of another state should apply was made in bad faith for the purpose of evading the usury laws of this State, and that defendant charged and received payment of usurious interest, the findings are sufficient to support a judgment in plaintiff's favor that he recover of defendant twice the amount of usurious interest paid as determined by this section. *Polikoff v. Finance Service Co.*, 205 N. C. 631, 172 S. E. 356 (1934).

**Usury in Fact Made Payable in This State.**—Where in fact a contract for the payment of usurious interest, in violation of § 24-1 was made payable in this State, the fact that it appeared from the face of the contract that it was payable in another state, does not relieve it of its usurious charge of interest contrary to the statute of this State. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

**Building and Loan Associations.**—See § 54-22 and note.

**Sum Paid to Trust Company Held to Be a Reasonable Brokerage Fee.**—\$2,600 paid to a trust company for its services in handling ninety \$1,000 bonds bearing interest at the legal rate was held not to constitute usury, but a reasonable brokerage fee. *McCubbins v. Virginia Trust Co.*, 80 F. (2d) 984 (1936).

## III. EQUITABLE DOCTRINES AS AFFECTING RIGHTS OF PARTIES.

### A. Summary of Law and Conclusions.

**Editor's Note.**—The operation of the



equitable doctrines whose primary purpose is to attenuate the hardships of technical rules of law, among which doctrines the relief granted by the equity courts against the enforcements of forfeitures occupies a foremost ground, and the effect upon the prevailing usury laws of the changes made in the essence of this section, have created no little diversity of opinion as to the determination of the rights of parties to a usurious transaction in proceedings of equitable nature.

The legal situation may be presented from two different angles: (a) where the lender seeks to enforce the usurious contract in an equitable proceeding, as where he seeks to foreclose a mortgage, (1) under the former law which made both the principal and the interest of a usurious transaction absolutely void, (2) under the present law, which declares only the interest void; (b) where the borrower seeks the aid of the court in the nature of an equitable interposition, as where he seeks to prevent the foreclosure of a usurious mortgage, (1) under the former law, (2) under the present law.

Under situation (a), (1) the cases are uniform that the lender can enforce neither the principal nor the interest of his usurious claim. *McBrayer v. Roberts*, 17 N. C. 75 (1831). This it is believed, on the ground that the law invalidating the principal and the interest of a usurious transaction is a positive statutory law which takes precedence over the equitable doctrine of relief against forfeitures, and also on the ground that a court of equity will not give its aid to a person who has exacted an unconscionable usurious bargain.

Situation (a), (2), also presents no difficulty. Here, as in the preceding situation, the court in equitable proceedings follows the exact terms of the statute, and allows the lender the recovery of his principal and disallows that of his interest.

Situation (b) is the one which presents the most difficulty. Under situation (b), (1), the court affected by the established equitable maxim that "he who seeks equity must do equity" declared that a borrower as a condition to the grant to him of equitable relief, must pay not only the principal but also the legal rate of interest thus saving harmless the lender from the terms of a positive statutory penalty. This conclusion has also been reached by many cases under the present law, with the result of abrogating a statutory rule which in no ambiguous terms declares the entire interest void and forfeited, by the operation of a mere equitable maxim. And this is the law in this State at the present. *Miller v. Dunn*,

188 N. C. 397, 124 S. E. 746 (1924), being the latest judicial utterance upon the subject. The justification of the holding seems to lie in the fact that the remedy to recover under this section is an independent action at law. It is submitted, (1) that the whole spirit of code procedure is to prevent unnecessary delays, and a circuitry of action to which the doctrine of the case would lead would frustrate that spirit; (2) that an equitable maxim cannot supersede a statutory rule which, in unequivocal terms, declares that the debtor shall not be compelled to pay any interest when usury has been exacted. These conclusions are supported by adjudicated cases, see *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893); *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893); and seem sound upon principle and policy.

Under the following headline will appear the state of authorities upon the subject, which will exemplify the classification of situations presented above, and will indicate the diversity of opinion which the court has entertained upon the point at different times.

#### B. Exposition of Authorities.

**Lender Precluded Even in Equity.**—A court of equity is bound by the statute of usury, and, although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose a usurious mortgage will be dismissed. *McBrayer v. Roberts*, 17 N. C. 75 (1831).

**Same—Borrower in Equity.**—When the borrower comes in equity, he will be made to do equity, by paying the sum borrowed and the lawful interest, as the price of assistance. But when the lender asks aid of equity, he must ask it on a contract not tainted by an unlawful and corrupt ingredient. *McBrayer v. Roberts*, 17 N. C. 75 (1831).

One who goes into a court of equity to seek relief from a usurious contract, will be required to pay legal interest. *Cook v. Patterson*, 103 N. C. 127, 9 S. E. 402 (1889).

It is well settled that the penalty for usury, provided for in this section, is not applicable in injunction proceedings—equitable in nature, the principle being that he who seeks equity must do equity. *Jonas v. Home Mfg. Co.*, 205 N. C. 89, 170 S. E. 127 (1933), citing *Waters v. Garris*, 188 N. C. 305, 124 S. E. 334 (1924).

Where in a legal action the defendant, a borrower of money, seeks an equitable relief and alleges usury, it is required that he pay the principal sum due with the legal

rate of interest, the only forfeiture which he can enforce being the interest in excess of the legal interest rate. *North Carolina Mfg. Corp. v. Wilson*, 205 N. C. 493, 171 S. E. 783 (1933).

**Equitable Principle Not Applicable in Legal Proceedings.**—The principle that a court of equity will eliminate an usurious rate of interest from the debt when the suit is brought by the debtor for the penalty, upon his paying the principal sum and the legal rate of interest, does not apply to an action at law involving no equitable principle. *Cheek v. Iron Belt Building, etc., Association*, 127 N. C. 121, 37 S. E. 150 (1900); *Cuthbertson v. Bank*, 170 N. C. 531, 87 S. E. 333 (1915).

The principle of equity that a debtor, seeking the aid of a court of equity, will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate (*Simonton v. Lannier*, 71 N. C. 498 (1874); *Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122 (1898); *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735 (1912)), such as in a case to enjoin the foreclosure of a mortgage or to grant other equitable relief, does not apply when the plaintiff is seeking legal relief. *Cuthbertson v. Peoples Bank*, 170 N. C. 531, 87 S. E. 333 (1915).

#### **Tender and Payment of Correct Interest.**

—Upon the principle that “he who seeks equity must do equity,” the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. *Miller v. Dunn*, 188 N. C. 397, 124 S. E. 746 (1924).

Where the plaintiff seeks injunctive relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law under this section, he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that “he who asks equity must do equity,” and he may not resist the foreclosure of the mortgage on the sole ground that he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject. *Waters v. Garris*, 188 N. C. 305, 124 S. E. 334 (1924).

A junior mortgagee seeking equitable relief against foreclosure of a senior mortgage because of usury should be required to tender, or at least, offer to pay the principal sum due, with legal interest thereon

at six per cent. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

**Equitable Maxim Can Not Change the Statutory Rule.**—It is entirely immaterial whether the plaintiff creditor has sought his relief by a proceeding which formerly would have been termed a suit in equity or an action at law. The distinction between these modes of procedure is expressly abolished. The plaintiff can not, by skillfully selecting one prayer for relief instead of another, avoid the penalty which the law imposes upon the transaction, which is the basis of his action. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

There are some authorities to the effect that when the debtor brings the action and invokes the equitable jurisdiction of the court, as by an injunction to prevent a sale under a mortgage, the court will only grant relief upon payment of the principal with legal interest. This is put upon the principle “who asks equity must do equity,” but the principle “he who asks equity must do equity,” has no application to a case where the right is conferred by statute, that the debtor shall be compelled to pay no interest when usury has been contracted for. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

Under the usury act in force up to 1866 whenever usury was reserved the entire contract was void, and neither principal nor interest could be recovered. *Ehringhaus v. Ford*, 25 N. C. 522 (1843). In *Ballinger v. Edwards*, 39 N. C. 449 (1847), this was construed to apply only on the law side of the docket, and when the debtor had to seek the aid of a court of equity he was compelled to pay the principal with legal interest. This section, while reducing the penalty to the loss of interest, seems to have expressly intended to change the doctrine laid down in *Ballinger v. Edwards*. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

An usurious contract is regarded by the settled law of every court as an oppression, practiced or attempted by the lender upon the borrower. A court of equity can not therefore be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression can not demand help even against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor or morality. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

That this section may work a hardship in any case gives the courts no authority

to disregard the statute or explain it away. When the legislature has constitutional authority to make the statute and its meaning is plain, with no limitation making it apply only when the action is brought by the creditor, the courts have not the power to restrict it. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

There is no exception in the statute, and, equity as a separate jurisdiction being abolished, there is no ground upon which the court can interpolate any exception. Indeed, it will be a virtual repeal of the usury law if a creditor, by dexterously securing himself by a mortgage with power of sale, can secure himself against the "forfeiture of all interest" which the statute law visits, without exception, upon every "note or other evidence of debt" which is in any way tainted with usury. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893); *Smith v. Bldg., etc., Asso.*, 119 N. C. 249, 26 S. E. 41 (1896). It would be an anomaly under this statute for the court to rule that the debtor must pay the principal debt, "with interest," when the statute provides that, if he does, the debtor can immediately sue to "recover back double the interest so paid." *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896); *Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122 (1898).

Where the payee withholds from the borrower a part of the face amount of the note, the same being a device to evade the usury laws, the borrower is entitled in equity to have the note credited with the amount so withheld upon the maturity of the note as against the payee under this section. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185 (1934).

#### IV. RIGHTS OF SUBSEQUENT PURCHASERS.

##### A. Summary of Law.

**Editor's Note.**—In this connection two important principles of law clash in the determination of the rights of the bona fide subsequent purchasers for value without notice of a negotiable instrument. The criterion of negotiability of an instrument presupposes that it shall be transferable free from all defenses which may exist between the original parties to the instrument, and is adhered to upon the consideration of promoting mediums of credit, commerce and industry. On the other hand public policy demands that debtors should enjoy full immunity from the imposition of usurious transactions. Should the doctrine of negotiability prevail, that policy and the statute by which it is given expression would be frustrated by a transfer of the

obligation to a holder in due course. To this end the impregnability of the incidents of negotiability have been lenified by an exception to the effect that where the evidence of obligation is void in itself or is made so by statute, the defenses which are available against the payee are also available against the holder. And since both the principal and the interest of a usurious obligation were rendered void in this State by the express terms of the former statute, the case presented no difficulty, and the judicial decisions invariably declared that the holder in due course was in no better position than the payee of the obligation, and that his recourse was against the usurious lender. See *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893); *Faison v. Grandy & Sons*, 126 N. C. 827, 36 S. E. 276 (1900).

Since the establishment of the rule that usury does not render void the principal of the obligation but merely avoids the interest, there has been some question as to the applicability of the old rule to the new situation. See the dissenting opinion of Mr. Justice Burwell, in *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893). But the holding of the cases, as will be illustrated by the succeeding citations, have been decidedly uniform in declaring that the statute makes void the entire interest, and hence the transferee of the instrument can recover only that which his transferor (the lender) could have recovered, viz., the principal without the interest.

##### B. Exposition of Authorities.

**Holder in Due Course Occupies No Better Position than the Lender.**—As to usurious contracts, the law regards the maker, not as in *pari delicto*, but as acting "in chains" (1 Story Eq. Juris., § 302), and to permit his contract, which is deemed exacted under duress, to come under the general rule in favor of innocent holders for value of commercial paper, would be to nullify the protecting statute. The recourse of the holder is against the payee and endorser, who is more likely by far to be able to respond than the maker. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

Prior to this section, a usurious contract worked a forfeiture of both the interest and the debt, and it was stated in *Coor v. Spicer*, 65 N. C. 401 (1871), that under the operation of such a statute, innocent and meritorious holders were obliged to suffer. *Faison v. Grandy & Sons*, 126 N. C. 827, 36 S. E. 276 (1900).

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of

the law. *Faison v. Grandy*, 126 N. C. 827, 36 S. E. 276 (1900).

In *Glenn v. Farmer's Bank*, 70 N. C. 191 (1874), *Rodman, J.*, says: "It is admitted law that notes vitiated by an usurious or gaming consideration can not be enforced in the most innocent hands, but are always and under all circumstances void." *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

**Same — Contrary Rule Would Render Statute Nugatory — Remedy of Holder against Lender.** — If, by passing the note off before maturity and for value, the endorsee may recover on it, the statute is useless, as the protection intended and the penalty and prohibition are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law which had declared the "entire interest forfeited" ab initio, by the fact of "charging or reserving" it. On the other hand, the innocent endorsee has his recourse against the payee who has endorsed the note to him (*Daniel on Neg. Inst.*, § 807), a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

**Same — Principle as Applied to Mortgage Obligations.** — The only case 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 holds that a mortgage given to secure a 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 § 39-20. Aside from the fact that this is held expressly otherwise in the later case of *Moore v. Woodward*, 83 N. C. 531 (1880), an examination of § 39-20 will show that *Coor v. Spicer*, was a palpable inadvertence. That statute in fact 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 sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice usually to the assignee of the note. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

**"Shall Be a Forfeiture" Construed.** — The Supreme Court has expressly held that the words, "shall be a forfeiture," in this section makes void the agreement as to in-

terest. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893).

But see the dissenting opinion of Judge *Burwell*, in *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893), to the effect that the statute does not render the usurious interest void so as to prevent an innocent purchaser of the obligation from recovering from the obligor the interest at the legal rate.

## V. USURY LAWS AS AFFECTING CORPORATIONS.

**Corporation Embraced within Usury Laws.**—In the absence of special legislation, corporations are embraced in the usury laws just as natural persons are, and there is no special legislation affecting this point. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289 (1877).

**Same—Conflict of Laws.**—The statute of the state of New York, forbidding corporations to plead usury as a defense, can not govern a corporation of this State sued in this State, although the bonds in question were delivered in New York and made payable there. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289 (1877).

Where such bonds express a rate of interest illegal in this State, and also in New York, and were issued in payment of a precedent debt and secured by a mortgage on the corporation's property, they could legally bear no greater rate of interest than that allowed in this State. *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289 (1877).

**Same—Exception.**—In *Commissioners v. Atlantic, etc., R. Co.*, 77 N. C. 289 (1877), it was held that a corporation can not legally sell its bonds, bearing the highest legal rate of interest, at a discount for the purpose of borrowing money. Such a sale is in effect a loan, and is usurious. *Ed. Note.*—But the doctrine of this case is abrogated by the latter part of this section which allows such a course.

**Provisions of Corporate Charter Construed.**—In *Simonton v. Lanier*, 71 N. C. 498 (1874), the plaintiff contended that the following language in his alleged act of incorporation, "May discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," confers the right to exact the rate of interest here agreed upon, although greater than the legal rate. It was held that the statute nowhere confers an express power to exceed the legal rate of interest and that the operative words, "any rate of interest that may be

agreed on," mean any rate of interest not greater than the legal rate.

**Building and Loan Associations.** — See § 54-22 and note.

## VI. PLEADING AND PRACTICE.

**Definiteness of Allegations.**—In an action brought to recover money alleged to be due on a contract entered into between the parties, wherein the plea of usury is set up in the answer and a recovery is sought under this section for double the amount of the interest paid, the recovery sought is in the nature of a penalty; and when the facts are known or readily obtainable the law requires a definite statement in the pleading as to the time and amount, before allegations in such action are held to be sufficient, and when such statement is not made no amendment to the pleadings should be allowed. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997 (1911).

**Borrower May Use Lender as Witness.**—To the end that the defense may be ample and complete, if the borrower in his discretion should resort to his remedy under this section he is authorized to examine the lender as a witness. *Merchants Bank of Fayetteville v. Lutterloh*, 81 N. C. 143 (1879).

**Statute of Limitations.**—An action to recover the penalty for usury, under this section, is barred after the lapse of two years from the accrual of the cause of action in the absence of disability or nonresidence affecting the running of the statute. *Smith v. Finance Co.*, 207 N. C. 367, 177 S. E. 183 (1934).

**Same — Nonresident Creditor.** — An action against a nonresident creditor for the statutory penalty for charging usury, who has no agent here upon whom process may be served, is not barred by the statute of limitations, nor does the fact in this case that one of the plaintiffs is a nonresident and the other has changed his residence affect the matter. *Cuthberton v. Peoples Bank*, 170 N. C. 531, 87 S. E. 333 (1915).

**Statute of Limitations a Part of Plaintiff's Case.**—Under § 1-53, a period of two years is allowed for the exercise of the right of the plaintiff to recover usurious interest paid by him; and under that provision it was held that it was a part of the plaintiff's right to allege and prove that the usury was paid within two years, and that the defendant need not specially plead the limitations as in the case of the ordinary statute of limitation. See *Rogers v. Bank*, 108 N. C. 574, 13 S. E. 245 (1891); *Roberts v. Insurance Co.*, 118 N. C. 429, 24 S. E. 780 (1896).

**When Counterclaim Available.** — While a counterclaim for usury may be set up in an action on a note under this section, such counterclaim may not be set up in an action in ejectment based on title to the property under foreclosure of the deed of trust securing the note. *North Carolina Mtg. Corp. v. Wilson*, 205 N. C. 493, 171 S. E. 783 (1933).

**Usury Question of Law When Facts Not in Dispute.**—What constitutes usury is a question of law to be determined by the court when the facts are not in dispute. *Grant v. Morris & Sons*, 81 N. C. 150 (1879).

**When Question for Jury.**—Where, in an action upon a note, the defendant pleads the usury statute, and the evidence is sufficient to sustain a verdict that the excess of interest was a proper charge made for negotiating the loan, the question should be submitted to the jury. *Loan, etc., Co. v. Yokley*, 174 N. C. 573, 94 S. E. 102 (1917).

Where the plea of the usury under this section is made by the plaintiff in the action to enjoin the defendant from the sale of land securing a mortgage note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of the plaintiff's contentions as a fact, and take the case from the jury accordingly. *Miller v. Dunn*, 188 N. C. 379, 124 S. E. 746 (1924).

The fact that a sum borrowed was made payable to the borrowers and an attorney with allegations and evidence that the attorney under instructions from the lender deducted a certain sum therefrom before the borrowers could obtain the money, together with the "item of expense" set out in the deed of trust securing the loan, is held sufficient to have been submitted to the jury on the question of usury. *Jonas v. Home Mtg. Co.*, 205 N. C. 89, 170 S. E. 127 (1933).

**Evidence Properly Submitted to Jury.**—Where the plaintiff alleged usury and the defendant contended that the transaction was within the "commission for the sale of bonds" exception to the usury law it was held that as the evidence was conflicting it was properly submitted to the jury, and was sufficient to support its verdict in plaintiff's favor. *Sherrill v. Hood*, 208 N. C. 472, 181 S. E. 330 (1935).

**New Note Must Be in the Nature of a Compromise in Order to Constitute a Waiver of Right to Plead Usury.**—A usurious contract is not purged of the usury by the execution of renewals or by a change

in the form of the contract, or by the giving of a separate note for the usurious charge, and in order for an agreement as to the total debt and the execution of a new note therefor to constitute a waiver of the right to plead usury, the new amount arrived at must be agreed to by the debtor as just and due the creditor, taking into consideration his claim of usury, and be in the nature of a compromise and settlement and be a novation rather than a renewal. *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406 (1936).

Thus where it was found that the parties agreed upon the total amount of the debt after an accounting involving the credit of sums obtained from the sale of collateral given for the debt, but not involving the question of usury, and that the debtor executed a new note for the balance thus arrived at, it was held insufficient to support the court's conclusion of law that the debtor waived the right to claim usury, the transaction being a renewal rather than a novation. *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406 (1936).

**By Whom May Be Pleaded.**—The plea of usury is open to the parties and their privies, and may be made when, by the transaction, the debtor's estate is wrongfully depleted, and ordinarily by one having the legal right to protect the estate, as a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. *Riley v. Sears*, 154 N. C. 509, 70 S. E. 997 (1911).

**Same—Rights of Trustee in Bankruptcy.**—A right of action to recover the penalty for a usury charge is in the nature of an action for debt, and is a wrongful detention of, or injury to, the estate of the bankrupt which passes to his trustee in bankruptcy. *Ripple v. Mortgage, etc., Corp.*, 193 N. C. 422, 137 S. E. 156 (1927).

**As a Defense.**—Where the payee of a promissory note or bond brings action thereon and the defendant sets up a deduction on account of usury, within the plain intent and meaning of this section the plaintiff will not be entitled to recover the usurious charge. *Pugh v. Scarboro*, 200 N. C. 59, 156 S. E. 149 (1930).

A claim of forfeiture of all interest for

usury may be properly set up as a defense in the creditor's action on the debt without a tender of the debt with legal interest, tender required only when the debtor seeks affirmative equitable relief such as enjoining the collection of the debt or the foreclosure of the security therefor. *Virginia Trust Co. v. Lambeth Realty Corp.*, 215 N. C. 526, 2 S. E. (2d) 544 (1939).

**Setting Aside Fraudulent Conveyance.**—In a creditor's action to establish its debt and to have a subsequent conveyance by the debtor set aside as fraudulent as to creditors, the fact that plaintiff's debt is tainted with usury entitles defendant debtor to invoke the forfeiture of interest, but does not defeat plaintiff's action, or estop plaintiff from asserting the equitable remedy of setting aside the fraudulent conveyance under the doctrine that he who seeks equity must come into court with clean hands. *Virginia Trust Co. v. Lambert Realty Corp.*, 215 N. C. 526, 2 S. E. (2d) 544 (1939).

**Restraining Foreclosure.**—The holder of a second mortgage, able and willing to pay the amount of the debt secured by the first mortgage, but alleging usury, under this section, is entitled to have a restraining order against foreclosure continued until determination of the issue of usury. *Wilson v. Union Trust Co.*, 200 N. C. 788, 158 S. E. 479 (1931).

**Effect of Consent Judgment.**—Where a controversy between the parties as to the amount of the debt has been settled by a consent judgment such judgment is conclusive and final as to any matter determined and cannot be impeached collaterally in another proceeding under this section. *Rector v. Suncrest Lbr. Co.*, 52 F. (2d) 946 (1931).

**Failure to Instruct as to Double Recovery Is Prejudicial.**—The plaintiff in his action to recover for usurious rate of interest paid and received by the lender is entitled under this section to recover double the amount of the interest so paid and received, and an instruction to the jury that fails to give him this right is prejudicial to him and is reversible error. *Bundy v. Commercial Credit Co.*, 200 N. C. 511, 157 S. E. 860 (1931).

§ 24-3. **Time from which interest runs.**—Interest is due and payable on instruments, as follows:

1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be

due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

3. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

4. Bills of exchange drawn or indorsed in the State, and which have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned. (1786, c. 248, P. R.; 1828, c. 2; R. C., c. 13; Code, ss. 44, 45, 46, 47; Rev., s. 1952; C. S., s. 2307.)

**Cross References.**—As to negotiable instruments, interest runs from date of instrument in absence of a stipulation to the contrary, see § 25-23, subsec. 2. As to money due as owelty, see § 46-11. As to commission in lieu of interest where advancement has been made as agricultural lien, see § 44-57.

**Debts Payable on Demand.** — Where money is payable on demand, interest does not accrue until a demand is made; but, when no time is appointed, the money is payable immediately without a demand, and hence interest accrues immediately. *Lewis v. Lewis*, 3 N. C. 32 (1798); *Freeland v. Edwards*, 3 N. C. 49, 2 Am. Dec. 620 (1798).

**Interest Payable from Time Principal Demanded.**—In the absence of a special agreement as to interest or as to time of payment, interest is payable on a debt from the time the principal is demanded. *Crawford v. Bank*, 61 N. C. 136 (1867); *Bank v. Hart*, 67 N. C. 264 (1872); *McRae v. Malloy*, 87 N. C. 196 (1882).

**Necessity of Demand.**—A person holding money belonging to another is not liable for interest thereon, except from the date of demand. *Hyman v. Gray*, 49 N. C. 155 (1856); *Neal v. Freeman*, 85 N. C. 441 (1881).

**Coupons or Installments of Interest.**—Coupons or installments of interest bear interest from the time of a demand of payment made after their maturity. *Burroughs v. Commissioners*, 65 N. C. 234 (1871).

**Interest from Commencement of Action.**—Where interest runs from the date of demand, and no demand has been made, interest will be allowed from the date of

commencement of suit. *Porter v. Grimley*, 98 N. C. 550, 4 S. E. 529 (1887).

**Bond Payable without Interest.**—Where a note or bond is made payable without interest at a certain date, interest does not run thereon except from the time when it should have been paid. *Dowd v. Railroad*, 70 N. C. 468 (1874).

**Coupons, when detached from the bond** to which they were annexed, bear interest from the time when they were due and payable. *Burroughs v. Commissioners*, 65 N. C. 234 (1871).

**A premium note for life insurance** at six per cent interest draws that rate from its date unless otherwise specified. *Owens v. Insurance Co.*, 173 N. C. 373, 92 S. E. 168 (1917).

**Order of County Treasurer for Payment of Money.**—Where A brought an action upon an order of a county treasurer, signed by the chairman of the board of county commissioners, it was held under this section that he was entitled to recover interest upon the amount of the order from the time of the demand of payment. *Yellowly v. Commissioners*, 73 N. C. 164 (1875).

**Unliquidated Damages.** — Unliquidated damages as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained. *Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664 (1888).

**When interest is recoverable on amount of verdict**, it will run from the date of the verdict, unless it can be legally determined before then. *Ludford v. Combs*, 195 N. C. 851, 141 S. E. 541 (1928).

**§ 24-4. Obligations due guardians to bear compound interest; rate of interest.**—Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him. On loans made out of the estate of their wards, guardians may lend at any rate of interest not less than four per cent per annum and not more than the maximum legal rate. This section shall in no way limit or affect the power of guardians to make other investments which are now or may hereafter be authorized or permitted by the laws, statutory or other-

wise, of the State of North Carolina. (1762, c. 69, P. R.; 1816, c. 925, P. R.; R. C., c. 54, s. 23; 1868-9, c. 201, s. 29; Code, s. 1592; Rev., s. 1953; C. S., s. 2308; 1943, c. 728.)

**Editor's Note.** — The 1943 amendment added the second and third sentences.

**Security in Addition to That of Borrower.**—The policy of this section is to require an investment by a guardian to be secured by the bond or note of some person in addition to the borrower. *Watson v. Holton*, 115 N. C. 36, 20 S. E. 183 (1894).

This in *Boyett v. Hurst*, 54 N. C. 167 (1854), where the guardian lends the money of his ward to a trading firm composed of two partners, who both became insolvent at the same time, and from the same causes, no security having been taken besides the names of the two partners, it was held that the guardian was accountable for the money thus loaned, notwithstanding at the time of this loan the partners were considered as entirely solvent and their failure was sudden and unexpected.

A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. *Bane v. Nicholson*, 203 N. C. 104, 164 S. E. 750 (1932).

**A guardian's primary duty is to invest the trust fund,** and he will be chargeable with interest in the absence of proof that it remained in his hands unemployed without his fault. *Wilson v. Lineberger*, 88 N. C. 416 (1883).

**§ 24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.**—All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section. (1786, c. 253, P. R.; 1789, c. 314, s. 4, P. R.; 1807, c. 721, P. R.; R. C., c. 31, s. 90; Code, s. 530; Rev., s. 1954; C. S., s. 2309.)

**Editor's Note — Correction of Punctuation in the Caption.** — The caption of this section was incorrectly punctuated prior to the Consolidated Statutes, and gave rise to at least one litigation. The comma which now appears after the word "bonds" did not then exist, consequently, the excepting clause embraced "judgments" as well as penal bonds. But the court in *In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031 (1918), disregarded the error and held that, though the caption of a statute may be called in aid of construction, it can not

**Guardian Accountable for Loss.** — A guardian will be held liable for any loss resulting from a loan made without taking any security, however solvent the debtor may have been when the loan was made. *Collins v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887).

**Compound Interest Defined.**—Compound interest is interest upon interest, where accrued interest is added to the principal sum, and that whole treated as a new principal, for the calculation of the interest for the next period. *Black's Law Dict.*, p. 636.

**Calculation of Compound Interest.** — The rule for compounding interest on notes due guardians is "to make annual rests," making the aggregate of principal and interest due at the end of a particular year a new principal, bearing interest thenceforward for another year. *Ford v. Vanduyke*, 33 N. C. 227 (1850); *Little v. Anderson*, 71 N. C. 190 (1874).

**Bonds in Settlement with the Ward.**—The bonds, upon which the guardian has lent the ward's money, may be transferred by him to the ward in settlement with him, and the guardian does not have to pay the ward's money. *Cobb v. Fountain*, 187 N. C. 335, 121 S. E. 614 (1924).

**Applied in** *Robinson v. Ham*, 215 N. C. 24, 200 S. E. 903 (1939).

control the text when it is clear, and gave expression to the contents of the section. This error was subsequently corrected in the Consolidated Statutes.

**At common law** a judgment did not carry interest when an execution of *sci. fa.* was issued upon it. In an action upon the judgment the plaintiff could recover interest by way of damages for the detention of the money. The statute was passed for the purpose of amending the law in this respect. *Collais v. McLeod*, 30 N. C. 221 (1848). The intent was that the principal



should bear interest because it was just and right that it should, and that the technical rule of the common law should no longer stand in the way. *McNeill v. Railroad*, 138 N. C. 1, 50 S. E. 458 (1905).

**This section is not exclusive** in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute. *Anderson Cotton Mills v. Royal Mfg. Co.*, 221 N. C. 500, 20 S. E. (2d) 818 (1942).

**Application to Liquidated Demands Only.**—The rule that all moneys due by contract, except those due on penal bonds, shall bear interest applies whenever a recovery is had for the breach of a contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936 (1914).

As to interest on amount awarded for the taking of lands under eminent domain, see *Yancey v. North Carolina State Highway, etc.*, Comm., 221 N. C. 185, 19 S. E. (2d) 489 (1942).

**Interest from the Time Money Should Have Been Paid.**—“The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully and the law implies a promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. *Revisal*, § 1954 [this section]; *Barlow v. Norfleet*, 72 N. C. 535 (1875); *Farmer v. Willard*, 75 N. C. 401 (1876). The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction.” *Lumber Co. v. Atlantic Coast Line R. Co.*, 141 N. C. 171, 53 S. E. 823, 6 L. R. A. (N. S.) 225 (1906).

**From Time Due.**—When a real estate man is entitled to recover a reasonable amount for his services rendered in securing a tenant for a building, the sum fixed by the verdict will, as a matter of law, draw interest from the time the same was

due and payable. *Thomas v. Piedmont Realty, etc., Co.*, 195 N. C. 591, 143 S. E. 144 (1928).

**After demand by a depositor or creditor of a bank for the payment of the amount due** and refusal of the bank to make payment, the bank is liable for the amount of the claim plus interest at the rate of six per centum per annum. *Hackney v. Hood*, 203 N. C. 486, 166 S. E. 323 (1932).

**Purpose of Requiring Jury to Distinguish Principal and Interest.**—The evident design of this section is to allow the plaintiff interest on the principal sum recovered in a judgment from the time of its rendition; and the direction to the jury to distinguish between the principal and interest was intended to provide for those cases in which the whole sum is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal sum was, it is equally within the spirit of the act that interest should be calculated on that. *DeLoach v. Worke*, 10 N. C. 36 (1824).

**Judgment Bears Interest from First Day of Term.**—Where a consent judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from its rendition, it bears interest from the first day of the term, the time given being merely for the purpose of raising the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of 6 per cent should be allowed. *In re Chisholm's Will*, 176 N. C. 211, 96 S. E. 1031 (1918).

**Verdict or Contract—Judgment Should Include Interest.**—Where the controversy is made to depend upon whether a written agreement of a certain date to subscribe to plaintiff's enterprise in a sum certain was binding upon the defendant corporation, the affirmative answer of the jury to the issue carries with it interest on the subscription from the date it was due, as a matter of law, and judgment should be rendered accordingly, and not from the date of its rendition as in tort. *Chatham v. Mecklenburg Realty Co.*, 174 N. C. 671, 94 S. E. 447 (1917).

**Interest on Value of Permanent Improvements on Land.**—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the

value of permanent improvements he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. *Perry v. Norton*, 182 N. C. 585, 109 S. E. 641 (1921).

**Interest on Contracts and Torts Distinguished.**—Where a verdict is given in an action on contract in plaintiff's favor for moneys due by the defendant to his intestate, interest is also given the plaintiff on the amount of the recovery as a matter of law, when not incorporated in the verdict. When in tort the matter of interest is awarded or not according as the jury may find. *Thomas v. Watkins*, 193 N. C. 630, 137 S. E. 818 (1927).

**In Tort Actions Judgment for Damages Bears Interest.**—Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the jury, yet, after the verdict, the judgment for the damages assessed bears interest by virtue of this section, and this is so, although the verdict is for a certain sum "without interest." *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315 (1889).

Interest is not allowable as a matter of law in case of tort. Its allowance as damages rests in the discretion of the jury. *Lincoln v. Claffin*, 7 Wall. (74 U. S.) 132, 19 L. Ed. 106 (1868).

**Conversion of Funds.**—In an action for damages for conversion, the verdict being for the value of the property at the time of the conversion, interest can only begin from the time of the judgment. However, the jury may allow interest on the amount of the damages from the time of the conversion. *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488 (1904).

The rule in this State is that interest, as interest, is allowed only when expressly given by statute, or by the express or implied agreement of the parties. *Devereux v. Burgwin*, 33 N. C. 490 (1850); *Lewis v. Rountree*, 79 N. C. 122 (1878). The only statute upon the subject is that contained in this section, which provides that all sums of money

due by contract of any kind whatsoever, excepting such as may be due on penal bonds, shall bear interest, etc., but there is no provision made for actions of trover or trespass de bonis asportatis. In such cases, in order to compel the wrongdoer to make full compensation to the injured party, the jury may, in their discretion, and as damages, allow interest upon the value of the property from the time of its conversion or seizure, and it has been usual for them to do so. But there is no rule which gives it as a matter of law and right. *Patapsco v. Magee*, 86 N. C. 350 (1882).

**Judgment against State Agency.**—This section has no application to a judgment against the State Highway and Public Works Commission. *Yancey v. North Carolina State Highway, etc., Comm.*, 222 N. C. 106, 22 S. E. (2d) 256 (1942).

**Judgment Bears Interest Though Nothing Is Said.**—By virtue of this section a judgment bears interest from the time of its rendition until paid, though nothing is said therein about interest. *McNeill v. Railroad*, 138 N. C. 1, 50 S. E. 458 (1905).

**Statement in Judgment That It Shall Bear Interest.**—It is best always that the court in its judgment should state fully the amount to be raised by the execution, both principal and interest; but the plaintiff will not forfeit his right to interest by the failure to do this, when enough appears on the face of the judgment to enable the officer to compute the amount justly due. All he is required to know is the amount of the principal, and then the statute makes that amount bear interest to the time of payment. *McNeill v. Railroad*, 138 N. C. 1, 50 S. E. 458 (1905).

This section was held directory so far as it provided that the judgment must itself state that it shall bear interest from the date of rendition until it is paid. It is perfectly clear that such a statement in the judgment is not essential to effectuate the intent of the legislature, which is to allow interest on judgments. *McNeill v. Railroad*, 138 N. C. 1, 50 S. E. 458 (1905).

**Compromise Judgment in Will Contest.**—Where, in a will contest, a compromise judgment was entered whereby legatees named in the will were to receive certain amounts in settlement of their legacies which were ordered to be paid by the administrator cum testamento thereafter to be appointed, the judgment was not such a judgment as, under this section would draw interest from its date.

Moore v. Pullen, 116 N. C. 284, 21 S. E. 195 (1895).

**Interest on Damages in Condemnation Proceedings.**—Interest is not allowed on a judgment rendered in the superior court for damages awarded by the jury to the owner for taking his lands in condemnation; for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, 82 S. E. 5 (1914).

**On Declared Dividend.** — Where a receiver declares a dividend which he wrongfully withholds, interest should run from the time the dividend is declared. Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747 (1890).

**Interest on Surety Bond.** — The surety bond of a clerk of the superior court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. Lee v. Martin, 188 N. C. 119, 123 S. E. 631 (1924).

The measure of the surety's liability is that of the principal, provided such liability does not exceed the penal sum of the bond, and where a bank gives a bond to an agency of the State to protect such agency's deposit, upon the insolvency of the bank with assets insufficient to pay depositors in full, the State agency may not hold the surety liable for interest from the time action on the bond is instituted, since in such circumstances the bank is not liable for interest, but the surety is liable for interest only from date of judgment against it on the bond on the amount for which the bank is liable to the State agency as of that date.

§ 24-6. **Judgment by default final, clerk ascertains.**—When a suit is instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant does not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by § 24-5. (1797, c. 475, P. R.; R. C., c. 31, s. 91; Code, s. 531; Rev., s. 1956; C. S., s. 2310.)

This section dispenses with a jury and directs the clerk to compute the interest preparatory to a final judgment by default in suits "instituted on a single bond, a

State v. United States Guarantee Co., 207 N. C. 725, 178 S. E. 550 (1935).

**Interest Imposed by Law in Nature of Damages.**—A debt draws interest from the date it becomes due, and when interest is not made payable on the face of the instrument, payment of interest will be imposed by law in the nature of damages for the retention of the principal of the debt. Security Nat. Bank v. Travelers' Ins. Co., 209 N. C. 17, 182 S. E. 702 (1935).

Under this section money due by contract, except money due on penal bonds, bears interest as a matter of law. Anderson Cotton Mills v. Royal Mfg. Co., 221 N. C. 500, 20 S. E. (2d) 818 (1942).

**Assessments against Policyholder in Mutual Insurance Company.**—In Miller v. Barnwell Bros., 137 F. (2d) 257 (1943), it was held that under this section interest should be allowed on assessments against policyholder in mutual insurance company under policies in suit from the dates of the respective demands by the receiver.

**Facts Not Excusing Payment of Interest by Insurance Company.**—Where under the terms of a policy of insurance payment is to be made to the beneficiary immediately upon receipt of due proof of death of insured, the failure of the insurer to make payment until more than a year after receipt of such due proof entitles the beneficiaries to interest on the amount from the date of insurer's receipt of due proof, and payment of interest will not be excused because payment by insurer was delayed by reason of the fact that the trust agreement under which the policy was assigned was changed without notice to insurer by adding an individual trustee, and the fact that the corporate trustee became insolvent before payment and a substituted trustee appointed and insurer did not have notice of such substitution until a much later date, insurer having had the use of the money during the period of delay. Security Nat. Bank v. Travelers' Ins. Co., 209 N. C. 17, 182 S. E. 702 (1935).

Cited in Bell v. Danzer, 187 N. C. 224, 121 S. E. 448 (1924).

covenant for the payment of money, bill of exchange, promissory note, or a signed account," contemplating the rendition of such judgment upon written instruments which themselves specify the precise sum to be paid, and need only an estimate of accrued interest. *Rogers v. Moore*, 86 N. C. 86 (1882).

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**Calculation.**—A judgment by default upon a speciality, for the want of a plea, entered by the clerk in court, upon his calculation of interest, was held to be an office judgment, and that the court possessed the power to correct a mistake in the clerk's calculation of interest at any time upon motion. *Griffin v. Hinson*, 51 N. C. 154 (1858).

§ 24-7. **Interest from verdict to judgment added as costs.**—When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto. (Code, s. 529; Rev., s. 1955; C. S., s. 2311.)

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### Article 17.

#### Promissory Notes and Checks.

- 25-191. Negotiable promissory note defined.  
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25-199. Application to present orders.

## ARTICLE 1.

*General Provisions.*

§ 25-1. **Definitions.**—In this chapter, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and setoff.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print. (1899, c. 733, s. 191; Rev., s. 2340; C. S., s. 2976.)

**Editor’s Note.**—Some of the decisions of other states which interpret the N. I. L. have been inserted in notes under this chapter where it is thought they may be of value in construing the law.

Some of the North Carolina cases cited in the notes to this chapter were decided

before the N. I. L. was adopted, but should be of aid in construing this law.

**Quoted** in Steinhilper v. Basnight, 153 N. C. 293, 69 S. E. 220 (1910).

**Cited** in Pickett v. Fulford, 211 N. C. 160, 189 S. E. 488 (1937).

§ 25-2. **Person primarily liable on instrument.**—The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable. (1899, c. 733, s. 192; Rev., s. 2342; C. S., s. 2977.)

**Cross Reference.**—As to liability of parties, see §§ 25-66 through 25-75.

**A surety** on an instrument comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906). See also *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930); *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351 (1934).

**Joint makers** upon the face of a negotiable instrument are deemed to be primarily liable thereon, and in an action upon the note the burden is upon the defendants to prove any matter in release, if brought within three years. *Roberson Co. v. Spain*, 173 N. C. 23, 91 S. E. 361 (1917). See also *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930).

When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defend-

ant’s signature on the back as endorser, the statute makes them each liable to the payee and, nothing else appearing, those signing as makers are primarily liable, with the right of contribution among themselves, while the endorser is secondarily liable. *Raleigh Trust Co. v. York*, 199 N. C. 624, 155 S. E. 263 (1930).

**Indorser.**—If a note, whether negotiable or not, is indorsed at the same time the note itself is made, the indorser ought to be held as original promisor or maker of the note. But where the note is indorsed after its delivery to the payee, the indorser is to be held as an indorser or guarantor depending upon whether the note is negotiable or not. *Lilly v. Baker*, 88 N. C. 151 (1883).

**Married Woman.**—When a married woman has executed a note as co-maker with her husband, a holder in due course for value may accordingly enforce collection thereof against her as a person primarily



liable on the note, and absolutely required to pay it. *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930).

**Parol Evidence as to Character of Signing.**—As between the payee of a negotiable note and the signers thereof, a person signing his name on the face of the note

may prove by parol evidence that to the knowledge of the payee he signed the same as surety and not maker. *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934).

**Cited in** *Mayers v. Bank*, 198 N. C. 542, 152 S. E. 628 (1930).

§ 25-3. **What constitutes reasonable time.**—In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. (1899, c. 733, s. 193; Rev., s. 2343; C. S., s. 2978.)

**Cross Reference.**—As to failure to present bill for acceptance within a reasonable time, see § 25-151.

**As Dependent upon Circumstances.** — What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as definite a rule as could well be established or considered desirable. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906).

Though it be inconvenient to have several rules, applicable to different classes of persons, it is more so to have one applied to all, which is wholly unsuited to the habits, transactions, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons to be affected by it; it must depend upon the circumstances of the case, and must be determined by the jury, under the directions of the court. *Raines v. Grantham*, 205 N. C. 340, 171 S. E. 360 (1933), citing *Britain v. Johnson*, 12 N. C. 293 (1827).

§ 25-4. **When law merchant governs.**—In any case not provided for in this chapter the rules of the law merchant shall govern. (1899, c. 733, s. 196; Rev., s. 2344; C. S., s. 2979.)

**Cross Reference.**—As to common law declared to be in force in North Carolina, see § 4-1.

§ 25-5. **Acts to be done on Sunday or holiday.**—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day. (1899, c. 733, s. 194; Rev., s. 2839; C. S., s. 2980.)

§ 25-6. **Application of chapter.**—The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine. (1899, c. 733, s. 195; Rev., s. 2345; C. S., s. 2981.)

**Applied in** *Barden v. Hornthal*, 151 N. C. 8, 65 S. E. 513 (1909).

## ARTICLE 2.

### *Form and Interpretation.*

§ 25-7. **Form of negotiable instrument.**—An instrument to be negotia-

ble must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty. (1899, c. 733, s. 1; Rev., s. 2151; C. S., s. 2982.)

**Cross References.**—As to certainty of sum, see § 25-8; as to unconditional promise, see § 25-9; as to fixed determinable time, see § 25-10; as to payment to order, see § 25-14; as to payment to bearer, see § 25-15.

**Editor's Note.**—It is apparent that this section is declaratory of the prior law upon the subject. As to certainty of amount to be paid and time of payment, see *First Nat. Bank v. Bynum*, 84 N. C. 25 (1881); necessity of payment in money, see *Johnson v. Henderson*, 76 N. C. 227 (1877).

**Effect of Conditions.**—A contingent condition has always defeated the negotiability of an instrument. *Goodloe v. Taylor*, 10 N. C. 458 (1825).

Since the passage of this law the court has held that a note, the payment of which was made dependent upon a condition expressed in a separate instrument, a deed, was not negotiable. *Pope v. Righter Parey Lumber Co.*, 162 N. C. 206, 78 S. E. 65 (1913).

**Necessity for Payment to Order or Bearer.**—Subsection four was applied in *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23 (1911).

Where an instrument is expressly made payable to a named person, such a provision clearly imports a lack of negotiability under this section. *Bank of United States v. Cuthbertson*, 67 F. (2d) 182 (1933).

The absence of the words "to bearer" or "to order" does not render the bonds non-assignable, but nonnegotiable. *Bank of United States v. Cuthbertson*, 67 F. (2d) 182 (1933).

**Form of Instrument.**—So long as the requirements of this section are complied with, the form of the instrument is immaterial. Thus it has been held that the fact that the instrument is written in pencil (*Gudger v. Fletcher*, 29 N. C. 372 (1847)), or that it is under seal (*First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855 (1887)), does not affect the negotiability.

To illustrate further, it has been held that a certificate of deposit containing words of negotiability (*Johnson v. Henderson*, 76 N. C. 227 (1887)), or a due bill (*Purtel v. Morehead*, 19 N. C. 239 (1837)) or a mortgage note for a specified sum, payable on a certain future day, though it

provided that the whole principal sum should become payable at the option of the mortgagee upon a default in an installment (*Thorpe v. Minderman*, 123 Wis. 149, 101 N. W. 417 (1904), decided under identical statute) is negotiable.

Although county warrants are transferable by indorsement and the indorsee or holder may sue upon them in his own name, they are not negotiable in the sense that the holder in due course is protected by the N. I. L. *Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874 (1898).

The provisions therein that a bond should be payable to bearer, or if registered to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, does not change its negotiable character. *Thomas v. De Moss*, 202 N. C. 646, 163 S. E. 759 (1932).

A municipal bond payable to bearer, and otherwise complying as to form with the provisions of this section, is a negotiable instrument, and as such when in the hands of a holder in due course as defined by § 25-58 is not subject to defenses which would otherwise ordinarily be available to the municipal corporation by which the bond was issued. *Bankers' Trust Co. v. Statesville*, 203 N. C. 399, 166 S. E. 169 (1932).

A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of this section. *North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484 (1931).

**Holders of negotiable mortgage notes** are necessary parties plaintiff in an equitable action to reform the deed of trust and the notes. *First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189 (1933).

**Unsigned Travelers' Cheque.**—A travelers' cheque not signed or countersigned by the purchaser or holder is not a negotiable instrument, since it is not an unconditional promise to pay to the order of a specified person or bearer, the promise to pay being conditioned upon the cheque

being countersigned with the signature appearing at the top of the cheque. *Venable v. American Exp. Co.*, 217 N. C. 548, 8 S. E. (2d) 804 (1940).

Cited in Peoples Building & Loan Assn.

§ 25-8. **What constitutes certainty as to sum.**—The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity. But a provision incorporated in the instrument to pay counsel fees for collection is not enforceable, but does not affect the other terms of the instrument or the negotiability thereof. (1899, c. 733, ss. 2, 197; 1905, c. 327; Rev., ss. 2152, 2346; C. S., s. 2983.)

**Editor's Note.**—In *First Nat'l Bank v. Bynum*, 84 N. C. 25 (1881), decided before this section was enacted, it was held that a provision for attorneys' fees and exchange made the note nonnegotiable because of uncertainty of the amount to be paid. This, according to the specific terms of the section, is, of course, no longer the law.

Although the first sentence of this section appears in the uniform N. I. L., the second sentence was inserted by the legislature of this State so that, in accordance with the uniform law, the stipulation for attorney fees does not destroy the negotiability of the instrument although the provision is not enforceable. It is the evident policy of the legislature to prevent any stipulation permitting "collection fees", as being against public policy. See *Turner v. Boger*, 126 N. C. 300, 35 S. E. 592 (1900), and citations. An application of the operation of this paragraph will be found in *Security Finance Co. v. Hendry*, 189 N. C. 549, 177 S. E. 629 (1925).

§ 25-9. **When promise is unconditional.** — An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. (1899, c. 733, s. 3; Rev., s. 2153; C. S., s. 2984.)

**Cross Reference.**—As to draft with bill of lading attached, see § 21-37 and notes.

**Editor's Note.**—This section is declaratory of the prior law upon the subject except that very early it was held that a statement of the consideration made the instrument conditional. See *Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625 (1908). And see *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308 (1909), which overruled *Howard v. Kimball*, 65 N. C. 175

*v. Swaim*, 198 N. C. 14, 150 S. E. 668 (1929); *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933); *Stein v. Levins*, 205 N. C. 302, 171 S. E. 96 (1933).

Since the provision for collection fees is invalid it does not affect the amount in suit in determining the jurisdiction of a justice court. *Bank v. Appalachian Land, etc., Co.*, 128 N. C. 193, 38 S. E. 813 (1901).

Since attorney fees are not collectible under this section an agent with special authority to pay a note due out of fund held by him is limited to a payment of the principal sum, interests and costs that have accrued at the time of payment. *Hooper v. Trust Co.*, 190 N. C. 423, 130 S. E. 49 (1925).

**Foreign Contract for Attorney's Fees.**—The validity of a provision in a note for attorney's fees executed and payable in Georgia, must be determined by the laws of North Carolina. *Exchange Bank v. Land Co.*, 128 N. C. 193, 38 S. E. 813 (1901). And because of this section, the courts of North Carolina will not enforce such a provision. *Security Finance Co. v. Hendry*, 189 N. C. 549, 177 S. E. 629 (1925).

(1871), and held in conformity with this section.

**Retention of Title in Seller.**—A written unconditional promise to pay a specified sum of money at a designated time is a negotiable instrument, and the negotiability is not affected because the title to goods sold for which the note was given is retained in the seller until payment shall have been made; or stipulations are made in the instrument for application of the

proceeds to the obligor's unqualified promise to pay. See *Branch Banking, etc., Co. v. Leggett*, 185 N. C. 65, 116 S. E. 1 (1923).

**Particular Fund Provided.**—Bonds issued for road building are negotiable, notwithstanding that a fund is provided for their payment. While the specification

of a particular fund out of which payment is to be made destroys the negotiability, a fund may be provided for payment, as in this case, without affecting it. *Commissioners v. Bank*, 157 N. C. 191, 72 S. E. 996 (1911).

§ 25-10. **What constitutes determinable future time.**—An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. An instrument is payable at a determinable future time, within the meaning of this chapter, notwithstanding the fact that it contains a provision waiving notice of protest, notice of dishonor, and an agreement to be bound notwithstanding any extension of time which may be granted. Or, if collaterals have been deposited as security for the payment thereof and the instrument contains a provision that if the value of the securities so deposited has so decreased or declined as to render the holder insecure, the holder may require the maker to deposit other and further collaterals to secure the same, and, upon failure to comply with such demand, to declare the instrument due at once. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, but an instrument payable at a determinable future time is negotiable, even though it may mature or be declared due upon a contingency happening before such future time. (1899, c. 733, s. 4; Rev., s. 2156; C. S., s. 2985; 1923, c. 72.)

**Editor's Note.**—The 1923 amendment added that part of the section beginning with the third sentence. For discussion of the amendment, see 1 N. C. Law Rev. 299.

The amendment also provides that provisions waiving notice of protest and notice of dishonor and agreements to be bound notwithstanding any extension of time, shall not affect negotiability. It seems that this merely makes more certain what was already understood to be the law. See *First Nat'l Bank v. Johnston*, 169 N. C. 526, 86 S. E. 360 (1915).

**Acceleration.**—Acceleration of the maturity of a note, or of notes in a series, as the result of the failure of the maker

to pay interest, or to pay one of the notes of said series, when same becomes due, according to the tenor of the note or notes, by virtue of an agreement to that effect appearing on the face of the note, or notes, does not make the note, or notes of the series, payable upon a contingency, and therefore nonnegotiable within the meaning of this section. *New Bern Banking, etc., Co. v. Duffy*, 153 N. C. 62, 68 S. E. 915 (1910); *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148 (1926).

**Applied,** as to retaining title to goods for which note given, in *Branch Banking, etc., Co. v. Leggett*, 185 N. C. 65, 116 S. E. 1 (1923).

§ 25-11. **Additional provisions as affecting negotiability.**—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal, nor authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal

property exemptions. (1899, c. 733, ss. 5, 197; 1905, c. 327; Rev., ss. 2154, 2346; C. S., s. 2986.)

**A Procedure Statute.**—In so far as this section relates to the enforcement of an authorization to confess judgment, it is merely procedural. *Monarch Refrigerating Co. v. Farmers' Peanut Co.*, 74 F. (2d) 790 (1935).

This section and §§ 1-248, 1-249, are mere procedural statutes, regulating the practice of the courts, and can, of course, have no extraterritorial effect or be looked to as limiting the powers of corporations. *Monarch Refrigerating Co. v. Farmers' Peanut Co.*, 74 F. (2d) 790 (1935).

**Negotiability Not Affected by Mortgage.**  
—The recital on the face of a note, to wit: "This is one of a series of notes secured by deed of trust or mortgage," does not affect the negotiable character of the notes

§ 25-12. **Effect of omissions; seal; designation of particular money.**  
—The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. (1899, c. 733, s. 6; Rev., s. 2155; C. S., s. 2987.)

**Statement of Transaction.**—A negotiable instrument, setting out the transaction for which the instrument is given, cannot be set aside when a holder in due course takes without notice of the infirmity or defect, where there is nothing in such contract to restrict negotiability in the instrument or to indicate fraud or an existent breach. *Bank v. Michael*, 96 N. C. 53, 1 S. E. 855 (1887); *Bank v. Hatcher*,

under this section. *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148 (1926).

**Additional Act Destroying Negotiability.**  
—A bond to pay money, and to do something else, "as to feed and clothe a slave," is not negotiable. *Knight v. Wilmington, etc.*, R. Co., 46 N. C. 357 (1854).

**Enforcement of Foreign Homestead Waiver.**—A provision in a note for the waiver of homestead exemption will not be forced by the courts of this State although the note may have been executed by parties in another state. *Exchange Bank v. Land Co.*, 128 N. C. 193, 38 S. E. 813 (1901).

**Applied in Branch Banking, etc., Co. v. Leggett**, 185 N. C. 65, 116 S. E. 1 (1923). See note under § 25-9.

151 N. C. 359, 66 S. E. 308 (1909).

**Bonds under Seal Negotiable.** — Bonds for the payment of money only, while they retain in other respects the properties and incidents of obligations under seal, are in this State put upon the footing of promissory notes and both are made negotiable securities under the statute. *Pate v. Brown*, 85 N. C. 166 (1881).

§ 25-13. **When payable on demand.**—An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. (1899, c. 733, s. 7; Rev., s. 2157; C. S., s. 2988.)

**Statute of Limitations.**—A promissory note, payable on demand, is due immediately, and the statute of limitations runs from the date. *Caldwell v. Rodman*, 50 N.

C. 139 (1857). The same is true of a bond when no time is specified for payment of it. *Ervin v. Brook*, 111 N. C. 358, 16 S. E. 240 (1892).

§ 25-14. **When payable to order.**—The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. When the instrument is payable to order,

the payee must be named or otherwise indicated therein with reasonable certainty. (1899, c. 733, s. 8; Rev., s. 2158; C. S., s. 2989.)

**Editor's Note.**—See 13 N. C. Law Rev. 80.

**Negotiability.**—Unless a note is payable “to the order of a special person or to bearer” it is not negotiable. *Johnson v.*

*Lassiter*, 155 N. C. 47, 71 S. E. 23 (1911). So a note payable to a specific person or his order is negotiable. *Insurance Co. v. Jones*, 191 N. C. 176, 131 S. E. 587 (1926).

§ 25-15. **When payable to bearer.**—The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last endorsement is an endorsement in blank. (1899, c. 733, s. 9; Rev., s. 2159; C. S., s. 2990; 1949, c. 953.)

**Editor's Note.**—The 1949 amendment rewrote this section. For comment on the 1949 amendment, see 27 N. C. Law Rev. 427.

**Effect of Indorsement upon Negotiability.**

**ity.**—An indorsement in blank of a non-negotiable instrument does not make it negotiable. *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23 (1911).

§ 25-16. **No formal language required.** — The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. (1899, c. 733, s. 10; Rev., s. 2160; C. S., s. 2991.)

§ 25-17. **Presumption as to date.**—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be. (1899, c. 733, s. 11; Rev., s. 2161; C. S., s. 2992.)

§ 25-18. **Antedated and postdated.**—The instrument is not invalid for the reason only that it is antedated or postdated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. (1899, c. 733, s. 12; Rev., s. 2162; C. S., s. 2993.)

§ 25-19. **When date may be inserted.**—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date. (1899, c. 733, s. 13; Rev., s. 2163; C. S., s. 2994.)

§ 25-20. **When blanks may be filled.**—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been

filled up strictly in accordance with the authority given and within a reasonable time. (1899, c. 733, s. 14; Rev., s. 2164; C. S., s. 2995.)

**Liability Where Amount Left Blank.**—*McArthur v. McLeod*, 51 N. C. 476 (1859); *Humphreys v. Finch*, 97 N. C. 303, 1 S. E. 870 (1887); *Phillips v. Hensley*, 175 N. C. 23, 94 S. E. 673 (1917).

**Who May Fill Blank.**—A bill of ex-

change drawn and issued in blank for the name of the payee may be filled up by a bona fide holder with his own name, and will bind the drawer. *Lawrence v. Mabry*, 13 N. C. 473 (1830).

§ 25-21. **Incomplete instrument not delivered.**—Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. (1899, c. 733, s. 15; Rev., s. 2165; C. S., s. 2996.)

**Acknowledgment after Completion.**—If the maker of a sealed note, blank as to the payee's name, acknowledges it to be his bond after the insertion of the payee's

name, and delivery, it is valid and its maker is liable thereon. *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9 (1896).

§ 25-22. **Delivery necessary; when effectual; when presumed.**—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. (1899, c. 733, s. 16; Rev., s. 2166; C. S., s. 2997.)

**Cross Reference.**—As to necessity of delivery in negotiation, see § 25-35.

**Presumption of Delivery to Holder in Due Course.**—Where a negotiable municipal bond is in the hands of a holder in due course, it is conclusively presumed that a valid delivery of the bonds had been made so far as the rights of the holder are concerned. *Bankers' Trust Co. v. Statesville*, 203 N. C. 399, 166 S. E. 169 (1932).

**Presumption of Delivery to Payee.**—Whenever a bill or note is found in the hands of the payee it will be presumed that it was delivered to him, but the presumption may be rebutted. *Pate v. Brown*, 85 N. C. 166 (1881).

**Delivery to Other than Payee.**—It is not necessary that delivery be made to the payee. If the delivery is made to another but shows that the maker intended to part with control, and that it was for

the payee's benefit, such delivery is sufficient to bind the maker. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867 (1921).

**Contemporaneous Parol Agreements.**—It is competent to prove a collateral agreement, as between the immediate parties, making a note nonpayable upon a contingency which would deprive the note of all consideration even though the note is under seal. *Farrington v. McNeill*, 174 N. C. 420, 93 S. E. 957 (1917).

But in an action upon a note the defendants were not permitted to set up the defense that as a part of the contemporaneous parol agreement they were given further time, until certain lands had been sold, for such would be in contradiction of the written instrument. *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616 (1917).

§ 25-23. **Construction, where instrument is ambiguous.**—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the

sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. (1899, c. 733, s. 17; Rev., ss. 1952, 2341; C. S., s. 2998.)

**Cross Reference.**—As to how indorsement made, see § 25-36; as to liability of indorser, see §§ 25-69, 25-70.

**Editor's Note.**—See 13 N. C. Law Rev. 81.

**Note without Interest.**—A note given for a specified amount "without interest"

will be construed to bear interest after maturity. *Dowd v. Railroad*, 70 N. C. 468 (1874).

**The indorsement may be on any part of the note**, even the face or under the maker's name. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979 (1917).

§ 25-24. **Signature must appear; trade or assumed name.**—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. (1899, c. 733, s. 18; Rev., s. 2167; C. S., s. 2999.)

**Name in Body of Instrument Not Necessary.**—It is not necessary that the name of the obligor appear in the note, it is sufficient that he sign it. *Howell v. Parsons*, 89 N. C. 230 (1883).

**Maker Must Show Lack of Consideration.**—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense in an action thereon, the burden is upon him to introduce evidence to establish his defense, and his

failure to do so will entitle the payee to a judgment in his favor. *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462 (1914); *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500 (1920).

**Instruments under Seal.**—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. *Angier v. Howard*, 94 N. C. 27 (1886); *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9 (1896).

§ 25-25. **Signature by agent; how authority shown.**—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency. (1899, c. 733, s. 19; Rev., s. 2168; C. S., s. 3000.)

**In General.**—This provision is an expression and affirmation of the better considered decisions on the subject. *Midgett v. Basnight*, 173 N. C. 18, 91 S. E. 353 (1917).

**Authority of Agent Necessary.**—The power to bind the principal by the making of negotiable paper is an important one, and not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot

be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the object of the agency, and the person dealing with the agent must, subject to the principles heretofore stated, see to it that his authority is adequate. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906).

**Agent by Implication.**—The indorsement by an agent is valid although the



power to indorse was conferred in a vague way, and the agency is one by implication. *Midgette v. Basnight*, 173 N. C. 18, 91 S. E. 353 (1917).

**Necessity for Proof.**—The fact that a

signature is by a duly authorized agent does not prove itself, but the facts must be established by proper testimony. *Midgette v. Basnight*, 173 N. C. 18, 91 S. E. 353 (1917).

§ 25-26. **Liability of person signing as agent.**—Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. (1899, c. 733, s. 20; Rev., s. 2169; C. S., s. 3001.)

**Sufficient Disclosure of Principal.**—Where a negotiable instrument is made by an agent for his principal, the agent, in order to exempt himself from liability, must not only name the principal, but must sufficiently show that the signature is that of the principal though done by an agent. A mere description of the relation is not sufficient to relieve the agent of liability. *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7 (1897).

**Agreement as to Personal Liability.**—

Where an administrator signs a note in the name of the estate and thereunder writes his name as administrator, and at the time of the execution of the note the parties agree that he should not be personally liable thereon, the payee may not hold the administrator personally liable thereon, in view of this section. *Bank of Spruce Pines v. Vance*, 205 N. C. 103, 170 S. E. 119 (1933).

**Applicability to Fiduciaries.**—See 9 N. C. Law Rev. 444.

§ 25-27. **Effect of signature by procuration.**—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent so signing acted within the actual limits of his authority. (1899, c. 733, s. 21; Rev., s. 2170; C. S., s. 3002.)

**Signature of Attorney.**—An attorney to whom a note is sent for collection has, prima facie, no authority to indorse the same in the name of his client, and the

purchaser should inquire as to the extent of the attorney's authority. *Sherrill v. Weisiger Clothing Co.*, 114 N. C. 436, 19 S. E. 365 (1894).

§ 25-28. **Effect of forged signature.**—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (1899, c. 733, s. 23; Rev., s. 2171; C. S., s. 3003.)

**Cross Reference.**—As to liability of acceptor in case of forged signature, see § 25-68.

**Editor's Note.**—Where the name of the maker of the instrument is forged, the instrument is neither a bill nor a check, since the statute provides that a forged signature is wholly inoperative. *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

A bank is presumed to know the signature of its customers and if it pays a forged check it cannot charge the amount to the account of the depositor, unless the depositor is negligent. *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296 (1906).

In case of drafts presented for payment

by an agent, the bank must be assured of the agency to hold another as principal. Letters of instruction to the agent are not sufficient to show power to draw drafts on the principal. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906).

Where the clerk of the superior court executed a check to the person named in a court order, and the brother of the payee of the check, by fraudulently representing himself to the payee, took the check to plaintiff and endorsed it in plaintiff's presence by forging the name of his brother, whereupon plaintiff endorsed the check by writing "O. K." and signing his name, plaintiff is not entitled to recover the amount of the check from the clerk individually or in his official capacity, plain-

tiff's negligence in endorsing the check without attempting to ascertain the identity of the person representing himself to be the payee barring any right to recover. *Keel v. Wynne*, 210 N. C. 426, 187 S. E. 571 (1936).

In *McKaughan v. Trust Co.*, 182 N. C. 543, 109 S. E. 355 (1921), it is held that when one forges a deed and under the forgery obtains a check payable to a third party and he indorses the check in the name of the third party, paying an outstanding debt to the drawer with a part of the funds so obtained, in an action against the bank the drawer can only recover the difference between the amount of the check and the amount paid to the

drawer. This case is criticized in 1 N. C. Law Rev. 40, where it is suggested that the check was payable to a fictitious person in which case the bank would not be liable, for the funds went into the hands of the person intended by the drawer, still it is said that if the drawer should recover at all he should recover all, for the funds that were paid him were for a prior debt and he became purchaser for value without notice.

That North Carolina will apply the doctrine that a forgery may be ratified is indicated in *Yarborough v. Trust Co.*, 142 N. C. 377, 55 S. E. 296 (1906).

**Cited in** *United States v. National City Bank*, 28 F. Supp. 144 (1939).

### ARTICLE 3.

#### *Consideration.*

§ 25-29. **Presumption of consideration.**—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. (1899, c. 733, s. 24; Rev., s. 2172; C. S., s. 3004.)

**Editor's Note.**—See 13 N. C. Law Rev. 52.

In *Planter's Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299 (1923), this section is construed with §§ 25-35 and 25-55 and it is held that one taking without indorsement takes subject to equities between the original parties, and the presumption of consideration may be rebutted.

**Maker Must Show Lack of Consideration.**—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee as a defense, in an action thereon the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payee to a judgment in his favor. *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462 (1914). *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500 (1920). See also *Bank of Lewiston v. Harrington*, 205 N. C. 244, 170 S. E. 916 (1933).

Where there is evidence tending to show that the president of a bank had received from the defendant an exchange of notes for the former's benefit, and that the defendant in the bank's action on the note admits its execution and delivery, it is prima facie evidence that the note was given for a consideration and defendant must show failure of consideration when relied upon by him. *American Trust Co. v. Anagnos*, 196 N. C. 327, 145 S. E. 619 (1928).

**When Holder Must Show Considera-**

**tion.**—While a valuable consideration is essential to the support of negotiable instruments it is not necessary in an action upon them for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration. *Campbell v. McCormac*, 90 N. C. 491 (1884); *Hunt v. Eure*, 188 N. C. 716, 125 S. E. 484 (1924).

**Instruments under Seal.**—The lack of consideration cannot benefit a maker of a bond under seal because the law conclusively presumes that it was made upon good and sufficient consideration. *Angier v. Howard*, 94 N. C. 27 (1886); *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9 (1896).

**Presumption of Sanity of Maker.**—There is a rebuttable presumption that a promisor was sane at the time of the execution of a note, and on that question the burden of showing the contrary, as a general rule, is upon the defendant or the person alleging it. *Jones v. Winstead*, 186 N. C. 536, 120 S. E. 89 (1923).

**Burden of Proof.**—Whenever a prima facie case is made out as provided by this section, in favor of the plaintiff, it is upon the defendant to go forward with his proof, or take the risk before the jury of an adverse verdict, but the burden of proof and the burden of the issue remains upon the plaintiff throughout the trial.

Stein v. Levins, 205 N. C. 302, 171 S. E. 96 (1933).

When plaintiff declares on a past-due negotiable note regular in form, and offers evidence of its execution by defendants, a prima facie case is made out, which imposes upon defendant the burden of going forward with evidence to rebut the presumption created by this section, or incur the risk of an adverse verdict. *Beam v.*

*Wright*, 224 N. C. 677, 32 S. E. (2d) 213 (1944).

**Quoted** in *White v. Johnson & Sons*, 205 N. C. 773, 172 S. E. 370 (1934).

**Cited** in *Peoples Building & Loan Assn. v. Swaim*, 198 N. C. 14, 150 S. E. 668 (1929); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930); *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342 (1943).

§ 25-30. **What constitutes consideration.**—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time. (1899, c. 733, s. 25; Rev., s. 2173; C. S., s. 3005.)

**Rule Prior to This Act.**—Many of the courts have heretofore denied that an indebtedness was sufficient consideration to constitute one a holder for value within the meaning of the law merchant. This statute on this question, however, changes the rule. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906).

**Pre-Existing Debt.**—The provision of this section that a pre-existing debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction. *Peoples Building & Loan Association v. Swaim*, 198 N. C. 14, 150 S. E. 668 (1929).

A person who accepts a check for a pre-existing debt owed him by the maker is a purchaser for value. *National Bank v. Marshburn*, 229 N. C. 104, 47 S. E. (2d) 793 (1948).

**Dower.**—The relinquishment of a right of dower is a valid consideration for a promissory note. *Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435 (1904).

**Note to Secure Mortgage.**—A note given by incorporators of a land company to secure the holder of a mortgage for the purchase price carries sufficient consideration. *Johnson v. Rodeger*, 119 N. C. 446, 25 S. E. 1021 (1896).

**Assignment of Contract for Carrying Mail.**—See note under § 25-33.

**Cited** in *American Trust Co. v. Anagnos*, 196 N. C. 327, 145 S. E. 619 (1928); *New Bern Oil, etc., Co. v. National Bank*, 26 F. (2d) 554 (1928); *Pridgen v. Baugh & Sons Co.*, 30 F. (2d) 353 (1929).

§ 25-31. **What constitutes a holder for value.**—Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time. (1899, c. 733, s. 26; Rev., s. 2174; C. S., s. 3006.)

**Drafts with Bill of Lading Attached.**—Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor. *Willard Mfg. Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026 (1903).

**Deposit of Draft for Collection.**—If drafts, deposited by the customer for his credit, returned unpaid, are charged back to the customer's account, and returned to him, this constitutes only an agency for collection. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901); *Davis v. Lum-*

*ber Co.*, 130 N. C. 174, 41 S. E. 95 (1902). But if the drawer was in debt to the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to the extent of the goods described in the bills of lading. *Latham v. Spragins*, 162 N. C. 404, 78 S. E. 282 (1913).

**Transfer to a Creditor.**—The transfer of a negotiable note by the holder to his creditor before maturity for an antecedent debt constitutes the transferee a holder for value. *American Exch. Nat. Bank v. Seagroves*, 166 N. C. 608, 82 S. E. 947 (1914).

**Held as Collateral.**—One who holds a negotiable note as collateral for the pay-

ment of a debt may maintain an action thereon in his own name, but not one who holds "for collection," for the latter is not "the party in interest." *Third National Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913).

**§ 25-32. When lien on instrument constitutes holder for value.**—Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien. (1899, c. 733, s. 27; Rev., s. 2175; C. S., s. 3007.)

**Assignment to Secure Debt.**—When a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice, to the extent of the debt secured. See *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822 (1901). The law was previously otherwise. *Harris v. Horner*, 21 N. C. 455, 30 Am. Dec. 182 (1836); *Holderby v. Blum*, 22 N. C. 51 (1838); *Potts v. Blackwell*, 56 N. C. 449 (1857).

**Holder as Collateral Security.**—An interpleader, where a note has been attached, who claims as a holder in due course, and makes it appear that the note was taken as collateral security to another note, is a holder in due course only to the extent of his lien. The balance is subject to attachment. *Sugg v. St. Mary's Oil Engine Co.*, 193 N. C. 815, 138 S. E. 169 (1927).

A bank taking a warehouse receipt as collateral security is a holder in due course to the extent of its lien. *Lacy v. Indemnity Co.*, 189 N. C. 24, 126 S. E. 316 (1925).

**Fertilizer Notes Where Grade Misrepresented.**—A note given for the purchase price of fertilizer reciting that there is no warranty is subject to the defense of lack of consideration, and if it appears that the fertilizer was not the grade as shown by the analysis on the sack, the plaintiff is not entitled to recover on the note. *Swift*

*v. Etheridge*, 190 N. C. 162, 129 S. E. 453 (1925).

**Against Holder in Due Course.**—A total absence of consideration is a matter of defense by the maker against the original payee. *Swift & Co. v. Aydtlett*, 192 N. C. 330, 135 S. E. 141 (1926).

**Burden to Show Want of Consideration.**—In *Conservatory v. Dickerson*, 158 N. C. 207, 73 S. E. 990 (1912), it is said that although notes, as simple contracts, require a consideration to support them, it has been long settled that they import a consideration, *prima facie*, so as to throw on the maker the burden to show a want of consideration. *McArthur v. McLeod*, 51 N. C. 476 (1859); *Campbell v. McCormac*, 90 N. C. 491 (1884). In the latter case it was said that: "It is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary and to rebut the presumption of validity and value which the law raises." *Piner v. Brittain*, 165 N. C. 401, 81 S. E. 462 (1914).

**Not Applicable to Nonnegotiable Paper.**—Whether the provisions of this section should be extended to nonnegotiable instruments so as to make the rule uniform is a matter which is addressed to the legislative discretion. *Hunt v. Eure*, 188 N. C. 716, 125 S. E. 484 (1924).

**Stated in Hardy v. Mitchell**, 156 N. C. 76, 72 S. E. 95 (1911).

**Cited in New Bern Oil, etc., Co. v. National Bank**, 28 F. (2d) 554 (1928).

**§ 25-33. Effect of want of consideration.**—Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise. (1899, c. 733, s. 28; Rev., s. 2176; C. S., s. 3008.)

**A contract for carrying mail** is not assignable, and in an action on a note given in part consideration of such assignment this may be shown as a failure of consideration, except as against a holder for value, in due course, without notice. *Peoples Bank, etc., Co. v. Duncan*, 194 N. C. 692, 140 S. E. 610 (1927).

**Presumption of Consideration May Be Rebutted.**—While the execution and de-

livery of a note under seal raises the presumption of consideration, such presumption, in view of this section, is rebuttable as against any person not a holder in due course. *Lentz v. Johnson & Sons*, 207 N. C. 614, 178 S. E. 226 (1935).

**Parol Evidence Rule Not Violated.**—The rule which prohibits the introduction of parol evidence to vary, modify or contradict the terms of a written instrument,

is not violated by showing failure of consideration. *Virginia Trust Co. v. Asheville*, 207 N. C. 164, 176 S. E. 257 (1934).

**Failure of consideration is a valid defense to a note under seal** by reason of the fact the presumption arising from a seal upon a negotiable instrument is rebuttable. *Patterson v. Fuller*, 203 N. C.

788, 167 S. E. 74 (1933).

**Quoted** in *White v. Johnson & Sons*, 205 N. C. 773, 172 S. E. 370 (1934).

**Cited** in *Owens v. Carstarphen*, 197 N. C. 424, 149 S. E. 374 (1929); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930); *New Bern Oil, etc., Co. v. National Bank*, 28 F. (2d) 554 (1928).

§ 25-34. **Liability of accommodation party.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. (1899, c. 733, s. 29; Rev., s. 2177; C. S., s. 3009.)

**Failure of Maker to Conform to Agreement.**—An accommodation indorser is not relieved from liability upon the ground that the maker agreed in parol to negotiate the note at a certain bank which he failed to do, but negotiated to the plaintiff instead who had notice of the agreement. *Parker v. McDowell*, 95 N. C. 219 (1886); *Parker v. Sutton*, 103 N. C. 191, 9 S. E. 283 (1889).

**Order of Liability on Instrument.**—A note, indorsed for the maker's accommodation, signed by the principal and surety is a joint and several obligation, and the owner may sue all or either of the obligors, without joining all as defendants. *Norfolk Nat. Bank v. Griffin*, 107 N. C. 173, 11 S. E. 1049 (1890); *Bank v. Carr*, 121 N.

C. 113, 28 S. E. 186 (1897).

**Indorser for Member of a Partnership.**—

A note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, indorses it and receives no benefit from it, cannot be the subject of an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorser unless the firm be insolvent. *Patton v. Carr*, 117 N. C. 176, 23 S. E. 182 (1895).

**Cited** in *Mayers v. Bank*, 198 N. C. 542, 152 S. E. 628 (1930); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930).

#### ARTICLE 4.

##### *Negotiation.*

§ 25-35. **What constitutes negotiation.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery. (1899, c. 733, s. 30; Rev., s. 2178; C. S., s. 3010.)

**Indorsement Must Be Proven.**—A note being made payable to X or order, indorsement by him was necessary to transfer the title and give the plaintiffs, as the holder, the benefit of the presumptions of the negotiable instrument act; and proof of such indorsement by the payee was necessary. *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (1905); *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447 (1906); *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417 (1910).

**What Constitutes Delivery.**—To constitute delivery of a negotiable note there must be a parting with the possession and with power and control over it by the

maker or endorser for the benefit of the payee or endorsee. To constitute delivery the note must be put out of possession of the endorser. *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394 (1950).

A letter written by the payee in transmitting to the maker a note for execution, declaring that the payee had and does will the indebtedness thereby evidenced to his grandchildren, the children of the maker, so that in case of his previous death the notes would be the property of his grandchildren, was insufficient to constitute a gift inter vivos to his grandchildren, there being nothing in the language to show present donative intent, and there being

neither actual nor constructive delivery of the notes to them. *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394 (1950).

**Delivery May Be Actual or Constructive.**—Where a negotiable instrument is payable to order, its transfer from one person to another is by endorsement, completed by delivery, actual or constructive. *Cartwright v. Coppersmith*, 222 N. C. 573, 24 S. E. (2d) 246 (1943).

A constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or desire. *Cartwright v. Coppersmith*, 222 N. C. 573, 24 S. E. (2d) 246 (1943); *Sinclair v. Travis*, 231 N. C. 345, 57 S. E. (2d) 394 (1950).

**Purchaser without Indorsement.**—A purchaser of a negotiable instrument for value before maturity, but without indorsement, becomes the holder of the equitable title only, and takes subject to any defense the maker may have against the original payee. *Bresee v. Crumpton*, 121 N. C. 122, 28 S. E. 351 (1897); *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220 (1910);

§ 25-36. **How indorsement made.**—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. (1899, c. 733, s. 31; Rev., s. 2179; C. S., s. 3011.)

**Cross Reference.**—As to indorsement by agent, see § 25-25.

**In General.**—The position of the indorsement is immaterial, it may be on the face or the back of the instrument so long as the intention of the parties can be ascertained. *First Nat. Bank v. Messer*, 136 Ga. 226, 71 S. E. 148 (1911).

**Prerequisite to Indorsement on Additional Paper.**—While a lack of room for further indorsements is not a prerequisite to attaching a paper, an essential requirement is that the paper be physically attached or that it should have been when the indorsement was made, and that an assignment or transfer on a separate paper will not suffice. *Midgette v. Basnight*, 173 N. C. 18, 91 S. E. 353 (1917); *Commercial Security Co. v. Main St. Phar-*

*Planters Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299 (1923); *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926); *Foxman v. Hanes*, 218 N. C. 722, 12 S. E. (2d) 258 (1941).

The introduction of a note in evidence without indorsement raises the presumption of equitable ownership and assignment, and without proof of indorsement the holder is not one in due course. *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502 (1910).

**Warehouse receipts**, indorsed by the owner of the cotton and by the superintendent of the warehouse are negotiable by delivery, and when taken as collateral confer upon the holder the position of a bona fide holder for value. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316 (1925).

**Stated** in *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (1905).

**Cited** in *Insurance Co. v. Jones*, 191 N. C. 176, 131 S. E. 587 (1926); *Dawson v. Bank*, 197 N. C. 499, 150 S. E. 38 (1929); *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933).

macy, 174 N. C. 655, 94 S. E. 298 (1917).

**Indorsement by Letter Attached to Note.**—Where a note was sent to a bank as security and attached to a letter, in which it is stated that the holder did assign the note to the bank as collateral security, it was held that the signature on the letter was sufficient indorsement. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979 (1917).

**Indorsement with Rubber Stamp.**—Where the name of the drawee is stamped on the back of a draft with a rubber stamp, by one having authority to do so and with intent to indorse it, it is a valid indorsement, but does not prove itself. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447 (1906).

§ 25-37. **Effect of indorsement by infant or corporation.**—The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon. (1899, c. 733, s. 22; Rev., s. 2180; C. S., s. 3012.)

**Married Women.**—In the case of *Vann v. Edwards*, 128 N. C. 425, 39 S. E. 66 (1901); *Vann v. Edwards*, 130 N. C. 70, 40 S. E. 853 (1902); *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904), which was

decided under the prior law, and was before the Supreme Court three times, it was held that a married woman may dispose of her property without the assent of her husband except in those cases where a

written instrument or conveyance is required for that purpose.

The delivery of a note to the indorsee after it has been indorsed in blank by the wife, the owner and the husband, is a suffi-

cient conveyance. But the indorsement may be explained as between the immediate parties. *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864 (1901).

§ 25-38. **Indorsement must be of entire instrument.**—An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorseees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue. (1899, c. 733, s. 32; Rev., s. 2181; C. S., s. 3013.)

**Editor's Note.** — An assignment of a note, to enable the assignee to sue thereon, must be made by the payee, and must

be for the whole, and not for a part of the sum mentioned in the note. *Martin v. Hayes*, 44 N. C. 423 (1853).

§ 25-39. **Kinds of indorsement.**—An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional. (1899, c. 733, s. 33; Rev., s. 2182; C. S., s. 3014.)

§ 25-40. **Special indorsement; indorsement in blank.**—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery. (1899, c. 733, s. 34; Rev., s. 2183; C. S., s. 3015.)

**Cross References.** — As to right of holder to change blank indorsement to special, see § 25-41; as to right of holder without indorsement when payable to order, see § 25-55 and annotations.

**Indorsement Where Note Payable to Bearer.** — Although a note payable to bearer may be transferred by delivery, it may also be transferred by indorsement of the holder, and in such case the indorser incurs the same obligation and liability as an indorser of a note payable to order. *Lilly v. Baker*, 88 N. C. 151 (1883).

**Right of Indorser in Blank When Instrument Subsequently Acquired by Delivery.** — An indorsement "without recourse," but not saying to whom the bill was indorsed was an indorsement in blank, and the bill became payable to bearer; and notwithstanding that subsequent holders afterwards indorsed it in full or specially, yet when it came again to C. by delivery, he had a right to demand payment of the bill from any prior indorser. *French v. Barney*, 23 N. C. 219 (1840).

**Transfer by Blank Indorsement Presumed.**—An indorsement in blank by the payee of a note is presumed to have been intended as a transfer thereof. *Davis v.*

*Morgan*, 64 N. C. 570 (1870). And nothing else appearing such indorsement constitutes a transfer of the note. *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864 (1901); but as between the immediate parties parol evidence is admissible to show a qualified or special contract. *Mendenhall v. Davis*, 72 N. C. 150 (1875); *Hill v. Shields*, 81 N. C. 251 (1879); *Hoffman v. Moore*, 82 N. C. 313 (1880); *Bank v. Pegram*, 118 N. C. 671, 24 S. E. 487 (1896).

**Title of Attorney Holding for Collection.** — A bond indorsed in blank and given to an attorney for collection amounts to an assignment of title, and conveys authority to the attorney to dispose of it as his own. *Parker v. Stallings*, 61 N. C. 590 (1868); *Bradford v. Williams*, 91 N. C. 7 (1884).

**Indorsement to Particular Class Is Special.**—The designation of a particular class is sufficient to render an indorsement special, and therefore an indorsement to "any bank, banker or trust company" is a special indorsement precluding the further negotiation of the instrument without the indorsement of one of the class specified. *Edgecombe Bonded Warehouse Co. v. Security Nat. Bank*, 216 N. C. 246, 4 S. E. (2d) 863 (1939).

§ 25-41. **How blank indorsement changed to special indorsement.**—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with

the character of the indorsement. (1899, c. 733, s. 35; Rev., s. 2184; C. S., s. 3016.)

**Changing Liability by Filling Blank.**—In case of an indorsement in blank any holder may fill in the blank over the signature thus making it payable to himself or some other person. But by filling in over the indorsement the holder cannot change the indorser's liability. *Lilly v. Baker*, 88 N. C. 151 (1883).

**Time of Filling Blank.**—Where a note is

indorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature, and this may be done at or before the trial. *Johnson v. Hooker*, 47 N. C. 29 (1854); *Lilly v. Baker*, 88 N. C. 151 (1883). It then becomes a special indorsement. *Tyson v. Joyner*, 139 N. C. 70, 51 S. E. 803 (1905).

§ 25-42. **When indorsement restrictive.**—An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. (1899, c. 733, s. 36; Rev., s. 2185; C. S., s. 3017.)

**Cross Reference.**—See notes to § 25-43.

§ 25-43. **Effect of restrictive indorsement; rights of indorsee.**—A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. (1899, c. 733, s. 37; Rev., s. 2186; C. S., s. 3018.)

**Editor's Note.**—Prior to the passage of this and the preceding section it was uniformly held in this State that a bank holding a note under a restricted indorsement for collection could not bring suit in its own name, but must bring suit in the name of the indorser. In *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913), decided after this section, the same rule was followed, the court citing prior cases and not referring to this and the preceding section. The case of *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927), decided the same question and follows the prior ruling. In 5 N. C. Law Rev. 369, there appears a criticism of these cases.

Construing this section of the N. I. L. with the section under civil procedure, which provides that every action must be prosecuted in the name of the real party in interest, we think § 1-57 is mandatory and compelling. We think the decision of *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913), correct in principle and founded on a just and reasonable interpretation of the statutes applicable and cognate. To say a collecting agency, because it is a bank, can sue in its own name would be to say that any attorney or any kind of collecting agent can likewise enter suit by reason of the agency. We do not think our statute allows this construction as to favoritism. The contrary construction would permit the real owner of the

instrument to defeat all equities of the maker by simply turning it over to an agent for collection. *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927); *Federal Reserve Bank v. Whitford*, 207 N. C. 267, 176 S. E. 584 (1934).

**There are general and restrictive indorsements.** In the case of a restrictive indorsement the indorsee cannot indorse to one, who will become a holder in due course, and have a right to sue either indorser. A restrictive indorsement restricts the rights of the indorsee to specified steps. *Drew v. Jacocks*, 6 N. C. 138 (1812).

**Indorsed as Collateral Security.**—A note indorsed to a bank is restrictive where the indorsement is unrestricted, if it appears that the note is only indorsed as collateral security, and for collection, or it appears that the indorser had been given depositor's credit for the amount of the note with the right to charge back in case of dishonor. *Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365 (1896).

**Rights of Restricted Indorsee.**—A draft or bill which is transferred to a bank by restrictive indorsement, as for deposit or for collection, is taken and held by the bank as agent of the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for a like purpose and affected by the re-



striction. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357 (1896); *Murchinson Nat. Bank v. Oil Mills*, 150 N. C. 718, 64 S. E. 885 (1909).

**Indorsement Enlarging Liability.**—"Demand, notice and protest waived, payment guaranteed by the undersigned" is an in-

dorsement with an enlarged liability. The language makes the holder one in due course and the instrument is taken free from equities and defenses which the maker has against the payee. *Richmond Guano Co. v. Walston*, 191 N. C. 797, 133 S. E. 196 (1926).

§ 25-44. **Qualified indorsement.**—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. (1899, c. 733, s. 38; Rev., s. 2187; C. S., s. 3019.)

**Cross Reference.**—As to instrument with indorsement enlarging liability, see notes to § 25-43.

**Effect of Indorsement without Recourse.**—Notes indorsed by the payee named therein, who wrote above his signature on the back of each note the words, "without recourse," is a qualified indorsement. Its effect is to constitute the indorser a mere assignor of the title to the note, which he held at the date of the indorsement. It does not impair the negotiable character of the note so indorsed. *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (1906); *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308 (1909); *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148 (1926).

Alone, a qualified indorsement is not sufficient notice as to discredit a negotiable instrument, but when combined with other suspicious facts it may become evidence to show infirmities. *Merchants Nat. Bank v.*

*Branson*, 165 N. C. 344, 81 S. E. 410 (1914).

**Qualifying Words May Precede or Follow Signature.**—The words qualifying an indorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferor of title. *Medlin v. Miles*, 201 N. C. 683, 161 S. E. 207 (1931).

**Qualified Indorser May Be Liable on Warranties.**—A negotiable instrument transferred by an indorsement reading "for value received I hereby sell, transfer and assign all my right, title and interest to within note to M." assigns title to the instrument by qualified indorsement, exempting the transferor from all liability as a general indorser, except that he is still chargeable with implied warranties as a seller. *Medlin v. Miles*, 201 N. C. 683, 161 S. E. 207 (1931).

§ 25-45. **Conditional indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally. (1899, c. 733, s. 39; Rev., s. 2188; C. S., s. 3020.)

**Cross Reference.**—As to indorsement with enlarged liability, see notes to § 25-43.

**In General.**—An indorsement to "A. B. for sixty days," if conditional is only a

guaranty for sixty days, if unconditional it is only to be in force for a limited time. *Johnson v. Olive*, 60 N. C. 213 (1864).

§ 25-46. **Indorsement of instrument payable to bearer.**—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. (1899, c. 733, s. 40; Rev., s. 2189; C. S., s. 3021.)

**Cross References.**—As to special indorsee indorsing in blank, see notes to § 25-40; as to who is bearer, see § 25-15.

§ 25-47. **Indorsement of instrument payable to two or more persons.**—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has au-

thority to indorse for the others. (1899, c. 733, s. 41; Rev., s. 2190; C. S., s. 3022.)

**Editor's Note.**—See 13 N. C. Law Rev. 34 (1929).  
92.

**Cited in** Dawson v. Bank, 197 N. C. 499,

**Applied in** Virginia-Carolina Bank v. First, etc., Bank, 197 N. C. 526, 150 S. E. 38 (1929).

**§ 25-48. Effect of instrument drawn or indorsed to a person as cashier.**—Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer. (1899, c. 733, s. 42; Rev., s. 2191; C. S., s. 3023.)

**§ 25-49. Indorsement, where payee's name misspelled.**—Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature. (1899, c. 733, s. 43; Rev., s. 2192; C. S., s. 3024.)

**§ 25-50. Indorsement in representative capacity.**—Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability. (1899, c. 733, s. 44; Rev., s. 2193; C. S., s. 3025.)

**Cross Reference.**—As to liability of person signing as agent, see § 25-26.

**§ 25-51. Presumption as to time of indorsement.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue. (1899, c. 733, s. 45; Rev., s. 2194; C. S., s. 3026.)

**In General.**—Indorsements in blank upon negotiable instruments are presumed to be made contemporaneously with the execution of such instrument. *Southerland v. Freemont*, 107 N. C. 565, 12 S. E. 237 (1890).

indorsed to a decedent, and it is found among his papers, the indorsement not bearing a date, he is prima facie presumed to have acquired it in due course. *Price Real Estate, etc., Co. v. Jones*, 191 N. C. 176, 131 S. E. 587 (1926).

**Indorsement to a Deceased Person.**—Where a negotiable instrument has been

**Cited in** *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935).

**§ 25-52. Presumption as to place of indorsement.**—Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated. (1899, c. 733, s. 46; Rev., s. 2195; C. S., s. 3027.)

**§ 25-53. Continuation of negotiable character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. (1899, c. 733, s. 47; Rev., s. 2196; C. S., s. 3028.)

**Cross Reference.**—See annotations under § 25-43.

**etc., Co.**, 202 N. C. 651, 163 S. E. 750 (1932).

**Applied in** *Dunlap v. London Guaranty,*

**§ 25-54. Striking out indorsement.**—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument. (1899, c. 733, s. 48; Rev., s. 2197; C. S., s. 3029.)

**Cross Reference.**—As to negotiation by prior party, see note to § 25-56.

takes up a bill, is remitted to his former title, and may strike out his indorsement and sue as indorsee those standing before

**In General.**—An indorser in full, who

him on the bill, although he may have once made a restrictive indorsement. *French v. Barney*, 23 N. C. 219 (1840).

**Suit without Striking Subsequent Indorsees.**—An indorser of a note may strike out the subsequent indorsers and bring

suit, or he may bring suit without striking the subsequent indorsers, as possession is prima facie evidence of payment to the indorsee. *Smith v. St. Lawrence*, 2 N. C. 174 (1795).

§ 25-55. **Effect of transfer without indorsement.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires in addition the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. (1899, c. 733, s. 49; Rev., s. 2198; C. S., s. 3030.)

**Cross Reference.**—As to indorsement in blank, see § 25-40.

**In General.**—Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to transfer the legal title; and where this is not done, a subsequent holder is not one in due course, though the instrument may have been indorsed to him for value by an intermediate holder. *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (1905); *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220 (1910); *Elgin City Banking Co. v. McEachern*, 163 N. C. 333, 79 S. E. 680 (1913). See also, *Foxman v. Hanes*, 218 N. C. 722, 12 S. E. (2d) 258 (1941).

Indorsement is not the only mode by which an interest in notes may be assigned in view of this section. *Dozier v. Leary*, 196 N. C. 12, 144 S. E. 368 (1928), applied this rule in a case where a husband transferred his interest in a note executed by him and his wife by a registered paper writing, which was held competent evidence in an action by the transferee for one-half the proceeds of the note.

**Payable to Order of Maker.**—One making a note payable to her own order and delivering it to another without indorsement does not make the holder a holder in

due course. *Planters Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299 (1923).

**When Indorsement Must Be Proven.**—Where the plaintiff at the trial presented the draft sued on, with the name of the drawee stamped on the back and testified that the draft had been discounted to him by the drawee before maturity for value and without notice, he is only the equitable owner, in the absence of proof that the instrument had been indorsed, and he holds it subject to any valid defense open to the maker, and it was error to exclude evidence tending to show fraud. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447 (1906).

**Where Assignee Is Not Holder in Due Course of a Collateral Note.**—Where a note is assigned as collateral security for another note, and the assignee holds the collateral note without procuring the indorsement of the assignor until after the collateral note is past due, the assignee is not a holder in due course of the collateral note, and takes same subject to all equities existing in favor of the maker of the collateral note as against the payee who assigned same. *Hare v. Hare*, 208 N. C. 442, 181 S. E. 246 (1935).

§ 25-56. **When prior party may negotiate instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. (1899, c. 733, s. 50; Rev., s. 2199; C. S., s. 3031.)

**Editor's Note.**—In 1 N. C. Law Rev. 187 there is a discussion of the N. I. L. which includes this and § 25-64. The rule seems to be as laid down in *Adrian v. McCaskill*, 103 N. C. 182, 9 S. E. 284 (1889), that one who obtains possession of a negotiable instrument after having formerly indorsed it is restored to his former position and

cannot hold indorsers subsequent to his first indorsement. The reason for this rule is clearly to avoid circuity of action for the subsequent indorsers would eventually hold him liable under his first indorsement. To the same effect, see *Ray v. Livingston*, 204 N. C. 1, 167 S. E. 496 (1933).

## ARTICLE 5.

*Rights of Holder.*

§ 25-57. **Right of holder to sue; payment.**—The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. (1899, c. 733, s. 51; Rev., s. 2200; C. S., s. 3032.)

**Cross References.**—As to right of bank, holding for collection, to sue, see § 25-43; as to definition of holder, see § 25-1; as to presumption that holder is holder in due course, see § 25-65.

**Holder May Sue without Proof of Indorsing Signatures.**—Possession of a note

raises the presumption that the possessor is a holder thereof and he may sue thereon without proof of the signatures of the indorsers, since a mere holder of a negotiable instrument may sue thereon in his own name. *Dillingham v. Gardner*, 219 N. C. 227, 13 S. E. (2d) 478 (1941).

§ 25-58. **What constitutes holder in due course.**—A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. (1899, c. 733, s. 52; Rev., s. 2201; C. S., s. 3033.)

**Cross References.**—As to defenses which may or may not be set up against a holder in due course, see § 25-63 and notes; as to defective title, see § 25-61; as to presumption in favor of holder, see § 25-65; as to defenses which are good as against a holder in due course, see note to § 25-61.

**Indorsement Necessary.**—To constitute a holder in due course it is required that the instrument be indorsed. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447 (1906); *Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299 (1923). See also *Keith v. Henderson County*, 204 N. C. 21, 167 S. E. 481 (1933).

**Same — Taking without Notice.** — A holder of a note not indorsed to him is not a holder in due course, and it makes no difference if he had no notice of the equities of the parties, he is subject to them nevertheless. *Steinhilper v. Basnight*, 153 N. C. 293, 69 S. E. 220 (1910).

**Indorsement Implies "Due Course."** — The holder of a negotiable instrument duly indorsed is, prima facie, a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it. *Smathers v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47 (1915); *Worth Co. v. International Feed Co.*, 172 N. C. 335, 90 S. E. 295 (1916).

**Admission of Indorsement to Holder.**—The admission by the maker of a promissory note that it had been indorsed to the plaintiff in due course raises the presumption prima facie that he is a holder in due course, and the prima facie case is not rebutted by a denial in the pleadings. *Gulf*

*States Steel Co. v. Ford*, 173 N. C. 195, 91 S. E. 844 (1917).

**The transfer by indorsement to another of a bond indemnifying a bank from any loss** which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, is an assignment of a chose in action, and the assignee is not a holder in due course. *North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484 (1931).

**Defective Title Rebutts Presumption.** — The presumption that every holder is a holder in due course does not apply when it is alleged and shown that the negotiable instrument was indorsed by one whose title was defective. *American Exch. Nat. Bank v. Seagroves*, 166 N. C. 608, 82 S. E. 947 (1914); *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926).

**Fraud as Preventing Party from Being Holder in Due Course.**—Where the endorser alleged in his answer that he signed the note upon representations made by the maker that the payee was lending the money to the maker to finance the equipment of a law office, that in fact the note was given to cover funds of the payee on deposit in a bank which had been wrongfully converted by the maker, and that the payee had full knowledge of, agreed to, and participated in, the fraudulent scheme to procure the endorser to sign the note by such false representations, the answer was sufficiently broad to allege fraud, and the payee was not a holder in due course under this section. *Mitchell v. Strickland*, 207 N. C. 141, 176 S. E. 468 (1934).

**Wrongful Procurement by Agent of Holder.**—Defendant's evidence tended to show that he executed the note in suit to be used to pay for shares of stock of the corporate payee, that the stock was never delivered to him and consequently the note was never delivered by him, but that the note was procured from his office without his knowledge or consent by the president of the payee who was also a collecting agent for a bank, and who turned the note over to the bank as collateral security for his company's note. Held: If in procuring the note the president of the company was acting as an agent of the company, knowledge of the infirmity, nothing else appearing, would not be imputed to the bank and it would be a holder in due course, while if, in procuring the note, he was acting as agent of the bank it would have imputed knowledge of the infirmity and would not be a holder in due course, and therefore, it being admitted that he was an agent of the bank, an instruction that the maker could not be held liable if the note had been taken by an agent of the bank, without further elaboration, is error. *National Bank v. Marshburn*, 217 N. C. 688, 9 S. E. (2d) 372 (1940).

**When Burden Shifts to Holder.** — A holder of a note to show that he is a holder in due course without notice must do so by the greater weight of evidence when the maker pleads and shows fraud, infirmity or defective title. *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738 (1908); *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417 (1910); *Bank v. Branson*, 165 N. C. 344, 81 S. E. 410 (1914); *Smathers v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47 (1915); *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495 (1918); *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485 (1926).

When a holder of a note admits certain infirmities in the note, in an action to recover on the note, the burden is upon him to show that he is a holder in due course. *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926).

The holder of a negotiable note is presumed to be a holder in due course, but, when its execution is proved to have been obtained by fraud, the burden then shifts to him to prove that he took it before maturity, for value and without notice. *Williams v. Green*, 23 F. (2d) 796 (1928).

**Enlarged Liability of Indorser Does Not Affect Negotiability.** — A negotiable note indorsed to a holder, bearing an enlarged liability—a guaranty of payment, makes the holder a holder in due course in spite

of the enlarged liability of the indorser. *Richmond Guano Co. v. Walston*, 191 N. C. 797, 133 S. E. 196 (1926).

**Renewal Note after Notice.** — A bank purchasing a note after maturity takes it subject to the equities of the parties. A subsequent note taken as a renewal of the first will not cure the defect and such holder cannot enforce payment. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856 (1924); *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126 (1924).

**Holder for Collection.**—A bank taking a note for collection is not a holder in due course. *Insurance Co. v. Cotton Mill Co.*, 187 N. C. 233, 121 S. E. 439 (1924); *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927).

**Town as Holder in Due Course of Bonds.** —Where a bank pledged certain bonds to secure the deposit of a town, the town acquired the bonds for value as security for a pre-existing indebtedness which is sufficient to constitute it a holder in due course within the meaning of this section. *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33 (1935).

**Holder of Note Obtaining Same by Indorsement after Maturity Is Not Holder in Due Course.**—*Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935).

**Drafts Charged Back.** — The fact that there is a custom among banks to take drafts for collection, and charge them back if they are unpaid, is not sufficient evidence to show that a bank holding a draft is not a holder in due course. *Lumber Co. v. Childerhose*, 167 N. C. 34, 83 S. E. 22 (1914); nor will the charging back of a check which is unpaid, make the holder bank a holder for collection, if the back charge was against an account that consisted of deposited checks that were later returned unpaid. *Standard Trust Co. v. Commercial Nat. Bank*, 240 F. 303 (1917).

**Question for Jury.**—Whether the execution of notes were induced by fraudulent representations, held a question for jury. *Clark v. Laurel Park Estates*, 196 N. C. 624, 146 S. E. 584 (1929).

**Same—Duty to Instruct.**—Where there is evidence that the holder of a negotiable instrument had notice of its infirmity, the question is for the jury, and a failure to instruct thereon is reversible error. *Peoples Bank, etc., Co. v. Duncan*, 194 N. C. 692, 140 S. E. 610 (1927).

**Applied in Wellons v. Warren**, 203 N. C. 178, 165 S. E. 545 (1932); *Bankers' Trust Co. v. Statesville*, 203 N. C. 399, 166

S. E. 169 (1932); *Dyer v. Bray*, 208 N. C. 248, 180 S. E. 83 (1935).

Cited in *Mayers v. Bank*, 198 N. C. 542,

152 S. E. 628 (1930). See also *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933).

**§ 25-59. When person not deemed holder in due course.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. (1899, c. 733, s. 53; Rev., s. 2202; C. S., s. 3034.)

**Cross Reference.**—As to what is reasonable time, see § 25-3 and note.

**In General.** — A cashier's check negotiated to a holder in another state within five days is negotiated in a reasonable time.

*Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906).

Cited in *State, etc., Trust Co. v. Hedrick*, 198 N. C. 374, 151 S. E. 723 (1930).

**§ 25-60. Notice before full amount paid.**—Where the transferee has received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. (1899, c. 733, s. 54; Rev., s. 2203; C. S., s. 3035.)

**Cross Reference.**—As to what constitutes notice, see § 25-62.

**In General.**—The title passes to one who takes a negotiable paper without notice of any defect or equities no matter how little he paid, in the absence of fraud. If there is fraud he is only entitled to what he has paid before receiving notice of the fraud. *Bank v. McNair*, 116 N. C. 550, 21 S. E. 389 (1895).

**Taken as Collateral Security.** — Where the original consideration of the paper is

illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud. *Dresser v. Missouri, etc., R. Co.*, 93 U. S. 92, 23 L. Ed. 815 (1876), or the amount of the debt to which it is collateral. *Kerr v. Cowen*, 17 N. C. 356 (1833); *United States Nat. Bank v. McNair*, 116 N. C. 550, 21 S. E. 389 (1895).

Cited in *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913).

**§ 25-61. When title defective.**—The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. (1899, c. 733, s. 55; Rev., s. 2204; C. S., s. 3036.)

**Cross Reference.**—As to burden of proof when title defective, see § 25-65.

**Editor's Note.**—In the case of the fraud which is sufficient to avoid an instrument as to such holder there is a considerable amount of conflict. However, it would seem that the better rule is that fraud ordinarily renders the instrument voidable only, and therefore, in accordance with the general rule is not a good defense as against a holder in due course where he proves himself to be such in accordance with § 25-65. See *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495 (1918).

**Rights of Holders of Notes Tainted with Usury or Illegality.** — The exceptions to the rule of § 25-65 are: (1) When by statute the paper is void in whole or in part from its inception, as for usury or for gaming or immoral contracts. In such cases it is void to the same extent into whosoever hands it may pass, even if acquired before maturity, for value and without

notice, and the sole remedy of the holder for the deficiency is against the indorser. *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717 (1893). (2) Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the indorsee before notice of the fraud. *Dresser v. Missouri, etc., R. Co.*, 93 U. S. 92, 23 L. Ed. 815 (1876), or the amount of the debt to which it is collateral. *Kerr v. Cowen*, 17 N. C. 356 (1833). But the exception does not extend further, not even to cases where the note was issued without any consideration, though it may be purchased by the indorsee for less than its face value. *United States Nat. Bank v. McNair*, 116 N. C. 550, 21 S. E. 389 (1895).

**When Title Subject to Question.**—In the absence of an allegation of fraud the intervener's title is not subject to question when suit is brought by a holder in

due course. *Moon v. Simpson*, 170 N. C. 335, 87 S. E. 118 (1915); *Moon v. Simpson*, 172 N. C. 576, 90 S. E. 578 (1916); *Worth Co. v. Feed Co.*, 172 N. C. 335, 90 S. E. 295 (1916).

**Burden of Proof.**—When it is shown or admitted that the title of the person who negotiated the instrument is defective, or there is evidence of the fact, it is necessary for a recovery by one claiming to be the holder in due course to show by the greater weight of the evidence that he is such a holder according to the terms of § 25-58. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906); *Bank v.*

*Fountain*, 148 N. C. 590, 62 S. E. 738 (1908); *Bank v. Branson*, 165 N. C. 344, 81 S. E. 410 (1914); *First Nat. Bank v. Warsaw Drug Co.*, 166 N. C. 99, 81 S. E. 993 (1914); *Smathers & Co. v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47 (1915); *Moon v. Simpson*, 170 N. C. 335, 87 S. E. 118 (1915); *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926); *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485 (1926).

**Cited in** *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927); *Clark v. Laurei Park Estates*, 196 N. C. 624, 146 S. E. 584 (1929).

§ 25-62. **What constitutes notice of defect.**—To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. (1899, c. 733, s. 56; Rev., s. 2205; C. S., s. 3037.)

**In General.**—Observable irregularities on the face of the instrument will no longer suffice to affect the rights of a holder in due course. It is necessary that circumstances set out in this section should occur in order to charge the holder with notice. *Smathers & Co. v. Toxaway 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); *Critchler v. Ballard*, 180 N. C. 111, 104 S. E. 134 (1920); *Holleman v. Trust Co.*, 185 N. C. 49, 115 S. E. 825 (1923); *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316 (1925). And see *Piedmont Carolina Ry. Co. v. Shaw*, 223 F. 973 (1915).

The fact that a note is negotiated by a stranger at a discount and one of the alternative places of payment was not known to the holder, is not sufficient to put him on notice of the defects. *Farthing v. Dark*, 111 N. C. 243, 16 S. E. 337 (1892). This case was reported in *Farthing v. Dark*, 109 N. C. 291, 13 S. E. 918 (1891), but at that time the court was not advertent to the fact that there was an alternative place of payment.

When a note is signed through fraud of another, and discounted with an indorsee that had notice of this fraud, the indorsee is subject to the equities between the parties. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856 (1924).

**Notice to Bank through Officers.** — A note payable to an officer of a bank and discounted at the bank through the discount committee does not make the bank subject to the principle of imputed knowledge when the officer is not a member of

the discount committee. *Bank v. Howard*, 188 N. C. 543, 125 S. E. 126 (1924).

A bank taking a note indorsed to it by its president takes with notice of all equities between the parties, when the president and cashier constitute the discount committee, as notice to the president constitutes notice to the bank. *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888 (1892).

**Duty to Inquire.** — When a person has knowledge of such facts and circumstances which make it incumbent on him to inquire as to the character of the note which he purchased, he will be affected with knowledge of all that the inquiry would disclose. *Bunting v. Ricks*, 22 N. C. 130, 32 Am. Dec. 699 (1838); *Hulbert v. Douglas*, 94 N. C. 122 (1886); *Loftin v. Hill*, 131 N. C. 105, 42 S. E. 548 (1902). But knowledge of the crookedness in business matters of the assignee does not defeat the title of the assignee or make it his duty to inquire relative to the note. *Setzer v. Deal*, 135 N. C. 428, 47 S. E. 466 (1904).

**Same—Interest Past Due.** — The fact that interest is past due does not of itself constitute notice of equities between the parties, but it may be considered by the jury in passing on the issue. *Trust Co. v. Whitehead*, 165 N. C. 74, 80 S. E. 1065 (1914).

**Statement of Transaction.**—A note containing on its face an express statement of the transaction for which it was given, in the absence of further evidence, is not notice of the equities between the parties. *Bank v. Hatcher*, 151 N. C. 359, 66 S. E. 308 (1909). See § 25-9 and note.

**Question for the Jury.**—Where there is

conflicting evidence as to notice the holder had of equities between the parties, issue should be submitted to a jury. *Loftis v. Hill*, 131 N. C. 105, 42 S. E. 548 (1902).

§ 25-63. **Rights of holder in due course.**—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (1899, c. 733, s. 57; Rev., s. 2206; C. S., s. 3038.)

**Cross Reference.** — For discussion of rights of holder taking through a holder in due course, see note to § 25-64.

**In General.** — One taking a note as a holder in due course can, under this section, enforce his right against all prior parties, except in case of a defective title as provided in § 25-61. *Davidson v. Powell*, 114 N. C. 375, 19 S. E. 601 (1894); *Bank v. McNair*, 116 N. C. 550, 21 S. E. 389 (1895); *Bank v. Griffin*, 153 N. C. 72, 68 S. E. 919 (1910); *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913). But see § 26-65 as to burden of proof where defect is shown.

The maker of a note may not set up defenses he may have against the payee of the note in an action by a holder in due course, but where the holder is not a holder in due course without notice, the maker may set up all defenses which he may have as against the payee. *Federal*

*Applied in Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33 (1935).

**Cited in** *New Bern Oil, etc., Co. v. National Bank*, 28 F. (2d) 554 (1928).

*Reserve Bank v. Atmore*, 200 N. C. 437, 157 S. E. 129 (1941).

Where the answer sufficiently alleges that the holder was not a holder in due course for value without notice, all defenses which the defendant may have are presentable under the pleadings. *Federal Reserve Bank v. Atmore*, 200 N. C. 437, 157 S. E. 129 (1941).

**Relief from Scheme to Evade Usury Laws.**—Where a borrower is entitled to enforce an equity against the payee because of a device to evade the usury laws, this equity cannot be enforced against a holder in due course. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185 (1934).

**Stated in** *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33 (1935).

**Cited in** *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933); *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935).

§ 25-64. **When subject to original defenses.**—In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter. (1899, c. 733, s. 58; Rev., s. 2207; C. S., s. 3039.)

**Editor's Note.**—The dictum in *Pierce v. Carlton*, 184 N. C. 175, 114 S. E. 13 (1922), to the effect that one who is not a party to the fraud in procuring an instrument but who takes with notice, and then passes the instrument on to a holder in due course, will take a good title and hold as a holder in due course when he reacquires the instrument from the holder in due course, is criticized in 1 N. C. Law Rev. 187.

**In General.**—If plaintiff failed to prove that he was a holder in due course, the notes, although in his hands as a holder, other than a holder in due course, are subject to the same defenses as if they were nonnegotiable. *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926). A past-due instrument, lodged with bank as security, is subject to all defenses. *Bank v. Loughran*, 126 N. C. 814, 36 S. E. 281 (1900).

The transferee of an unindorsed instrument not payable to bearer also takes subject to defenses. *Bresee v. Crumpton*, 121 N. C. 122, 28 S. E. 351 (1897).

A holder in due course may transfer a complete title to a third person although the latter when he takes the paper has knowledge of facts which would defeat recovery by the payee. *Wellons v. Warren*, 203 N. C. 178, 165 S. E. 545 (1932).

"But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." *Ray v. Livingston*, 204 N. C. 1, 167 S. E. 496 (1933).

**Holder of Note after Maturity Takes Subject to Equities.**—Where the holder of



a negotiable note obtained same by endorsement after maturity, he takes same subject to equities, and the maker of the note may establish as against such holder that the note was paid before it was endorsed and acquired by the holder. *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935).

**Purchaser after Maturity Takes Free of Agreement of Third Person to Pay Note.**

— A purchaser for value after maturity

§ 25-65. **Who deemed holder in due course.**—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. (1899, c. 733, s. 59; Rev., s. 2208; C. S., s. 3040.)

**Cross References.**—As to what constitutes holder in due course, see § 25-58. As to exceptions to this section, see note to § 25-61.

**Holders to Whom Applicable.** — The presumption that the holder is one in due course exists in favor of the holder of a draft payable to order with bill of lading attached. *Manufacturing Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026 (1903); *Mangum v. Mutual Grain Co.*, 184 N. C. 181, 114 S. E. 2 (1922).

This presumption does not exist in favor of a holder of an unindorsed note not payable to bearer. *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (1905).

But when a properly negotiated note is found among the papers of a deceased person that is prima facie evidence that the holder is a holder in due course, and until it is alleged and shown by a party liable on the note that it is defective, the evidence is sufficient for the administrator of the holder to recover thereon. *Insurance Co. v. Jones*, 191 N. C. 176, 131 S. E. 587 (1926).

**When Presumption Becomes Operative—Proof of Indorsement.** — The presumption becomes operative as a matter of course where there is neither allegation nor proof that the title to a negotiable instrument is defective. The holder by indorsement is only required to prove the indorsement in order for him to be deemed prima facie a holder in due course. *Moon v. Simpson*, 170 N. C. 335, 87 S. E. 118 (1915).

**Rebuttal of Presumption.** — The prima facie case is not rebutted by a mere denial in the answer of the ownership of the plaintiff. *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775 (1897); *Gulf States Steel Co. v. Ford*, 173 N. C. 195, 91 S. E. 844 (1917).

takes the note free from an agreement by a third person to pay the note when such third person was never a purchaser or holder of the note and the purchaser has no knowledge of such agreement between the maker and the third person. *Pickett v. Fulford*, 211 N. C. 160, 189 S. E. 488 (1937).

**Cited in** *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126 (1924).

**Defective Title — Holder's Burden of Proof.**

—Where fraud on the part of the payee in the procurement and issuance of the instrument is shown, the burden of proving due course is shifted to the holder. *Myers v. Petty*, 153 N. C. 462, 69 S. E. 417 (1910); *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913); *Bank v. Branson*, 165 N. C. 344, 81 S. E. 410 (1914); *American Exch. Nat. Bank v. Seagroves*, 166 N. C. 608, 82 S. E. 947 (1914); *Bank v. Sherron*, 186 N. C. 297, 119 S. E. 497 (1923); *Hooker v. Hardee*, 192 N. C. 229, 134 S. E. 485 (1926). This rule also applies where the holder admits infirmities in the instrument. *Whitman v. York*, 192 N. C. 87, 133 S. E. 427 (1926).

Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

The burden rests upon the holder, when the title of a prior holder is shown to be defective, to show lack of knowledge of the defect. *Standard Inv. Co. v. Snow Hill*, 78 F. (2d) 33 (1935).

The holder by indorsement must show that the instrument was indorsed before maturity. An indorsement by a rubber stamp is a valid indorsement but does not prove itself. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447 (1906).

It was competent for the defendant to introduce evidence as to the quality of goods for which a draft was accepted in order that he might show fraud and deception and where such proof was admitted the burden of proving holding in due course devolved upon holder. *Campbell v. Patton*, 113 N. C. 481, 18 S. E. 687

(1893); *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906); *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738 (1908); *Park v. Exum*, 156 N. C. 228, 72 S. E. 309 (1911); *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913); *Fidelity Trust Co. v. Ellen*, 163 N. C. 45, 79 S. E. 263 (1913); *Bank v. Branson*, 165 N. C. 344, 81 S. E. 510 (1914); *Smathers & Co. v. Toxaway Hotel Co.*, 168 N. C. 69, 84 S. E. 47 (1915); *Discount Co. v. Baker*, 176 N. C. 546, 97 S. E. 495 (1918).

**Jury Question.** — The credibility of the plaintiff's evidence that he is a holder in due course is for the jury. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522 (1906); *Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738 (1908); *Park v. Exum*, 156 N. C. 228, 72 S. E. 309 (1911); *Standing Stone Nat. Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913); *Fidelity Trust Co. v. Ellen*, 163 N. C. 45, 79 S. E. 263 (1913).

#### Interveners Assume Burden of Proving

**Title.** — Where a forwarding bank intervenes and claims title to a draft of a non-resident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached. *Sterling Mills v. Milling Co.*, 184 N. C. 461, 114 S. E. 756 (1922).

**Renewal Note Subject to Defenses against the Original.**—If a note is negotiated after maturity and then taken up by a renewal note, the renewal note is subject to all the equities the original note was subject to. *Grace v. Strickland*, 188 N. C. 369, 124 S. E. 856 (1924).

**Applied in Manufacturing Co. v. Summers**, 143 N. C. 102, 55 S. E. 522 (1906); *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126 (1924); *Dyer v. Bray*, 208 N. C. 248, 180 S. E. 83 (1935).

**Cited in Dixon v. Smith**, 204 N. C. 480, 168 S. E. 683 (1933); *Mansfield v. Wade*, 208 N. C. 790, 182 S. E. 475 (1935); *Pickett v. Fulford*, 211 N. C. 160, 189 S. E. 488 (1937).

## ARTICLE 6.

### *Liabilities of Parties.*

§ 25-66. **Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. (1899, c. 733, s. 60; Rev., s. 2209; C. S., s. 3041.)

**Quoted in** *White v. Johnson & Sons*, 205 N. C. 773, 172 S. E. 370 (1934).

**Cited in** *Howell v. Robertson*, 197 N. C. 572, 150 S. E. 32 (1929); *Wachovia Bank &*

*Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269 (1930); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930); *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934).

§ 25-67. **Liability of drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder. (1899, c. 733, s. 61; Rev., s. 2210; C. S., s. 3042.)

**Cross Reference.**—See note under § 53-71.

**Right of Drawer to Arrest Payment.**—A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the paper, or by agreement deors the instrument as to persons affected with notice, retain the right to arrest payment. *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885 (1909).

Where a draft or bill is transferred to a bank by restrictive indorsement, as for

deposit or for collection, the instrument is taken and held by the bank as agent for the indorser, and for the purpose indicated, and subject to the right of the indorser to arrest payment or divert the proceeds in the hands of any intermediate or sub-agent who has taken the paper for like purpose and affected by the restriction. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357 (1896); *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885 (1909); *Balbach v. Frelinghuysen*, 15 F. 675 (1883).

**Rights of Holder without Notice of Re-**

**strictions.**—When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against

§ 25-68. **Liability of acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse. (1899, c. 733, s. 62; Rev., s. 2211; C. S., s. 3043.)

**Cross Reference.**—As to unlawfulness of bank to handle draft connected with receipt for liquor the sale of which is unauthorized, see § 18-33.

**Burden on Acceptor to Prove Signature of Drawer.**—When a check drawn against a depositor of a bank is paid by the bank, in an action to recover deposits, the burden is on the bank to show that the check was signed by the depositor as maker. *Yarborough Trust Co.*, 142 N. C. 377, 55 S. E. 296 (1906).

Where the cashing bank acts in good faith, the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine. The fact that the cashing bank stamped the check "all prior indorsements guaranteed" makes no difference to the drawee as that guarantee is only applicable to subsequent holders in due course. *State Bank v. Savings, etc., Co.*, 168 N. C. 605, 85 S. E. 5 (1915).

**When Forgery Known to Drawee.**—

§ 25-69. **When person deemed indorser.**—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. (1899, c. 733, s. 63; Rev., s. 2212; C. S., s. 3044.)

**In General.**—A person indorsing a note at the time it is made should be held as original promisor. If the note is indorsed after delivery to the payee and negotiated, the indorsement binds the indorser as indorser only, but if it is not negotiated he is liable as guarantor. *Lilly v. Baker*, 88 N. C. 151 (1883).

Persons placing their names on the back of the note are, therefore, nothing else appearing, indorsers and liable on the note only as indorsers. *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423 (1908); *Houser v. Fayssoux*, 168 N. C. 1, 83 S. E. 692

the rights of the bank so holding the paper. *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. 885 (1909).

**Cited in** *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Where a depositor is aware of forgery and indorses the check, and it is accordingly credited to him without knowledge of such facts on the part of the bank, the bank may return the check to such depositor and rightfully charge his account therewith, without reference to any fraudulent intent on his part. *Woodward v. Savings, etc., Co.*, 178 N. C. 184, 100 S. E. 304 (1919).

**Mistake Not Grounds for Repudiating Acceptance.**—When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because later it is ascertained that the drawer was without funds to meet the check, though when the payment was made the officials labored under the mistake that there were funds sufficient. *Woodward v. Savings, etc., Co.*, 178 N. C. 184, 100 S. E. 304 (1919).

**Cited in** *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

(1914); *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866 (1915); *Meyers v. Battle*, 170 N. C. 168, 86 S. E. 1034 (1915); *Barber v. Absher Co.*, 175 N. C. 602, 96 S. E. 43 (1918); *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925); *Dillard v. Farmers Mercantile Co.*, 190 N. C. 225, 129 S. E. 598 (1925).

"Appropriate words" as provided by this section, must appear upon the instrument itself or in some sufficient writing attached thereto and becoming an essential and integral part thereof, and parol evidence is not admissible to show that

one signing as indorser is primarily liable on the note. *Waddell v. Hood*, 207 N. C. 250, 176 S. E. 558 (1934).

**Indorsement as Surety.**—When it is set out in the body of a note that indorsers on the back are sureties, they will be held liable as sureties and not as indorsers. *Dillard v. Farmers Mercantile Co.*, 190 N. C. 225, 129 S. E. 598 (1925).

**Indorsement by Board of Directors.**—Where a resolution, by the board of directors of a corporation, authorized two of their number, by their signatures, to bind each of the directors individually on any notes due by the company or renewals thereof, the indorsement of such notes, by the two directors so authorized, binds the other directors as indorsers only and not as principals. *Hertford Bkg. Co. v. Stokes*, 224 N. C. 83, 29 S. E. (2d) 24 (1944).

**When Parol Evidence Admissible.**—Parol evidence is admissible as between the parties to explain the instrument. For example, "the surety on the face of a note, and an accommodation indorser, may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect. So, several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties." *Brandt Suretyship Guaranty*, Vol. 1 (3 ed.), pp. 562-3; *Sykes v. Everett*, 167 N. C. 600, 83 S. E.

585 (1914); *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925).

But it is not competent to show that the liability of one whose name is written on the back of a note as an indorser is primary, and not secondary, for the purpose of sustaining the contention that notice of dishonor by nonpayment is dispensed with. *Fourth Nat. Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866 (1915); *Busbee v. Creech*, 192 N. C. 499, 135 S. E. 326 (1926).

Where the directors of a corporation sign a negotiable instrument on the back thereof as indorsers, the holder may not show by parol that they signed as co-makers, or guarantors, or sureties. *Wrenn v. Lawrence Cotton Mills*, 198 N. C. 89, 150 S. E. 676 (1929).

Testimony in direct contradiction of the written agreement as expressed in the indorsement to "guarantee payment of this note \* \* \* with full knowledge of this contract," should be excluded under this section. *Carr v. Clark*, 205 N. C. 265, 171 S. E. 88 (1933).

**Applied in Corporation Commission v. Wilkinson**, 201 N. C. 344, 160 S. E. 292 (1931); *Hyde v. Tatham*, 204 N. C. 160, 167 S. E. 626 (1933).

**Cited in Nance v. Hulin**, 192 N. C. 665, 135 S. E. 774 (1926); *Howell v. Robertson*, 197 N. C. 572, 150 S. E. 32 (1929).

**§ 25-70. Liability of irregular indorser.**—Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee. (1899, c. 733, s. 64; Rev., s. 2213; C. S., s. 3045.)

**Cited in Rouse v. Wooten**, 140 N. C. 557, 53 S. E. 430 (1906); *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423 (1908); *Meyers v. Battle*, 170 N. C. 168, 86 S. E. 1034 (1915), and held not applicable to that case; *Wrenn v. Lawrence Cotton Mills*, 198 N. C. 89, 150 S. E. 676 (1929).

**§ 25-71. Warranty, where negotiation by delivery.**—Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes. (1899, c. 733, s. 65; Rev., s. 2214; C. S., s. 3046.)

**Cross Reference.**—As to qualified indorsement, see § 25-44.

**§ 25-72. Liability of general indorser.**—Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of § 25-71; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. (1899, c. 733, s. 66; Rev., s. 2215; C. S., s. 3047.)

**Cross Reference.**—As to words which exempt transferor from liability as general indorser, see § 25-44 and note.

**Considered with Other Sections.**—This section, which restricts the warranty to subsequent holders in due course, must be considered in connection with other sections of the negotiable instruments law. *Ray v. Livingston*, 204 N. C. 1, 167 S. E. 496 (1933).

**Contract of Indorsement Is a Separate Contract.**—A contract of indorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification and for value it guarantees to a holder in due course among other things that the instrument, at the time of the indorsement, is a valid and subsisting obligation. *Wachovia Bank, etc., Co. v. Grafton*, 181 N. C. 404, 107 S. E. 316 (1921).

**Indorsement after Maturity.**—An indorsee taking after maturity takes the title to whatever interest his indorsee had, and by the indorsement the indorser makes such warranties as are provided by statute. *Smith v. Godwin*, 145 N. C. 242, 58 S. E. 1089 (1907).

**An indorsement "without recourse"** does not impair the negotiability of the instrument, but qualifies the indorsement and where one has acquired a negotiable instrument by an indorsement by a holder without recourse, there is no implied warranty on the part of such indorser. *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (1906); *Walter v. Kilpatrick*, 191 N. C. 458, 132 S. E. 148 (1926).

**Signature Not Explained by Parol.**—When a payee or regular indorsee thereof writes his name on the back of a note, as between him and a bona fide holder for value and without notice, the law implies that he intended to assume the well-known liability of an indorser, and he will not be permitted to contradict this implication. But this rule does not apply between the original parties to a contract which is not in writing, although there may be the signature of one or more parties to authenticate that some contract was made. *Sykes*

*v. Everett*, 167 N. C. 600, 83 S. E. 585 (1914).

**Liability of Substituted Indorser.**—Where an indorser as originally appearing on a negotiable note has his name stricken from the instrument by the payee and another person signs in substitution for him, the liability of the substituted indorser to the payee remains as a general indorser, unaffected by the cancellation and substitution, when his signature is not obtained by misrepresentation that the other indorsers had consented to the substitution and remained bound by the instrument. *Ehird v. Little*, 205 N. C. 583, 172 S. E. 198 (1934).

**Set-off of Deposits against Note.**—Where a depositor in an insolvent national bank had indorsed a note on which he was in fact primarily liable, and procured the bank to discount it for his benefit, he was entitled in a suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note. *Williams v. Coleman*, 190 N. C. 368, 129 S. E. 818 (1925); *Yardley v. Clothier*, 51 F. 506, 17 L. R. A. 462 (1892); *Williams v. Rose*, 218 F. 898 (1914); *Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059 (1892); *Yardley v. Philler*, 167 U. S. 344, 17 S. Ct. 835, 42 L. Ed. 192 (1897).

**Not Applicable to Usury.**—The provisions made as to warranties which prevail in case of unqualified indorsements refer to lawful transactions, and do not relate to transactions coming within the meaning of our usury laws. *Sedbury v. Duffy*, 158 N. C. 432, 74 S. E. 355 (1912).

**Parol Evidence.**—Where an unqualified indorsement is supported by a valuable consideration and the maker seeks to enforce the indorser's liability the indorser may introduce parol evidence of an agreement entered into by the parties contemporaneously with the execution of the note that payment was to be made out of a particular fund, but he may not introduce parol evidence in contradiction of the written terms of the note that he was not to be held liable in any event. *Kindler v.*

Wachovia Bank, etc., Co., 204 N. C. 198, 167 S. E. 811 (1933).

Applied in Hyde v. Tatham, 204 N. C. 160, 167 S. E. 626 (1933).

§ 25-73. **Liability of indorser, where paper negotiable by delivery.**—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. (1899, c. 733, s. 67; Rev., s. 2216; C. S., s. 3048.)

§ 25-74. **Order in which indorsers are liable.**—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. (1899, c. 733, s. 68; Rev., s. 2217; C. S., s. 3049.)

**Cross Reference.**—As to liability of subsequent holder when instrument is negotiated back to prior holder, see § 25-56.

**Editor's Note.**—See 13 N. C. Law Rev. 82, 87.

**Contribution between Indorsers.**—An indorser of a negotiable instrument is not subject to contribution among all others who may have indorsed the same, but only liable to those who are subsequent in date to his indorsement, to the full amount of their payment as an indemnitor. Lancaster v. Stanfield, 191 N. C. 340, 132 S. E. 21 (1926).

An indorser of a negotiable instrument who had paid a judgment obtained thereon in an action against him and the insolvent makers, cannot, nothing else appearing, recover the amount in his action therefor against a subsequent indorser. Lynch v. Loftin, 153 N. C. 270, 69 S. E. 143 (1910).

**Parol Evidence between Immediate Parties.**—Parol evidence is admissible to

show that as between or among themselves parties to a negotiable instrument are liable otherwise than appears prima facie. Bank v. Burch, 145 N. C. 316, 59 S. E. 71 (1907); Sykes v. Everett, 167 N. C. 600, 83 S. E. 585 (1914); Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1925); Dillard v. Mercantile Co., 190 N. C. 225, 129 S. E. 598 (1925); Lancaster v. Stanfield, 191 N. C. 340, 132 S. E. 21 (1926).

**Parol Evidence against Remote Indorsee.**—In an action upon a note by a remote indorsee, who purchased bona fide for full value and without notice, against the payee, who indorsed the note in blank, evidence of an agreement between the payee and his immediate indorsee that he should not be held liable on his indorsement is not admissible. Hill v. Shields, 81 N. C. 250 (1879).

**Cited in** Howell v. Robertson, 197 N. C. 572, 150 S. E. 32 (1929).

§ 25-75. **Liability of agent or broker.**—Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by § 25-71, unless he discloses the name of his principal and the fact that he is acting only as agent. (1899, c. 733, s. 69; Rev., s. 2218; C. S., s. 3050.)

**Cross Reference.**—See also §§ 25-26 and 25-50.

## ARTICLE 7.

### *Presentment for Payment.*

§ 25-76. **Effect of want of demand on principal debtor.**—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. (1899, c. 733, s. 70; Rev., s. 2219; C. S., s. 3051.)

**Cross References.**—As to when presentment is not necessary in order to charge drawer and indorsers, see §§ 25-85, 25-86; as to place of presentment, see § 25-79; as to notice to those secondarily liable, see §

25-96 et seq.

**Presentment Necessary to Hold Drawer.**—When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it, and a

failure to do so will discharge the debt. *Mauney & Son v. Coit*, 80 N. C. 300 (1879).

**Presentment Must Be Made in a Reasonable Time to Hold Drawer.**—A drawer of a bill, having funds in the hands of the drawee has a right that the bill be presented for payment, and he cannot be charged unless the bill was presented in a reasonable time, although he knew at the time of drawing the bill that the drawee was insolvent. *Long v. Stephenson*, 72 N. C. 569 (1875); *Cedar Falls Co. v. Wallace*, 83 N. C. 225 (1880).

**Effect of Guaranteeing Prior Indorsements.**—A certificate of deposit forwarded to another bank by the drawer bank must be presented in a reasonable time, and if not presented the drawer is not liable, although it stamped the certificate "Prior indorsements guaranteed." *Bank v. Trust Co.*, 159 N. C. 85, 74 S. E. 747 (1912).

**Presentment of Checks.**—A postdated check, like any other check need not be presented on the day of its date, but may be presented within a reasonable time thereafter, and the fact that the drawee had money on deposit to meet it on that date, but did not have it when the check was presented, is not equivalent to a "tender of payment." *Philadelphia Life Ins. Co. v. Hayworth*, 296 F. 339 (1924).

**Sufficient Funds on Deposit May Amount to Tender.**—The fact that the maker of a

negotiable note payable at a certain bank kept a deposit sufficient to pay the note at the bank on the due date may amount to a tender of payment under this section, but such tender would discharge only persons secondarily liable on the note, and would not discharge the liability of the maker and surety on the note. *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351 (1934).

**Surety's Liability.**—When one is a surety on a note, as to all holders he stands on the same basis as the principal, and presentment for payment is not necessary to make him liable thereon. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906). See also *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351 (1934).

**Guarantor's Liability.**—One who is a guarantor on a note is not primarily liable, and presentment is necessary to hold him liable thereon. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906).

**When Failure to Make Demand Available as Defense—Proof.**—If a note be payable at a particular time and place, a demand at the time and place need not be averred or proven in an action by the holder against the maker. A failure to make such demand can only be used in defense if the money was ready at the time and place. *Nichols v. Pool*, 47 N. C. 23 (1854).

**Cited in** *Perry v. Taylor*, 148 N. C. 362, 62 S. E. 423 (1908).

§ 25-77. **Presentment.**—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. (1899, c. 733, s. 71; Rev., s. 2220; C. S., s. 3052.)

**In General.**—Where a negotiable paper is assigned, the transaction is to be regulated according to the laws of merchants, by which the assignee is bound to apply for payment within a reasonable time. *Plummer v. Christmas*, 1 N. C. 145 (1799).

**Presentment of Checks within Reasonable Time.**—Instruments payable on demand may be presented within a reasonable time after their issue. In this respect

there is no difference between a postdated check and any other. In either case it should be presented within a reasonable time after its issue, but the only effect of a failure to present it within such time is to discharge the drawer from liability to the extent of the loss caused by the delay. *Philadelphia Life Ins. Co. v. Hayworth*, 296 F. 339 (1924).

§ 25-78. **What constitutes a sufficient presentment.**—Presentment for payment to be sufficient must be made (1) by the holder or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made. (1899, c. 733, s. 72; Rev., s. 2221; C. S., s. 3053.)

**In General.**—The presentment of a bill of exchange or draft must be made to the drawee or acceptor, or to an authorized agent. A personal demand is not always

necessary, and it is sufficient to make the demand at the residence or usual places of business of the drawee, where the presentment is for payment. It is the duty of the

bank collector to be careful, not only to present the draft at the usual place of business, but, if the plaintiff was not in, to assure himself that the person to whom he

presented the draft for acceptance was the authorized agent of the plaintiff. *Burrus v. Life Ins. Co.*, 124 N. C. 9, 32 S. E. 323 (1899).

**§ 25-79. Place of presentment.**—Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make the payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. (1899, c. 733, s. 73; Rev., s. 2222; C. S., s. 3054.)

**Place of Payment Specified.**—Whenever a bill of exchange or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary whether the maker lives at the same place or a different one. *Sullivan v. Mitchell*, 4 N. C. 93 (1814). But the maker

is not bound to pay it until it is presented at the place where it is expressed to be payable. *Bank v. Bank*, 35 N. C. 75 (1851).

**Presentment of a draft for payment at the place of its date** is sufficient, no other place of presentment appearing. *Wittkowski v. Smith*, 84 N. C. 671 (1881).

**§ 25-80. Instrument must be exhibited.**—The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it. (1899, c. 733, s. 74; Rev., s. 2223; C. S., s. 3055.)

**Lost or Destroyed Note.**—The provisions of this section that upon payment of a note it must be delivered up to the party paying it, does not apply where the note has been lost or destroyed, and, under the facts of

this case, there was no error in not requiring a bond for the protection of the maker where there was no request made therefor. *Wooten v. Bell*, 196 N. C. 654, 146 S. E. 705 (1929).

**§ 25-81. Presentment where instrument payable at bank.**—Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. (1899, c. 733, s. 75; Rev., s. 2224; C. S., s. 3056.)

**§ 25-82. Presentment where principal debtor is dead.**—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. (1899, c. 733, s. 76; Rev., s. 2225; C. S., s. 3057.)

**§ 25-83. Presentment to persons liable as partners.**—Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. (1899, c. 733, s. 77; Rev., s. 2226; C. S., s. 3058.)

**In General.**—Where the protest of a notary public stated that he presented a bill, which purported to be drawn on a firm, to A, one of the members thereof, it was

held to be evidence that A was a member of that firm, and that the presentment was properly made. *Elliott v. White*, 51 N. C. 98 (1858).

**§ 25-84. Presentment to joint debtors.**—Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all. (1899, c. 733, s. 78; Rev., s. 2227; C. S., s. 3059.)



**§ 25-85. When presentment not required to charge the drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. (1899, c. 733, s. 79; Rev., s. 2228; C. S., s. 3060.)

**In General.**—The drawers, having funds in the hands of the drawee, had the right to expect their bill to be honored by them, and they were entitled to presentment of their bill in a reasonable time and strict notice if dishonored on the part of the plain-

tiff, although the defendants at the time they drew the bill may have believed the drawees were insolvent and had been so notified by them and requested not to draw on them. *Cedar Falls Co. v. Wallace Bros.*, 83 N. C. 225 (1880).

**§ 25-86. When presentment not required to charge the indorser.**—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. (1899, c. 733, s. 80; Rev., s. 2229; C. S., s. 3061.)

**Where holder testifies that endorser was not accommodation endorser** this section is not applicable. *Hyde v. Tatham*, 204 N. C. 160, 167 S. E. 626 (1933).

S. E. 1034 (1915).

**Lack of Funds with Which to Pay.**—Where the treasurer of a corporation indorses the corporate note, payable at a certain bank, and at its maturity the corporation has no funds at the bank, it is not necessary that the note should have been presented to the bank for payment. *Meyers Co. v. Battle*, 170 N. C. 168, 86

**Burden of Proof on Holder.**—If it is in fact an accommodation paper, then, notwithstanding the form of the paper, the drawer would be primarily liable and not entitled to notice, but the burden to show this is on the holder, and there being no evidence to that fact, the form of the paper governs and the drawer is entitled to notice. *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455 (1895).

**§ 25-87. When delay in presentment is excused.**—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (1899, c. 733, s. 81; Rev., s. 2230; C. S., s. 3062.)

**Delay Caused by One Liable.**—Where an agent has incurred a personal liability on a negotiable instrument given in behalf of his principal, he may not avoid payment on the ground of delay in pre-

senting it for payment, when the delay was at his own request and by his own conduct. *Caldwell County v. George*, 176 N. C. 602, 97 S. E. 507 (1918).

**§ 25-88. When presentment may be dispensed with.**—Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied. (1899, c. 733, s. 82; Rev., s. 2231; C. S., s. 3063.)

**Where Presentment Cannot Be Made.**—Where the maker is a seaman, without any domicile in the State, and goes on a voyage about the time the note falls due, no demand on him is necessary in order to charge the indorser. *Moore v. Coffield*, 12 N. C. 247 (1827).

bonds and the bonds could not be issued at once, and the drawer cooperated with the county to get the bond issue, there is a sufficient implied waiver of immediate presentment, and a presentment within a reasonable time after the bond issue was sufficient to bind the drawer. *Caldwell County v. George*, 176 N. C. 602, 97 S. E. 507 (1918).

**Implied Waiver of Presentment.**—Where a check was given for county

**§ 25-89. When instrument dishonored by nonpayment.**—The instrument is dishonored by nonpayment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid. (1899, c. 733, s. 83; Rev., s. 2232; C. S., s. 3064.)

**§ 25-90. Liability of persons secondarily liable when instrument dishonored.**—Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. (1899, c. 733, s. 84; Rev., s. 2233; C. S., s. 3065.)

**Cross Reference.**—As to right of surety when he considers himself in danger of to demand payee or holder to bring suit loss, see § 26-7.

**§ 25-91. Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace, except as allowed by the succeeding section. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. (1899, c. 733, s. 85; Rev., s. 2234; 1907, c. 897; 1909, c. 800, s. 1; C. S., s. 3066.)

**§ 25-92. When days of grace allowed.**—All bills of exchange payable within the State, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight, but no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand. (Code, s. 43; 1905, c. 327; Rev., s. 2235; 1907, c. 861; C. S., s. 3067.)

**§ 25-93. How time is computed.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment. (1899, c. 733, s. 86; Rev., s. 2236; C. S., s. 3068.)

**§ 25-94. Rule where instrument is payable at bank.**—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. (1899, c. 733, s. 87; Rev., s. 2237; C. S., s. 3069.)

**In General.**—Where a note is made payable at a certain bank it amounts to an order to the bank to pay same out of the maker's deposit upon presentment when due. *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351 (1934).

**Liability Where Bank Fails to Pay out of Deposits.**—Where the bank of deposit of the maker of a note is the one specified as the place of its payment, and also the one to which the note is sent at maturity for collection, the maker's written

order on the note to the bank to pay it from his deposits is sufficient; and where the bank accepts this order and retains the note without entry on its books for twelve days, then its doors are closed and a receiver appointed, the payee of the note is held responsible for the acts of its agency for collection, and a plea of payment is good. *Peaslee-Gaulbert Co. v. Dixon*, 172 N. C. 411, 90 S. E. 421 (1916).

**Cited in** *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914).

**§ 25-95. What constitutes payment in due course.**—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. (1899, c. 733, s. 88; Rev., s. 2238; C. S., s. 3070.)

## ARTICLE 8.

### *Notice of Dishonor.*

**§ 25-96. To whom notice of dishonor must be given.**—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or nonpayment, notice of dishonor must be given to the drawer and

to each indorser, and any drawer or indorser to whom such notice is not given is discharged. (1899, c. 733, s. 89; Rev., s. 2239; C. S., s. 3071.)

**Cross Reference.**—As to notice to principal, see § 25-76.

**In General.**—The draft having been accepted, the drawee became primarily liable, and in the event of dishonor notice must be given to all those who are secondarily liable as drawer and indorsers. *Denny v. Palmer*, 27 N. C. 610 (1845); *Tiedman Com. Paper*, § 336; 3 *Randolph Com. Paper*, § 1238; 2 *Daniel Neg. Inst.*, § 995; *Brown v. Teague*, 52 N. C. 573 (1860); *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455 (1895).

Following the statute it was held in *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423 (1908), that failure to give notice of dishonor discharged the indorser from further liability. *Barber v. Absher*, 175 N. C. 602, 96 S. E. 43 (1918).

**Notice to Surety.**—A surety on a note is not discharged from liability by reason of the fact that he was not given notice of its dishonor. *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906).

**Notice to Forwarding Bank.**—When a bank forwards a check to another bank to be collected, and the drawee bank is negligent in notifying the forwarding bank of nonpayment, the right of the forwarding bank to recover will be determined by whether or not it would have prevented loss by notice, and it can recover such

§ 25-97. **By whom notice given.**—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given. (1899, c. 733, s. 90; Rev., s. 2240; C. S., s. 3072.)

**In General.**—The notice required by law to be given to an indorser is good if it be sufficient to put the indorser on inquiry; no particular form is required and any person through whose hands a bill or note has passed may give notice to the drawer or his prior indorser of the dishonor of the bill, although the bill or note may not have been taken up by him at that time. *Bank v. Seawell*, 9 N. C. 560 (1823).

**Verbal Notice.**—Where a bank holding

§ 25-98. **Notice given by agent.**—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. (1899, c. 733, s. 91; Rev., s. 2241; C. S., s. 3073.)

§ 25-99. **Effect of notice given on behalf of holder.**—Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. (1899, c. 733, s. 92; Rev., s. 2242; C. S., s. 3074.)

loss only as was occasioned by the delay. *Bank v. Trust Co.*, 177 N. C. 254, 98 S. E. 595 (1919).

**Waiver of Notice.**—Notice of dishonor may be waived by an indorser of a negotiable paper before or after maturity thereof by express words or by necessary implication, and when so waived, notice of dishonor need not be given. *National Bank v. Johnson*, 159 N. C. 526, 86 S. E. 360 (1912).

**Burden on Holder to Show Primary Liability.**—The burden is on the holder of a note, seeking to hold an indorser, to whom notice of dishonor has not been given, liable thereon upon the contention that notice was not required, to prove that the note was given for his accommodation. Parol evidence is not admissible to show primary liability to sustain the contention that notice of dishonor is dispensed with. *Busbee v. Creech*, 192 N. C. 499, 135 S. E. 326 (1926).

**Effect of Endorser's Consent to Extension of Time.**—It cannot be determined as a matter of law that an endorser is not entitled to notice of dishonor as provided in this section, by reason of his consent to an extension of time of payment granted the principal. *Davis v. Royall*, 204 N. C. 147, 167 S. E. 559 (1933).

a note for collection gave verbal notice of dishonor to one of the indorsers, and all of the indorsers discussed the matter among themselves and determined to refuse payment, the notice was sufficient, as the indorsers notified each other, and this notice inured to the benefit of the holders. *Piedmont Carolina Ry. Co. v. Shaw*, 223 F. 973 (1915).

Verbal notice is good if sufficient to put endorsers upon inquiry. *Bank v. Seawell*, 9 N. C. 560 (1823).

§ 25-100. **Effect, where notice is given by party entitled thereto.**—Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given. (1899, c. 733, s. 93; Rev., s. 2243; C. S., s. 3075.)

§ 25-101. **When agent may give notice.**—Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (1899, c. 733, s. 94; Rev., s. 2244; C. S., s. 3076.)

§ 25-102. **When notice sufficient.**—A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate it unless the party to whom the notice is given is in fact misled thereby. (1899, c. 733, s. 95; Rev., s. 2245; C. S., s. 3077.)

**Prior Law.**—There was no necessity for signing under the prior law. *Bank v. Seawell*, 9 N. C. 560 (1823).

§ 25-103. **Form of notice.**—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. (1899, c. 733, s. 96; Rev., s. 2246; C. S., s. 3078.)

§ 25-104. **To whom notice may be given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf. (1899, c. 733, s. 97; Rev., s. 2247; C. S., s. 3079.)

§ 25-105. **Notice when party is dead.**—When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased. (1899, c. 733, s. 98; Rev., s. 2248; C. S., s. 3080.)

§ 25-106. **Notice to partners.**—When the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. (1899, c. 733, s. 99; Rev., s. 2249; C. S., s. 3081.)

§ 25-107. **Notice to persons jointly liable.**—Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others. (1899, c. 733, s. 100; Rev., s. 2250; C. S., s. 3082.)

§ 25-108. **Notice to bankrupt.**—Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee. (1899, c. 733, s. 101; Rev., s. 2251; C. S., s. 3083.)

§ 25-109. **Time within which notice must be given.**—Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter. (1899, c. 733, s. 102; Rev., s. 2252; C. S., s. 3084.)

**The burden is on the holder to show**      endorsers of a negotiable note and in the  
**that notice of nonpayment was given the**      absence of evidence of such notice to an

endorser, or to his personal representative after his death, the holder is not entitled to recover on the endorsement. *Williams v. Fowier Automobile Co.*, 207 N. C. 309, 176 S. E. 567 (1934).

§ 25-110. **Notice where parties reside in the same place.**—When the person giving and the person to receive notice reside in same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the post office in time to reach him in the usual course on the day following. (1899, c. 733, s. 103; Rev., s. 2253; C. S., s. 3085.)

§ 25-111. **Notice where parties reside in different places.**—Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the post office, then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last subdivision. (1899, c. 733, s. 104; Rev., s. 2254; C. S., s. 3086.)

**A reasonable notice** is one which is sent by the first post after the day of dishonor, and when there is a daily mail, this necessarily means the next day, if the next day's mail does not leave before business hours. *Hubbard v. Troy*, 24 N. C. 134 (1841); *Denny v. Palmer*, 27 N. C. 610 (1845); *National Bank v. Bradley*, 117 N. C. 526, 23 S. E. 455 (1895).

**Sufficient Proof of Notice.**—It was held

in *Lindenberger v. Beal*, 6 Wheat. (19 U. S.) 104, that the evidence of the letter containing notice, put into the post office, directed to the defendant at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before parol evidence could be admitted. *Faribault v. Ely*, 13 N. C. 67 (1828).

§ 25-112. **Where sender deemed to have given due notice.**—Where notice of dishonor is duly addressed and deposited in the post office the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. (1899, c. 733, s. 105; Rev., s. 2255; C. S., s. 3087.)

§ 25-113. **What constitutes deposit in post office.**—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department. (1899, c. 733, s. 106; Rev., s. 2256; C. S., s. 3088.)

§ 25-114. **Time of notice to antecedent parties.**—Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. (1899, c. 733, s. 107; Rev., s. 2257; C. S., s. 3089.)

§ 25-115. **Where notice must be sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the post office nearest to his place of residence or to the post office where he is accustomed to receive his letters; or (2) if he lives in one place and has his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section. (1899, c. 733, s. 108; Rev., s. 2258; C. S., s. 3090.)

**Diligent Attempt to Notify Necessary.**—A holder of a dishonored bill must give notice to all indorsers, or make a diligent attempt to give this notice, if he does not

know where the indorser resides. *Runyon v. Montfort*, 44 N. C. 371 (1853).

**Nearest Post Office.**—The rule that notice to a distant indorser should be sent to the post office nearest to his residence was founded on the presumption that the information would most speedily be given in such way; but the rule is subject to modification, and the true inquiry is, was the no-

tice directed to that post office which was most likely to impart to the indorser the earliest intelligence, though it may not be the nearest; if it was, it is sufficient. *Bank v. Lane*, 10 N. C. 453 (1825).

**Notice sent to the place where the bill was drawn** is not sufficient. *Denny v. Palmer*, 27 N. C. 610 (1845).

§ 25-116. **Waiver of notice.**—Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. (1899, c. 733, s. 109; Rev., s. 2259; C. S., s. 3091.)

**Mistake.**—When one, thinking there has been a presentment for payment, makes promises that would amount to a waiver, had there been a presentment, he is not liable on the grounds of waiver of notice if there had been no presentment for payment. *Lilly v. Petteway*, 73 N. C. 358 (1875).

**Extension of Time.**—The authorities seem to hold that where the indorser consents in advance of maturity to extensions of the time of payment of the note, he thereby waives his right to receive notice of dishonor and presentment for payment. *National Bank v. Johnston*, 169 N. C. 526, 86 S. E. 360 (1915).

**Promise to Pay after Failure to Be Notified.**—A promise to pay generally,

or a promise to pay a part, or a part payment made, with a full knowledge that he had been fully released from liability on the bill by the neglect of the holder to give notice, will operate as a waiver and bind the party who makes it for the payment of the whole bill. *Shaw Bros. v. McNeill*, 95 N. C. 535 (1886).

Where, upon the dishonor of a bill of exchange or promissory note, the indorsee has neglected to give the proper notice, the drawer or indorser of the bill or indorser of the note will still be liable, if, after a knowledge of all the facts which in law would have discharged him, he promises to pay the bill or note. *Moore v. Tucker*, 25 N. C. 347 (1843).

§ 25-117. **Who affected by waiver.**—Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only. (1899, c. 733, s. 110; Rev., s. 2260; C. S., s. 3092.)

**In General.**—Where upon the face of a negotiable note there is an agreement to waive notice of dishonor or an extension of time, etc., one placing his name on the back thereof is deemed to be an indorser without indication of other liability therein, and is bound by the agreement expressed on the face of the instrument waiving notice, etc. *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925).

**Endorser Is a "Party" to the Note.**—An

extension of time for payment of a note will not discharge an endorser when the note provides on its face that extension of time for payment is waived by all parties to the note, the endorser being a "party" to the note. *Vannoy v. Stafford*, 209 N. C. 748, 184 S. E. 482 (1936).

**Applied in Fidelity Bank v. Hessee**, 207 N. C. 71, 175 S. E. 826 (1934).

**Cited in National Bank v. Johnston**, 169 N. C. 526, 86 S. E. 360 (1915).

§ 25-118. **Waiver of protest.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. (1899, c. 733, s. 111; Rev., s. 2261; C. S., s. 3093.)

**Waiver Binding Partnership.**—Where a partner, after the dissolution of the firm, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former copartner, especially when the latter has been a dormant member. *Mauney & Son v. Coit*, 80 N. C. 300 (1879).

**Inland Bills.**—Although protest is not necessary on an inland bill, yet its waiver in such a case is construed to signify as much as when applied to foreign bills. *Shaw Bros. v. McNeill*, 95 N. C. 535 (1886).

**Foreign Bills.**—A protest is necessary only in case of foreign bills. A waiver

of protest on a foreign bill is also a waiver of presentment and notice. Shaw Bros. v. McNeill, 95 N. C. 535 (1886). **Cited in** National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360 (1915).

§ 25-119. **When notice is dispensed with.**—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. (1899, c. 733, s. 112; Rev., s. 2262; C. S., s. 3094.)

§ 25-120. **Delay in giving notice.**—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. (1899, c. 733, s. 113; Rev., s. 2263; C. S., s. 3095.)

§ 25-121. **When notice need not be given to drawer.**—Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) Where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment. (1899, c. 733, s. 114; Rev., s. 2264; C. S., s. 3096.)

**Cross Reference.** — As to notice, see note to § 25-85.

§ 25-122. **When notice need not be given to indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation. (1899, c. 733, s. 115; Rev., s. 2265; C. S., s. 3097.)

**In General.**—Although, at the time of the indorsement of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dis-

pense with the necessity of a due notice. Denny v. Palmer, 27 N. C. 610 (1845). **Cited in** Busbee v. Creech, 192 N. C. 499, 135 S. E. 326 (1926).

§ 25-123. **Notice of nonpayment where acceptance refused.**—Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary unless in the meantime the instrument has been accepted. (1899, c. 733, s. 116; Rev., s. 2266; C. S., s. 3098.)

§ 25-124. **Effect of omission to give notice of nonacceptance.**—An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. (1899, c. 733, s. 117; Rev., s. 2267; C. S., s. 3099.)

§ 25-125. **When protest need not be made; when it must be made.**—Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange. (1899, c. 733, s. 118; Rev., s. 2268; C. S., s. 3100.)

**In General.**—Protest is not necessary to fix the drawee and indorsers of inland bills of exchange with liability, although it is necessary in the case of foreign bills. Shaw Bros. v. McNeill, 95 N. C. 535 (1886).

## ARTICLE 9.

*Discharge.*

§ 25-126. **How instrument discharged.**—A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right. (1899, c. 733, s. 119; Rev., s. 2269; C. S., s. 3101.)

**Acceptance of Note of Another Party.**—In an action on a note the maker and sureties may rely on the discharge of the note by the payee's acceptance of the note of another party in the sum due, and the payee's delivery to them of the papers on which defendants were bound, since this is an intentional cancellation by the payee, under this section, which is not required to be in writing. Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 172 S. E. 360 (1934).

**Act Discharging Simple Contract.**—An instruction that a negotiable instrument may be discharged by an act which would

discharge a simple contract for the payment of money is not error under this section. Hood System Industrial Bank v. Dixie Oil Co., 205 N. C. 778, 172 S. E. 360 (1934).

**Compromise Payment by Surety.**—When the liability of a surety or accommodation endorser is discharged by compromise and settlement, the maker is entitled to credit only for the amount actually paid. First, etc., Nat. Bank v. Hinton, 216 N. C. 159, 4 S. E. (2d) 332 (1939).

Cited in Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938).

§ 25-127. **Discharge of person secondarily liable.**—A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved. (1899, c. 733, s. 120; Rev., s. 2270; C. S., s. 3102.)

**Release of Maker Discharges Indorser.** \*—Where the holder of a negotiable instrument releases the maker from liability thereon, he thereby discharges from liability his indorser from whom he acquired the instrument. Lumber Co. v. Buchanan, 192 N. C. 771, 136 S. E. 129 (1926).

**A tender of payment under § 25-76 would discharge only persons secondarily liable** on the note, as provided by this section, and would not discharge the liability of the maker and surety on the note. Dry v. Reynolds, 205 N. C. 571, 172 S. E. 351 (1934).

**Extension of Payment.**—In an action upon a negotiable instrument, the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," is not an extension of payment for a "fixed and definite"

period, which would operate as a release to such other from liability. Roberson v. Spain, 173 N. C. 23, 91 S. E. 361 (1917).

Where the face of a note contains an agreement that the parties should remain bound notwithstanding any extension of time granted the maker, upon payment of interest by him, the endorsers remain liable although ignorant of such extensions and payments of interest by the maker, they being bound by their agreement in the note and the extension being supported by the necessary elements of certainty, mutuality and consideration. Fidelity Bank v. Hesse, 207 N. C. 71, 173 S. E. 826 (1934).

Applied in Corporation Commission v. Wilkinson, 201 N. C. 344, 160 S. E. 292 (1931).

Cited in National Bank v. Johnston, 169 N. C. 526, 86 S. E. 360 (1915).



§ 25-128. **Right of party paying instrument.**—When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated. (1899, c. 733, s. 121; Rev., s. 2271; C. S., s. 3103.)

**Right to Put into Circulation.**—When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation. *Price v. Sharp*, 24 N. C. 417 (1842).

**Liability of Principal.**—An indorser who

§ 25-129. **Renunciation by holder.**—The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. (1899, c. 733, s. 122; Rev., s. 2272; C. S., s. 3104.)

**In General.**—The right of an obligor to defend an action against himself on a negotiable note, under the provisions of this section may be done by virtue thereof only as therein expressed when the release is in writing, and may not be shown when resting only by parol. *Manly v. Beam*, 190 N. C. 659, 130 S. E. 633 (1925).

**A parol agreement between an official of a bank that the bank would release the endorsers or sureties** on a note upon the

§ 25-130. **Unintentional cancellation; burden of proof.**—A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority. (1899, c. 733, s. 123; Rev., s. 2273; C. S., s. 3105.)

§ 25-131. **Effect of alteration of instrument.**—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor. (1899, c. 733, s. 124; Rev., s. 2274; C. S., s. 3106.)

**Cross Reference.**—See note to § 25-132.

**In General.**—It is familiar learning that if the payee of a bond alters it in any material part, without the consent of the obligor, the bond is avoided and may be defeated on the plea of non est factum. *Mathis v. Mathis*, 20 N. C. 55 (1838); *Davis v. Coleman*, 29 N. C. 424 (1847); *Dunn v. Clements*, 52 N. C. 58 (1859); *Darwin v. Rippey*, 63 N. C. 319 (1869).

pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him. *Pace v. Robertson*, 65 N. C. 550 (1871).

**Cited in** *Roberson v. Spain*, 173 N. C. 23, 91 S. E. 361 (1917).

maker confessing judgment thereon is not enforceable, a verbal renunciation being ineffectual under the provisions of this section. *Page Trust Co. v. Lewis*, 200 N. C. 286, 156 S. E. 504 (1931).

**No writing is necessary** if "the instrument is delivered to the person primarily liable thereon." *Hood System Industrial Bank v. Dixie Oil Co.*, 205 N. C. 778, 172 S. E. 360 (1934).

**Liability on Raised Checks.**—Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised

the amount of the check, indorses it to another, and receives the money thereon, the maker is not liable to the indorsee except in an action for the original or true

amount of the check. *Broad St. Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11 (1922).

§ 25-132. **What constitutes a material alteration.**—Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. (1899, c. 733, s. 125; Rev., s. 2275; C. S., s. 3107.)

**In General.**—Adding the words “in specie” after the word “dollars” in a note is a material alteration. *Darwin v. Rippey*, 63 N. C. 319 (1869).

The cutting off the name of one of the makers of a promissory note and substituting that of another was a material alteration of the note, and vitiated it. *Davis v. Coleman*, 29 N. C. 424 (1847).

**Striking Out Endorser's Name and Substituting Another Is Material.**—Where the payee of a negotiable instrument acquires it with certain endorsers thereon and subsequently strikes out the name of one endorser and another signs as endorser in

lieu of the endorser whose name was stricken out, the change is a material one under this section, and will release the endorsers who had not consented to the substitution, but will not release those endorsers whose consent had been procured, as provided in § 25-131. *Efird v. Little*, 205 N. C. 583, 172 S. E. 198 (1934).

**Immaterial Alterations.**—The addition that does not vary the terms of the contract, and adds nothing more than is already implied by law is not sufficient to be construed as a material alteration. *Houston v. Potts*, 64 N. C. 33 (1870).

## ARTICLE 10.

### *Bills of Exchange.*

§ 25-133. **Bill of exchange defined.**—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. (1899, c. 733, s. 126; Rev., s. 2276; C. S., s. 3108.)

**Cross Reference.**—See note under § 53-71.

**Option of Holder to Treat Draft as Bill or Note.**—Where a draft drawn to the maker's order and, having been indorsed by another, is accepted at a bank, and then purchased in due course before maturity by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was ultra vires, and not within the authority of its charter, authorizing it to accept bills, notes, com-

mercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, and may be treated as a bill or note, at the option of the holder. *Sherrill v. American Trust Co.*, 176 N. C. 591, 97 S. E. 471 (1918).

**Cited in** *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23 (1911); *Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914); *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

§ 25-134. **Bill not an assignment of funds in hands of drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. (1899, c. 733, s. 127; Rev., s. 2277; C. S., s. 3109.)

**Editor's Note.**—See 13 N. C. Law Rev. 131, as to what orders constitute an assignment.

**Cited in** *Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914).

§ 25-135. **Bill addressed to more than one drawee.**—A bill may be addressed to two or more drawees jointly, whether they are partners or not, but

not to two or more drawees in the alternative or in succession. (1899, c. 733, s. 128; Rev., s. 2278; C. S., s. 3110.)

§ 25-136. **Inland and foreign bills of exchange.**—An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill. (1899, c. 733, s. 129; Rev., s. 2279; C. S., s. 3111.)

§ 25-137. **When bill may be treated as promissory note.**—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. (1899, c. 733, s. 130; Rev., s. 2280; C. S., s. 3112.)

**In General.**—A paper coming directly within the definition of an inland bill of exchange can be treated as a bill or note at the option of the holder, the drawer and drawee being the same person. *Sherrill v. American Trust Co.*, 176 N. C. 591, 97 S. E. 471 (1918).

§ 25-138. **Referee in case of need.**—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. (1899, c. 733, s. 131; Rev., s. 2281; C. S., s. 3113.)

ARTICLE 11.

*Acceptance.*

§ 25-139. **Acceptance defined; how made.**—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. (1899, c. 733, s. 132; Rev., s. 2282; C. S., s. 3114.)

**Acceptance by Agent.**—The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906).  
Cited in *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

§ 25-140. **Holder entitled to acceptance on face of bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. (1899, c. 733, s. 133; Rev., s. 2283; C. S., s. 3115.)

Cited in *Commercial Investment Trust v. Windsor*, 197 N. C. 208, 148 S. E. 42 (1929).

§ 25-141. **Acceptance by separate instrument.**—Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. (1899, c. 733, s. 134; Rev., s. 2284; C. S., s. 3116.)

**Letters of Acceptance.**—A letter written to a drawer within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even though there are no funds in his hands belonging to the drawer, if the bill is drawn

payable at a fixed time, and not at or after sight. *Nimock v. Woody*, 97 N. C. 1, 2 S. E. 249 (1887).

Where the letters, upon which the plaintiff bank relied as authority to an agent to make the draft which it cashed, show that the alleged authority to draw was nothing

more than private instructions by the principal to his agent as to how he should conduct this part of the business, and were not to be used as a basis of credit to the agent, the court properly nonsuited the plaintiff. *Bank v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906).

**§ 25-142. When promise to accept equivalent to acceptance.**—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (1899, c. 733, s. 135; Rev., s. 2285; C. S., s. 3117.)

**§ 25-143. Time allowed drawee to accept.**—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation. (1899, c. 733, s. 136; Rev., s. 2286; C. S., s. 3118.)

**Cited in** *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914); *Lamb v. Hood*, 205 N. C. 409, 171 S. E. 359 (1933); *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

**§ 25-144. Liability of drawee retaining or destroying bill; conditional payment of checks by drawee banks.**—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

Any payment made by a drawee bank for a check presented to it shall be conditional, subject to revocation, unless the bank accepts or certifies the check; but such conditional payment shall become unconditional at midnight of the next business day following the presentment of the check unless prior to such time the check is returned by the drawee bank, either by delivery, or by deposit in the mails, to the bank or person presenting it; provided, that this section shall not prevent the presentment and payment of checks on other terms, in accordance with clearing house rules or practices, or pursuant to special collection agreements, and shall not apply to checks presented over the counter otherwise than for credit to a depositor's account. (1899, c. 733, s. 137; Rev., s. 2287; C. S., s. 3119; 1949, c. 954.)

**Editor's Note.** — The 1949 amendment added the second paragraph.

**Cited in** *Standard Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074 (1914); *Lamb v. Hood*, 205 N. C. 409, 171 S. E. 359 (1933); *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

**§ 25-145. Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. (1899, c. 733, s. 138; Rev., s. 2288; C. S., s. 3120.)

**§ 25-146. Kinds of acceptances.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. (1899, c. 733, s. 139; Rev., s. 2289; C. S., s. 3121.)

**§ 25-147. What constitutes a general acceptance.**—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere. (1899, c. 733, s. 140; Rev., s. 2290; C. S., s. 3122.)

§ 25-148. **What constitutes a qualified acceptance.**—An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all. (1899, c. 733, s. 141; Rev., s. 2291; C. S., s. 3123.)

**Qualified as to Time.**—Where one accepted a draft on him “payable when I receive funds to the use of the drawer,” he became liable when the moneys were placed to his credit though he had not taken manual possession thereof. *Wallace Brothers v. Douglas*, 116 N. C. 659, 21 S. E. 387 (1895).

§ 25-149. **Rights of parties as to qualified acceptance.**—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto. (1899, c. 733, s. 142; Rev., s. 2292; C. S., s. 3124.)

ARTICLE 12.

*Presentment for Acceptance.*

§ 25-150. **When presentment for acceptance must be made.**—Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable. (1899, c. 733, s. 143; Rev., s. 2293; C. S., s. 3125.)

§ 25-151. **Failure to present in reasonable time discharges drawer and indorsers.**—Except as herein otherwise provided the holder of a bill which is required by § 25-71 to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged. (1899, c. 733, s. 144; Rev., s. 2294; C. S., s. 3126.)

§ 25-152. **How presentment made.**—Presentment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead, presentment may be made to his personal representative; (3) where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. (1899, c. 733, s. 145; Rev., s. 2295; C. S., s. 3127.)

**In General.**—A draft payable at no definite place in a city or town, must be presented at the maker's residence or place of business, if he has such, at its maturity, and if he has none, then the presence of the instrument in the city is a sufficient presentation. *Peoples Nat. Bank v. Luterloh*, 95 N. C. 495 (1886).

§ 25-153. **On what days presentment may be made.**—A bill may be

presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter. (1899, c. 733, s. 146; Rev., s. 2296; 1909, c. 800, s. 1; C. S., s. 3128.)

§ 25-154. **Presentment where time is insufficient.**—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. (1899, c. 733, s. 147; Rev., s. 2297; C. S., s. 3129.)

§ 25-155. **Where presentment is excused.**—Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some other ground. (1899, c. 733, s. 148; Rev., s. 2298; C. S., s. 3130.)

§ 25-156. **When dishonored by nonacceptance.**—A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or cannot be obtained; or (2) when a presentment for acceptance is excused and the bill is not accepted. (1899, c. 733, s. 149; Rev., s. 2299; C. S., s. 3131.)

§ 25-157. **Duty of holder, where bill not accepted.**—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. (1899, c. 733, s. 150; Rev., s. 2300; C. S., s. 3132.)

§ 25-158. **Rights of holder, where bill not accepted.**—When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. (1899, c. 733, s. 151; Rev., s. 2301; C. S., s. 3133.)

## ARTICLE 13.

### *Protest.*

§ 25-159. **In what cases protest necessary.**—Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest in case of dishonor is unnecessary. (1899, c. 733, s. 152; Rev., s. 2302; C. S., s. 3134.)

**Waiver of Protest.**—In foreign bills the protest may be waived; the words, "I waive protest," or "waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, are universally regarded as expressly waiving presentment and notice, the protest being, according to the law merchant, the formal and necessary evidence of the dishonor of such an instrument. *Shaw Bros. v. Mc-*

*Neill*, 95 N. C. 535 (1886).

**Protest in Another State.**—A promissory note made in another state need not be protested before the owner may sue an indorser, there being no evidence that this is required in the state where the note was executed. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876 (1902).

**How Protested.**—By the law merchant a protest of a bill by a public notary is, in

itself, evidence. And by our statute such protest is prima facie evidence. *Gordon v. Price*, 32 N. C. 385 (1849).

**Protest of Inland Bills.**—Protest of an order or inland bill is not necessary to enable the holder to recover the principal and interest. Notice in due time of nonaccept-

ance or nonpayment is all that is required for that purpose. *Hubbard v. Troy*, 24 N. C. 134 (1841); *Peoples Nat. Bank v. Lutterloh*, 95 N. C. 495 (1886); *National Bank v. Brady*, 117 N. C. 526, 23 S. E. 455 (1895).

§ 25-160. **How protest made.**—The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. (1899, c. 733, s. 153; Rev., s. 2303; C. S., s. 3135.)

§ 25-161. **By whom protest made.**—Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. (1899, c. 733, s. 154; Rev., s. 2304; C. S., s. 3136.)

§ 25-162. **When protest to be made.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. (1899, c. 733, s. 155; Rev., s. 2305; C. S., s. 3137.)

§ 25-163. **Where protest made.**—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonacceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for the payment to or demand on the drawee is necessary. (1899, c. 733, s. 156; Rev., s. 2306; C. S., s. 3138.)

§ 25-164. **Protest both for nonacceptance and nonpayment.**—A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. (1899, c. 733, s. 157; Rev., s. 2307; C. S., s. 3139.)

§ 25-165. **Protest before maturity, where acceptor insolvent.**—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (1899, c. 733, s. 158; Rev., s. 2308; C. S., s. 3140.)

§ 25-166. **When protest dispensed with.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. (1899, c. 733, s. 159; Rev., s. 2309; C. S., s. 3141.)

§ 25-167. **Protest where bill is lost.**—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (1899, c. 733, s. 160; Rev., s. 2310; C. S., s. 3142.)

#### ARTICLE 14.

##### *Acceptance for Honor.*

§ 25-168. **When a bill may be accepted for honor.**—Where a bill of exchange has been protested for dishonor by nonacceptance or protested for

better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party. (1899, c. 733, s. 161; Rev., s. 2311; C. S., s. 3143.)

§ 25-169. **How acceptance for honor made.**—An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. (1899, c. 733, s. 162; Rev., s. 2312; C. S., s. 3144.)

§ 25-170. **When deemed an acceptance for honor of drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. (1899, c. 733, s. 163; Rev., s. 2313; C. S., s. 3145.)

§ 25-171. **Liability of acceptor for honor.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. (1899, c. 733, s. 164; Rev., s. 2314; C. S., s. 3146.)

§ 25-172. **Agreement of acceptor for honor.**—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. (1899, c. 733, s. 165; Rev., s. 2315; C. S., s. 3147.)

§ 25-173. **Maturity of bill payable after sight accepted for honor.**—Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. (1899, c. 733, s. 166; Rev., s. 2316; C. S., s. 3148.)

§ 25-174. **Protest of bill accepted for honor.**—Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need. (1899, c. 733, s. 167; Rev., s. 2317; C. S., s. 3149.)

§ 25-175. **How presentment for payment to acceptor for honor made.**—Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified. (1899, c. 733, s. 168; Rev., s. 2318; C. S., s. 3150.)

§ 25-176. **When delay in making presentment excused.**—The provisions of § 25-87 apply where there is delay in making presentment to the acceptor for honor or referee in case of need. (1899, c. 733, s. 169; Rev., s. 2319; C. S., s. 3151.)

§ 25-177. **Dishonor of bill by acceptor for honor.**—When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. (1899, c. 733, s. 170; Rev., s. 2320; C. S., s. 3152.)



## ARTICLE 15.

*Payment for Honor.*

§ 25-178. **Who may make payment for honor.**—Where a bill has been protested for nonpayment any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. (1899, c. 733, s. 171; Rev., s. 2321; C. S., s. 3153.)

§ 25-179. **How payment for honor must be made.**—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it. (1899, c. 733, s. 172; Rev., s. 2322; C. S., s. 3154.)

§ 25-180. **Declaration before payment for honor.**—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. (1899, c. 733, s. 173; Rev., s. 2323; C. S., s. 3155.)

§ 25-181. **Preference of parties offering to pay for honor.**—Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference. (1899, c. 733, s. 174; Rev., s. 2324; C. S., s. 3156.)

§ 25-182. **Effect on subsequent parties, where bill is paid for honor.**—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. (1899, c. 733, s. 175; Rev., s. 2325; C. S., s. 3157.)

§ 25-183. **Where holder refuses to receive payment supra protest.**—Where the holder of a bill refuses to receive payment supra protest he loses his right of recourse against any party who would have been discharged by such payment. (1899, c. 733, s. 176; Rev., s. 2326; C. S., s. 3158.)

§ 25-184. **Rights of payer for honor.**—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. (1899, c. 733, s. 177; Rev., s. 2327; C. S., s. 3159.)

## ARTICLE 16.

*Bills in a Set.*

§ 25-185. **Bills in a set constitute one bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. (1899, c. 733, s. 178; Rev., s. 2328; C. S., s. 3160.)

§ 25-186. **Rights of holders, where different parts are negotiated.**—Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. (1899, c. 733, s. 179; Rev., s. 2329; C. S., s. 3161.)

§ 25-187. **Liability of holder who indorses two or more parts of a set to different persons.**—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser sub-

sequent to him is liable on the part he has himself indorsed as if such parts were separate bills. (1899, c. 733, s. 180; Rev., s. 2330; C. S., s. 3162.)

§ 25-188. **Acceptance of bills drawn in sets.**—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. (1899, c. 733, s. 181; Rev., s. 2331; C. S., s. 3163.)

§ 25-189. **Payment by acceptor of bills drawn in sets.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. (1899, c. 733, s. 182; Rev., s. 2332; C. S., s. 3164.)

§ 25-190. **Effect of discharging one of a set.**—Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. (1899, c. 733, s. 183; Rev., s. 2333; C. S., s. 3165.)

#### ARTICLE 17.

#### *Promissory Notes and Checks.*

§ 25-191. **Negotiable promissory note defined.**—A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him. (1899, c. 733, s. 184; Rev., s. 2334; C. S., s. 3166.)

**Cross Reference.**—As to form of negotiable instrument, see § 25-7 et seq.

**Nonnegotiable Note.**—To render a note nonnegotiable it must show on its face that the promise to pay is conditional, or render the amount to be paid uncertain. *First National Bank v. Michael*, 96 N. C. 53, 1 S. E. 855 (1887). A note not payable to order or bearer is not a negotiable paper. *Newland v. Moore*, 173 N. C. 728, 92 S. E. 367 (1917).

**Note under Seal.**—A written instrument, whereby a party promises to pay the party therein named a sum certain at a time specified therein, is a promissory note in this State, although it be under seal. *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855 (1887).

**Bond Treated as Note under Seal.**—A bond is in form negotiable, and when in-

dorsed for value and without notice before maturity it is to be regarded, so far as its negotiability is concerned and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal. *Miller v. Tharel*, 75 N. C. 148 (1876); *Spence v. Tabscott*, 93 N. C. 246 (1885). The principle was applied in *Lewis v. Long*, 102 N. C. 206, 9 S. E. 637 (1889), in which it was decided that an obligor on a bond could not, as against an indorsee for value, before maturity and without notice, set up the defense that he executed the same as a surety only. *Christian v. Parrott*, 114 N. C. 215, 19 S. E. 151 (1894).

**Cited in** *Wachovia Bank & Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269 (1930); *Taft v. Covington*, 199 N. C. 51, 153 S. E. 597 (1930).

§ 25-192. **Check defined.**—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check. (1899, c. 733, s. 185; Rev., s. 2335; C. S., s. 3167.)

**Cross Reference.**—See note under § 53-71.

**A check is further defined** as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment at all events of a sum of money to a certain person therein named or to him or his order, or to bearer, and

payable on demand. *Woody v. First Nat. Bank*, 194 N. C. 549, 140 S. E. 150 (1927).

**Restrictions as to Payments.**—A stipulation stamped on the face of a check, that it will positively not be paid to a certain company or its agents, is a valid restriction and binding on the holder. *Commercial*

Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524 (1896).

**Time of Presentment.**—A “check” is a bill of exchange drawn on a bank, payable on demand, and instruments payable on demand may be presented within a reasonable time after their issue. Philadelphia Life Ins. Co. v. Hayworth, 296 F. 339 (1924).

**Stated in In re Will of Winborne,** 231

§ 25-193. **Within what time a check must be presented.**—A check must be presented for payment within drawer will be discharged from liability by the delay. (1899, c. 733, s. 186; Rev., s. 2336; C. S., s. 3168.)

**Cross Reference.**—As to what is reasonable time, see § 25-3.

**Cashier’s checks,** whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by indorsement for value without notice and within a reasonable time, a holder can maintain the position of a holder in due course. Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522 (1906).

**Due Diligence.**—A check is only conditional payment, but the payee must exercise due diligence in presenting it for payment, and where his failure to exercise such diligence causes loss he must suffer it, due

§ 25-194. **Bank may refuse to honor check more than six months old in the absence of contrary instructions.**—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is presented for payment more than six months from its date, such bank or trust company may, unless expressly instructed by the drawer or maker to pay the same, refuse payment thereof and no liability shall thereby be incurred to the drawer or maker for dishonoring the instrument by non-payment. (C. S., s. 3168; 1929, c. 341, s. 3.)

§ 25-195. **Effect of certification of check.**—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance. (1899, c. 733, s. 187; Rev., s. 2337; C. S., s. 3169.)

**In General.**—The certification of a check by the bank on which it is drawn is equivalent to the acceptance, and the bank then becomes the debtor to the holder, against whom he may maintain his action. It does not affect the enforcement of an agreement between the original parties, made before certification of the check, by which the debtor had agreed to waive or withdraw a condition annexed to the acceptance of his check that it was to be received by the payee, his creditor, in full compromise of his debt in a larger amount. Drewry-Hughes Co. v. Davis, 151 N. C. 295, 66 S. E. 139 (1909).

**Whether Certified at Instance of Drawer or Payee.**—A drawer of a check by having

N. C. 463, 57 S. E. (2d) 795 (1950).

**Cited in Standard Trust Co. v. Bank,** 166 N. C. 112, 81 S. E. 1074 (1914); *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929); *State v. Crawford*, 198 N. C. 522, 152 S. E. 504 (1930); *Seymour v. Peoples Bank*, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938); *National Bank v. Marshburn*, 229 N. C. 104, 47 S. E. (2d) 793 (1948).

diligence being determined in accordance with the facts and circumstances of each particular case. *Henderson Chevrolet Co. v. Ingle*, 202 N. C. 158, 162 S. E. 219 (1932).

**Facts to Be Considered.**—In determining what is a reasonable time for the presentment of a check for payment regard must be had to the nature of the instrument, the customs and usages of trade in regard to such instrument, and the facts of the particular case. *Raines v. Grantham*, 205 N. C. 340, 171 S. E. 360 (1933).

**Cited in Standard Trust Co. v. Bank,** 166 N. C. 112, 81 S. E. 1074 (1914).

the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. *Commercial Investment Trust v. Windsor*, 197 N. C. 208, 148 S. E. 42 (1929).

**Cited in Seymour v. Peoples Bank,** 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

**§ 25-196. Effect, where holder of check procures it to be certified.**

—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. (1899, c. 733, s. 188; Rev., s. 2338; C. S., s. 3170.)

**Cited in** Seymour v. Peoples Bank, 212 N. C. 707, 194 S. E. 464, 116 A. L. R. 682 (1938).

**§ 25-197. Check not assignment of funds.**—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. (1899, c. 733, s. 189; Rev., s. 2339; C. S., s. 3171.)

**Editor's Note.**—See 13 N. C. Law Rev. 131.

**In General.**—A depositor is a creditor of a bank, his deposit becoming a part of the general fund, the property of the bank, and subject to assignment by the owners of the bank and a check holder is, to the extent of his check, the assignee of the depositor's debt due him by the bank, but he has no lien upon the deposit for the amount of this check and a payee or holder of a check has an interest in the deposit as against the drawer, subject to the bank's right to pay outstanding checks before notice. Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245 (1890).

**A check passes no title to money on deposit in a bank.** Perry v. Bank, 131 N. C. 117, 42 S. E. 551 (1902).

**And Drawer May Stop Payment Prior to Acceptance.** — A check is a bill of exchange drawn on a bank and does not operate as an assignment of any part of the funds to the credit of the drawer until the check is presented to and accepted by the bank, and the drawer at any time prior to acceptance is at liberty to stop payment and to withdraw his funds from the bank. In re Will of Winborne, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

**The payee of an unaccepted, uncertified check has no right of action against the bank** upon which the check is drawn, for

he is in no position to allege a breach of legal duty and no action at law can be maintained except there is shown to have been a failure in the performance of some legal duty. General American Life Ins. Co. v. Stadiem, 223 N. C. 49, 25 S. E. (2d) 202 (1943).

An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim, Perry v. Bank, 131 N. C. 117, 42 S. E. 551 (1902), until after its acceptance by the bank, Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524 (1896). See also Brantley v. Collie, 205 N. C. 229, 171 S. E. 88 (1933).

**Acceptance may be evidenced in various ways,** as where the bank pays the check without endorsement to some person unauthorized by the payee to receive it and charges the amount to the depositor's account, and where evidence on this point is conflicting an issue is raised for the jury, and a judgment as of nonsuit should be denied. Dawson v. National Bank, 196 N. C. 134, 144 S. E. 833 (1928).

**Cited in** Standard Trust Co. v. Bank, 166 N. C. 112, 81 S. E. 1074 (1914); Dawson v. National Bank, 197 N. C. 499, 150 S. E. 33 (1929).

**§ 25-198. When stop-payment order given to bank expires.**—No revocation, countermand or stop-payment order relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State shall remain in effect for more than six months after the service thereof on the bank, unless the same be renewed, which renewals shall be in writing and which renewals shall be in effect for not more than six months from date of service thereof on the bank or trust company, but such renewals may be made from time to time. (1929, c. 341, s. 1.)

**§ 25-199. Application to present orders.**—No notice affecting a check upon which revocation, countermand or stop-payment order has been made prior to March 19, 1929, shall be deemed to continue for a period of more than six months thereafter. (1929, c. 341, s. 2.)

## Chapter 26. Suretyship.

Sec.	Sec.
26-1. Surety and principal distinguished in judgment and execution.	26-7. Surety, indorser, or guarantor may notify creditor to take action.
26-2. Principal liable on execution before surety.	26-8. Notice; how given; prima facie evidence thereof.
26-3. Summary remedy of surety against principal.	26-9. Effect of failure of creditor to take action.
26-4. Subrogation of surety paying debt of deceased principal.	26-10. [Repealed.]
26-5. Contribution among sureties.	26-11. Cancellation of judgment as to surety.
26-6. Dissenting surety not liable to surety on stay of execution.	

§ 26-1. **Surety and principal distinguished in judgment and execution.**—In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk or justice of the peace issuing it. (1826, c. 31, s. 1; R. C., c. 31, s. 124; Code, s. 2100; Rev., s. 2840; C. S., s. 3961.)

**Cross Reference.**—As to right of surety to subrogation, see note to § 26-3.

**In General.**—A surety is bound with his principal as an original promisor. Baylies' Sureties and Guarantors, 4. *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175 (1890).

The surety's promise is to pay a debt, which becomes his own debt when the principal fails to pay it. 2 *Parsons' Notes and Bills*, 117-118. *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175 (1890).

**Construed Strictly.**—The liability of a surety cannot be enlarged by construction. *Shoe Co. v. Peacock*, 150 N. C. 545, 64 S. E. 437 (1909).

**Order of Liability.**—The order in which parties to a security are liable at law, is the order in which, independently of contract, they will be held bound in equity. *Smith v. Smith*, 16 N. C. 173 (1828).

Where it appeared that a negotiable instrument was signed by three persons other than the principal obligor, and it also appeared from a writing executed some time thereafter by one to indemnify the other two that they (the other two) "signed as co-sureties" of the third, it was held, that the character of suretyship in which all three signed was sufficiently established. *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237 (1890).

**Same—Parol Evidence to Show Coprincipals.**—In *Williams v. Glenn*, 92 N. C. 253 (1885), the note (under seal) was made with W. "as principal" and B. and G. "as sureties," yet as between the obli-

gors the court held that parol evidence was admissible to show that *Boyden* and *Glenn* were coprincipals, and that the rule of contribution obtained among them. *Smith v. Carr*, 128 N. C. 150, 38 S. E. 732 (1901).

While all of the makers may appear as principals upon the face of the paper, or some principals and some sureties, yet it may be shown that while appearing as principals they were in fact sureties, or some principals and others sureties; and upon the establishment of the fact of co-suretyship, the right of contribution follows. *Smith v. Carr*, 128 N. C. 150, 38 S. E. 732 (1901).

**Same—Issue Submitted.**—In an action against the maker and indorsers of a note, an issue should be submitted as to whether or not the indorsers were cosureties, or whether one was a supplemental surety to the other. *Parish v. Graham*, 129 N. C. 230, 39 S. E. 825 (1901).

**May Allege and Prove Suretyship.**—When sued, either of the defendants may allege that he is surety, and, if the allegation be proven, the jury in their verdict and the court in the judgment shall distinguish the principal and surety, and it shall be so indorsed on the execution issued for the collection of the judgment. *Bank v. McArthur*, 261 F. 97 (1919).

In *Gatewood v. Leak*, 99 N. C. 357, 6 S. E. 635 (1888), it was said: "If the appellee was surety, as he alleges, he might, as allowed by the statute, (this section) have shown, by proper evidence on the

trial in the actions in which the judgments were obtained by the appellant, that he was such surety, and the jury in their verdict, or the justice of the peace in his judgment, would have distinguished him as surety, and the executions would have been issued with a proper indorsement to that effect; and in that case the sheriff would have levied the sum required to be collected, first, out of the property of the principal if he had sufficient for that purpose."

**Same—Practice of Courts.**—It is not the practice of the courts to see that evidence of suretyship is produced and such fact inserted in the judgment, in the absence of the defendants and without any averment or request on their part. *Morehead Banking Co. v. Duke*, 121 N. C. 110, 28 S. E. 191 (1897).

**Effect of Not Alleging Suretyship.**—In *Bank v. McArthur*, 261 F. 97 (1919), it was said that: "It would not seem that, by failing to set up his suretyship in the action brought by the American National Bank on the note, McArthur lost any equitable rights against McBryde to which he was entitled as surety. It is true, as held in *Gatewood v. Leak*, 99 N. C. 357, 6 S. E. 635 (1888), that the surety, who has failed to set up the fact and have it found as provided by the statute, cannot enjoin the plaintiff in the judgment from proceeding to sell his land for its satisfaction. Neither McArthur nor plaintiffs may enjoin the bank from enforcing its judgment against himself until it has exhausted McBryde's property."

The magistrate is not bound to discriminate except upon the application of, and due proof by, the surety. *Stewart v. Ray*, 26 N. C. 269 (1844).

**Effect of Finding of Jury.**—Where a suit is brought at law against two persons, a finding of the jury that one of the defendants is principal, and the other surety, if binding at all between the parties, does not in equity establish the relation of suretyship. *Lowder v. Noding*, 43 N. C. 208 (1851).

**When Execution Does Not Distinguish.**—Where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the sheriff may collect it from the surety, though the plaintiff in the execution directed him to

collect it from the other. *Shuford v. Cline*, 35 N. C. 463 (1852).

**Right of Surety to Subrogation.**—See note to § 26-3.

**Right of Surety to Assign Judgment.**—It was stated in *Barringer v. Boyden*, 52 N. C. 187 (1859): "The right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desires it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intentment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase and not as a payment." *Bank v. McArthur*, 261 F. 97 (1919).

**Signing on Faith of Creditor's Representations.**—Persons signing a note as surety upon faith in the creditor's representation that another will sign as cosurety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of the fulfillment of the representation. *Bank v. Hunt*, 124 N. C. 171, 32 S. E. 546 (1899), distinguished. *Bank v. Jones*, 147 N. C. 419, 61 S. E. 193 (1908).

**Bond Joint and Several on Face.**—Although the bond is joint and several on its face it can be shown by parol that a party thereto is a surety. *Coffey v. Reinhardt*, 114 N. C. 509, 19 S. E. 370 (1894).

**Statute of Limitations.**—If the purchaser of a note before maturity, for value and without notice, subsequently receives notice that a party thereto is a surety and delays action for three years after maturity the surety will be protected by the three years' statute of limitations. *Coffey v. Reinhardt*, 114 N. C. 509, 19 S. E. 370 (1894).

§ 26-2. **Principal liable on execution before surety.**—When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and, for want of sufficient property of the

principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety. (1826, c. 31, s. 2; R. C., c. 31, s. 125; Code, s. 2101; Rev., s. 2841; C. S., s. 3962.)

**Surety's Interest in Collateral.**—The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such a security is created, and by what-

ever means the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest. *Bank v. Homesley*, 99 N. C. 531, 6 S. E. 797 (1888).

**§ 26-3. Summary remedy of surety against principal.**—Any person who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the court or justice shall award execution against the estate of the principal. (1797, c. 487, s. 1, P. R.; R. C., c. 110, s. 1; Code, s. 2093; Rev., s. 2842; C. S., s. 3963.)

I. General Consideration.

II. Subrogation.

III. Assignments.

#### I. GENERAL CONSIDERATION.

**Editor's Note.**—See 13 N. C. Law Rev. 116.

**The words "superior court"** used in this section mean the clerk of the superior court. *Bank v. Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

**Cannot Sue in Tort.**—A surety who has paid money for his principal cannot sue him in an action of tort. *Ledbetter v. Torney*, 33 N. C. 294 (1850).

**Citation Issued to Principal.**—This section, providing that a surety who shows that he has paid out money upon a judgment against his principal and himself may have a citation issued to the principal by the clerk to show cause why execution should not be awarded him therefor, is constitutional. *Bank v. Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

**Notice to Corporation to Show Cause.**—A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded in favor of a surety who has paid a judgment against the corporation and himself, which sets out the date and amount of the judgment, the relation of the parties, that the surety has actually expended money in payment of said judgment, and that the principal has not reimbursed him, is a compliance with the section. *Bank v. Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

**Validity of Order.**—While, under the section the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words "that the judgment heretofore rendered is hereby revived, to the end that execution may be issued." The last sentence will be regarded as surplusage. *Bank v. Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

**When Surety Entitled to Action for Money Paid.**—A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant, until it has been satisfied. *Hodges v. Armstrong*, 14 N. C. 253 (1831).

To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt. *Hodges v. Armstrong*, 14 N. C. 253 (1831).

**Right of Surety When Funds Misapplied.**—Where a surety prays a judgment against his principal he may recover any funds wrongfully converted or misapplied by the principal. *Fidelity Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496 (1904).

**Surety Cannot Trace Property.**—A surety who has to pay the debt, has no equity to follow the specific property which the principal debtor purchased with the borrowed money. *Carlton v. Simon*, 94 N. C. 401 (1886).

**Same—Bank Deposits.**—Where the principal debtor borrowed a sum of money, which he deposited in a bank which soon

afterwards became insolvent, and the surety had to pay the debt, the surety has no equity to enjoin the principal debtor from collecting the dividends from the insolvent bank, until he can recover a judgment. *Carlton v. Simonton*, 94 N. C. 401 (1886).

**Right against Partnership.**—Where a writ is issued against two copartners for partnership debt, and one of them is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay the debt, has no remedy except against the individual for whom he became bail. He has no claim upon the other partner. *Foley v. Robards*, 25 N. C. 177 (1842).

Where one indorsed a note at the request of a member of a firm for the purpose of obtaining money for the use of the firm, and the proceeds were so used, the indorser, upon payment of the note, can recover therefor against the firm, though no member of such firm signed the note. *Springs v. McCoy*, 122 N. C. 628, 29 S. E. 903 (1898).

**When Surety's Liability Barred by Limitations.**—Property mortgaged by an administrator to a surety to secure him against loss may be subjected to payment of estate debts, though the personal liability of the surety is barred. *Hooker v. Yellowley*, 128 N. C. 297, 38 S. E. 889 (1901).

**The obligation of a bond for the forthcoming of property** is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be delivered to the officer at the time designated and not that the execution shall be satisfied; and therefore, if a surety to the forthcoming bond before it is forfeited discharges the execution without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although by the payment of the money in satisfaction of the execution the bond was discharged. *Gray v. Bows*, 18 N. C. 437 (1836).

**When Mortgage Inures to Benefit of Creditors.**—A mortgage given by an administrator to a surety on his bond to secure the latter against loss inures to the benefit of the creditors of the estate. *Hooker v. Yellowley*, 128 N. C. 297, 38 S. E. 889 (1901).

**Bond of Guardian in Suit on Behalf of Ward.**—Where a guardian, having given a bond for the prosecution of a suit by him on behalf of his ward and signed the same individually, was compelled to pay the

costs of the suit out of his individual estate, he cannot recover the same under the provisions of this section, which gives a summary method for reimbursement of a surety who has paid money for another. *Green v. Burgess*, 117 N. C. 495, 23 S. E. 439 (1895).

## II. SUBROGATION.

**Subrogation Explained.**—Subrogation is the substitution of another person in the place of a creditor, so that the former can succeed to the rights of the latter in relation to the debt, and to entitle one to such equitable relief, he must have paid the money upon request or as surety or under some compulsion made necessary by the adequate protection of his own rights. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104 (1893).

Legal subrogation is based upon payment and exists where one who has an interest to protect or is secondarily liable makes payment, while conventional subrogation, so named from the convention or agreement of the civil law, is founded upon the agreement of the parties, which really amounts to an equitable assignment. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104 (1893); *Bank v. Bank*, 158 N. C. 250, 73 S. E. 157 (1911); *Pub. Co. v. Barber*, 165 N. C. 478, 81 S. E. 694 (1914); *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44 (1918).

The doctrine of equity, upon which subsequent cases have been ruled, was announced in *Deering v. Earl of Winchelsea* (1787), *White & Tudor's L. C. Eq.* 784, and *Pomeroy, Eq.* (3d Ed.) 1419, in which it is said: "By the fact of payment the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration. If, therefore, the creditor refuses to surrender up such securities, the surety may maintain an equitable suit to compel their assignment and surrender. *Bank v. McArthur*, 261 F. 97 (1919).

It is held that an indorser on a note may pay it and demand its delivery, and if the contract has been merged into a judgment, his right is to an assignment of the judgment and to enforce it for his own benefit. The principle is clearly stated by Prof. Langdell: "If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him and not to the debtor, though



the latter has a clear legal right to receive it, the debt being paid and extinguished; i. e., equity destroys the legal right of the debtor, and converts the creditor into a trustee for surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is therefore entitled to the pledge as an incident of the debt. This, however, is only a fiction—a fiction, moreover, which is contrary to law, for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law." *Bank v. McArthur*, 261 F. 97 (1919).

**A surety paying the debt of his principal** is entitled to be subrogated to all the rights of the creditors, against a co-surety as well as against the principal, and this includes the right to have a judgment which he has paid assigned to a trustee for his benefit, so as to compel his co-surety to pay his pro rata part. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

In *Brandt on Suretyship*, § 347, quoted in *Tripp v. Harris*, 154 N. C. 296, 70 S. E. 470 (1911), it is said: "A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt, and he may, with or without a formal assignment thereof, have the same foreclosed in his own name, for his benefit."

**Where a surety, as such, paid the whole of a debt**, then the section gives him a right of action against co-sureties at law, and also such priority as the creditor would have had as a claimant against his principal's estate. *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684 (1895).

**Rights Acquired.**—The party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none. *Sheldon on Subrogation*, § 6; *Clark v. Williams*, 70 N. C. 679 (1874); *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104 (1893).

An endorser or surety who pays the indebtedness is subrogated to the rights of the creditor as against the property of the debtor. *Ex parte Pittinger*, 142 N. C. 85, 54 S. E. 845 (1906).

A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator is not subrogated to the rights of the creditor whose debt he paid, but to the right of the admin-

istrator for whom he paid it. *Clark v. Williams*, 70 N. C. 679 (1874).

**Same—Liens and Securities.**—A surety who pays the debt is subrogated to all the specific liens and securities which the creditor has against the principal debtor. *Carlton v. Simonton*, 94 N. C. 401 (1886).

**When Doctrine Cannot Be Invoked.**—If a surety pays a judgment and has it entered "satisfied," without having it assigned to a trustee for his benefit, the remedy of subrogation is lost. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

Where several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to or operation upon each other, the doctrine of subrogation cannot be invoked. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104 (1893).

**Same—Corporation Note.**—The endorsers on a note of a corporation secured by mortgage on its property are not entitled to subrogation, either legal or conventional, when it is ascertained that the note was paid by the corporation, and not the endorsers, and where there is evidence that the latter had paid it, the question should be submitted to the jury. *Joyner v. Reflector Co.*, 176 N. C. 274, 97 S. E. 44 (1918).

**Rights of Surety against Party Receiving Money with Full Knowledge.**—A surety company which has been called upon to pay a devastavit committed by its principal, an administrator, is entitled to be subrogated to the rights of the creditor against a party who received the money with knowledge of its wrongful appropriation, and his rights are exactly those of the creditor. *Caviness v. Fidelity Co.*, 140 N. C. 58, 52 S. E. 265 (1905).

**A surety, omitted in the deed of trust to secure the sureties**, is entitled to be subrogated to the rights of his co-sureties pro tanto, if he has paid the debts, and the payees in the notes have a superior equitable right of subrogation to the benefit of any security given by the principal debtor to his sureties. *Wiswall v. Potts*, 58 N. C. 184 (1859); *Harrison v. Styres*, 74 N. C. 290 (1876); *Ijames v. Gaither*, 93 N. C. 358 (1885); *Sherrod v. Dixon*, 120 N. C. 60, 26 S. E. 770 (1897). And this is true whether they knew of it or not. *Matthews v. Joyce*, 85 N. C. 258 (1881); *Blanton & Co. v. Bostic*, 126 N. C. 418, 35 S. E. 1035 (1900).

### III. ASSIGNMENTS.

**Preservation of Lien by Assignment.**—A surety may preserve the lien of judgment against the principal and himself

by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

A surety who pays the amount recovered against him and his principal, or co-sureties, may have the judgment assigned to another in trust for his use, and it will continue in force for his benefit; and he may, upon motion in the cause, have satisfaction of the judgment entered, even against the consent of the assignee. *State v. Hearn*, 109 N. C. 150, 13 S. E. 895 (1891).

**Assignment of Right by Surety.**—Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principal thereon. *Haywood v. Russell*, 182 N. C. 711, 110 S. E. 81 (1921).

**§ 26-4. Subrogation of surety paying debt of deceased principal.**—Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment. (1829, c. 23; R. C., c. 110, s. 4; Code, s. 2096; Rev., s. 2843; C. S., s. 3964.)

**Scope.**—This section which confers on the claim of a surety, paying the debt for which he is surety, the dignity, in the administration of the assets of the principal, which the debt, if unpaid would have had, applies to a judgment whether the payment be made before or after the death of the principal. *Drake v. Coltrane*, 44 N. C. 300 (1853).

**When Co-surety Deemed Bond Creditor.**—A co-surety, who pays the bond debt for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety, under the act of 1828 as construed in *Drake v. Coltrane*, 44 N. C. 300 (1853); *Howell v. Reams*, 73 N. C. 391 (1875).

When a plaintiff, a co-surety, discharged the bond debt, for the payment of which

**When One Half of Judgment Paid and Other Assigned.**—Where a surety who paid and had satisfaction entered as to one half of a judgment against himself, his principal and a co-surety, and procured the judgment as to the other half to be assigned to a trustee for his benefit, it was in effect the same as if he had procured the whole judgment to be so assigned. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

**When Assignment of Security Taken.**—If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor but while it is not in force, the surety can not maintain an action for the money paid for the assignment. *Hodges v. Armstrong*, 14 N. C. 253 (1831).

**When Person Charged with Notice of Assignment.**—Where a judgment against a principal and the sureties on a note is paid by the sureties, and an assignment thereof is made to a trustee for the benefit of the sureties, but by a mistake payment is entered on the judgment record, which is afterwards corrected by the entry thereon of the assignment, a person taking a mortgage on the property of the judgment debtor, after the assignment is entered on the record, takes with notice of the assignment. *Patton v. Cooper*, 132 N. C. 791, 44 S. E. 676 (1903).

the defendant's intestate was equally bound, he becomes a bond creditor as to the assets of the intestate; and when, pending an action for contribution, the administrator paid off the bonds voluntarily, of equal dignity with said surety debt, having previously paid an open account, he committed a devastavit to the extent of the plaintiff's claim for contribution, such claim being for a sum smaller than the bonds so preferred and the open account. *Howell v. Reams*, 73 N. C. 391 (1875).

**Applied**, in subrogating widow to rights of mortgagee where policy in which she is named beneficiary is assigned to and paid to mortgagee, in *Russel v. Owen*, 203 N. C. 262, 165 S. E. 687 (1932).

**Cited** in *Brown v. McLean*, 217 N. C. 555, 8 S. E. (2d) 807 (1940).

**§ 26-5. Contribution among sureties.**—Where there are two or more sureties for the performance of a contract, and one or more of them may have

been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the State, such surety may have and maintain an action against every other surety for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost. (1807, c. 722, P. R.; R. C., c. 110, s. 2; Code, s. 2094; Rev., s. 2844; C. S., s. 3965.)

- I. The Right to Contribution Generally.
- II. When Surety Obtains Advantage over Co-sureties.
- III. Contribution Enforced.
  - A. In General.
  - B. Actions and Incidents Thereto.

## I. THE RIGHT TO CONTRIBUTION GENERALLY.

**Editor's Note.**—*Atwater v. Farthing*, 113 N. C. 388, 24 S. E. 736 (1896), was a case where A endorsed a note for the maker, and subsequently, but before it was discounted, F endorsed it. The principal became insolvent and left the State. A paid the note. The court held that F was a co-surety, and that the doctrine of contribution was applicable for A's benefit. The Court said that the decision was governed by *Daniel v. McRae*, 9 N. C. 590 (1823) and *Dawson v. Pettway*, 20 N. C. 531 (1839).

**Rule of Contribution.**—The rule of contribution is founded upon the maxim that "equality is equity," and not upon contract. It is a rule of common justice whereby parties who undertake to account for the default or miscarriage of another, should equally bear the burden imposed by a failure of their principal. As between them, there is no agreement implied, but an equitable presumption raised by the fact of the payment by one, that the others will equalize the burden thus borne by him, by paying to him such sum as will make the loss equal upon each, which can be rebutted by showing that there was an agreement, whether verbal or written, to the contrary. *Smith v. Carr*, 128 N. C. 150, 153, 38 S. E. 732 (1901). See *Allen v. Wood*, 38 N. C. 386 (1844).

This maxim can only be applied to those whose situations are equal; otherwise equality is not equity, and hence if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety ceases, and the maxim does not apply. *Moore v. Moore*, 11 N. C. 353 (1826).

It is broadly stated in 2 *Brandt Suretyship* 309, that "A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal." This is founded in reason and justice, and up to the adop-

tion of our present Constitution was enforced in the courts of equity. Art IV, § 1, of the Constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

**Same — Primary and Conditional Liability.**—The equitable doctrine of contribution is enforced upon the principle that those engaged in a common hazard in the same degree or relation should bear the loss equally, but where one is surety and the others indorsers, the liability of the former is primary and of the latter a conditional one, and not being in the same situation with regard to the hazard, the surety is not entitled to contribution from the indorsers. *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. C. 614, 92 S. E. 695 (1917).

**Presumption of Equity.** — Co-principals and co-sureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence. *Smith v. Carr*, 128 N. C. 150, 38 S. E. 732 (1901).

**Surety for Other Sureties.**—It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to other sureties. The test of liability is the intent of the parties as indicated by their agreement. *Citizens Nat. Bank v. Burch*, 145 N. C. 316, 59 S. E. 71 (1907).

**Sureties on Successive Guardianship Bonds.** — The sureties to the successive bonds of a guardian stand in the relation of co-sureties, one bond to the other or others, and are liable, in case of insolvency of the guardian, to contribution in proportion to the amount of the several penalties of the bonds. The risk they take is a joint risk, and there is an implied engagement or

obligation, each set of sureties with the other, to bear any loss which may fall on them proportionally, as above stated; or, if it is borne by one class, to contribute by way of reimbursement. *Bell v. Jasper*, 37 N. C. 597 (1843); *Jones v. Hays*, 38 N. C. 502 (1845); *Bright v. Lennon*, 83 N. C. 184 (1880).

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of co-sureties 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).

All the bonds given by a guardian are but securities for the same thing, and the sureties on each are bound to contribution, but their liabilities are in proportion to the amount of their respective bonds. *Jones v. Blanton*, 41 N. C. 115 (1848).

**When Surety Should Answer for Default and Stop Costs.** — As a general rule, upon the default and insolvency of a principal, a surety should answer for the default, and not unnecessarily let cost be run up where the liability and amount thereof is clear. But where, as in the instant case, the guardian claimed to have settled with and paid the wards, it was prudent in plaintiff in regard to his own interests and as an act of justice to his co-sureties on other bonds, to incur costs to the point of developing how the fact of alleged settlement was, and to this effect are the authorities. *Bright v. Lennon*, 83 N. C. 184 (1880).

The costs incurred by one surety, or one set of sureties, are not always to be regarded as a loss borne to which in equity contribution may be had, but it would seem to depend on the prudence and bona fides of the defense by which they were incurred. *Bright v. Lennon*, 83 N. C. 184 (1880).

**Assets Given Up by Mistake of Law.** — Where A and B were co-sureties on an administration bond, and being sued upon the same by one of the next of kin, and while the suit was pending compromised the same under the advice of counsel and from an honest belief that both were liable to a larger sum on account of the devastavit and insolvency of their principal, and it is afterwards discovered that B, who had administered on the estate of the principal, had, by a misapprehension of law, but acting under legal counsel, and in good faith, erroneously given up assets of their principal to another claim, which, if they had been held by him, would have saved them both

from loss by this suretyship, yet it was held that A could not sustain a bill to throw the whole loss on B, there being no evidence that B had concealed from A the fact of having thus parted with the assets and not making any allegation of fraud or imposition on the part of B. *Brandon v. Medley*, 54 N. C. 313 (1854).

**Release of Principal.** — A surety who seeks to recover from a co-surety a ratable part of money paid must take care to do no act which will prevent the co-surety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the co-surety. *Draughan v. Bunting*, 31 N. C. 10 (1848).

**Sureties on Sheriff's Tax Bond.** — The right of contribution does not exist between sureties of the different bonds of a sheriff as tax collector. *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627 (1898).

**When One Surety in Fact Surety for Co-Surety.** — Where A. and B. signed a negotiable note apparently as joint principals, when, in fact, the latter was surety for the former and the appellant signed the note by writing his name across the back, with the word "surety" underneath, it was held that in the absence of any evidence that appellant knew of the relation between the makers, he was surety for the two, and that surety B. could not compel contribution. *Citizens Nat. Bank v. Burch*, 145 N. C. 316, 59 S. E. 71 (1907).

**Release by Securing Part of Debt.** — If there be several sureties for the same principal, and one of them be fixed with the payment of the whole debt, or of more than his ratable part thereof, the others, who are solvent, shall be compelled to contribute, in order to equalize the loss. But if by any agreement between the sureties, one of them is released by the creditor, upon his securing the payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties, for a loss arising from the deficiency of another to them. *Moore v. Isley*, 22 N. C. 372 (1839).

**Agreement between Sureties.** — There can be no doubt that after two persons have become sureties for a common principal they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another co-surety. *Long v. Barnett*, 38 N. C. 631 (1845); *Commissioners v. Nichols*, 131 N. C. 501, 42 S. E. 938 (1902).

Where the land of one of two sureties of a third person was sold under execution for the debt, and the other surety and a third person bid it off, it was held that an agreement by the surety who owned the land to take the whole debt upon himself and satisfy the execution in return for an assignment of the bid to him, was a promise to pay his own debt and not affected by the statute of frauds; and in such case the surety who paid could not obtain contribution from his co-surety. *Hockaday v. Parker*, 53 N. C. 16 (1860).

## II. WHEN SURETY OBTAINS ADVANTAGE OVER CO-SURETIES.

**Property Advanced by Principal to One of Sureties.**—Where money is advanced by the principal to one of the sureties, to discharge the debt, before the debt is actually discharged, the co-surety may file his bill in equity for an account and for relief but if the money is paid by the principal after the debt has been discharged by the sureties, to one of two sureties, to reimburse both, then the co-surety has his remedy against the surety receiving the money, by an action at law for money had and received, and, therefore, can not support a suit in equity. *Allen v. Wood*, 38 N. C. 386 (1844).

An indemnity obtained from a principal by one of two co-sureties, after the risk is incurred, inures equally to the benefit of both. *Pool v. Williams*, 30 N. C. 286 (1848).

Where the principal placed property in the hands of a surety sufficient to satisfy the debt, and then left the State, it was held that a third person, also bound for the debt as surety, having been compelled to pay it, might recover its amount from the person who had received the property without making a previous demand. *Parham v. Green*, 64 N. C. 436 (1870), citing with approval, *Sherrod v. Woodward*, 15 N. C. 360 (1833); *Hall v. Robinson*, 30 N. C. 56 (1847); *Draughan v. Bunting*, 31 N. C. 10 (1848); *Norfleet v. Cromwell*, 64 N. C. 1 (1870).

When two persons engage in a common risk as sureties for a third and one of them subsequently takes an indemnity from the principal debtor it inures to the benefit of both. *Fagan v. JACOBS*, 15 N. C. 263 (1833); *Gregory v. Murrell*, 37 N. C. 233 (1842); *Hall v. Robinson*, 30 N. C. 56 (1847).

**Separate Indemnity.**—In *Long v. Barnett*, 38 N. C. 631 (1845), the court said: "As one, when he is about to become a surety with others, may stipulate for a

separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement. *Moore v. Moore*, 11 N. C. 358, 15 Am. Dec. 523 (1826)." *Commissioners v. Nichols*, 131 N. C. 501, 42 S. E. 938 (1902).

**When Indemnity May Be Reached.**—The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in fraud, or for the benefit of the other. *Moore v. Moore*, 11 N. C. 358 (1826).

**Before and after Severance of Relationship.**—While the relation of joint sureties exists, funds received by one of them (except under special circumstances) for the discharge of, or as an indemnity against, his liability, are to be applied for the common benefit of the sureties. But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claims. *Moore v. Isley*, 22 N. C. 372 (1839).

**When Advantage Lost by Laches.**—Where the surety merely had a deed of trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the co-surety is not entitled, on account of this laches, to make him responsible for the value of the property. *Pool v. Williams*, 30 N. C. 286 (1848).

**Supplementary Surety.**—Where one of two sureties claims to be a supplemental surety by agreement, the burden is upon him to show the agreement. *Carr v. Smith*, 129 N. C. 232, 39 S. E. 831 (1901).

**Parties.**—One of three joint solvent sureties cannot sustain a bill against either of his co-sureties for contribution out of a fund alleged to have been received by that surety for his indemnity from the estate of an insolvent co-surety, without making the other a party. *Moore v. Isley*, 22 N. C. 372 (1839).

## III. CONTRIBUTION ENFORCED.

### A. In General.

**Accommodation Maker and Endorser.**—An accommodation maker who pays a note may recover contribution from an accommodation endorser of the note where they intended to become co-sureties. *Gilliam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925).

**Co-Surety Paying Bond Debt Deemed Bond Creditor.**—In *Howell v. Reams*, 73 N. C. 391 (1875) it was held that a co-surety who pays the bond debt, for which the other surety is equally bound, shall be deemed a bond creditor in the administration of the estate of the deceased co-surety. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

**Liable for Ratable Part of Debt Only.**—The section provides that where one or more sureties have been compelled to satisfy the contract of their principal, they may sue their co-sureties for their ratable part of the debt paid for the principal. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894).

There was a judgment against the principal and two sureties, and an execution levied on the property of one of the sureties. A bought this property from this surety, pending the levy, and afterwards obtained an assignment of the judgment to enable him to have the whole amount satisfied out of the property of the co-surety, and issued an execution for that purpose. It was held that he was restrained from collecting out of the co-surety more than the fair proportion which the latter owed, whether A had actual notice of the lien of the execution or not. *Dobson v. Prather*, 41 N. C. 31 (1849).

**Rights of Surety Paying Entire Debt.**—Under the act of 1807, now this section, one surety may recover at law from another his ratable proportion of the debt of the principal, but the rights of the surety who pays the debt are not enlarged nor is the co-surety deprived of any just grounds of defense which would before have been available to him in equity. *Hall v. Robinson*, 30 N. C. 56 (1847).

**In Case of Absent Co-surety.**—A co-surety must make contribution, without regard to the share of contribution, which the absent co-surety would have had to pay, had he been within the reach of the process of our courts. *Jones v. Blanton*, 41 N. C. 115 (1848).

**Accommodation Endorser Not Liable as Co-surety.**—Where A, as surety, signed the note of B, payable to C, and it was endorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agree to become co-sureties of B, it was held that A had no right to contribution from C. *Smith v. Smith*, 16 N. C. 173 (1828).

**Liability Need Not Be Fixed by Judgment.**—It is not necessary, to entitle a surety to maintain an action for contribution, that the amount of his liability

which was paid by him should be fixed by a judgment. *Bright v. Lennon*, 83 N. C. 184 (1880).

**Statute of Limitations.**—In the case of a surety's payment and action for contribution against the co-surety, the statute of limitations runs only from the payment. *Sherrod v. Woodward*, 15 N. C. 360 (1833); *Craven v. Freeman*, 82 N. C. 361 (1880).

A surety who pays money for his principal, may maintain an action against his co-surety for his ratable part, without first making a demand, and the statute of limitations therefore begins to run from the time of the payment of the money. *Sherrod v. Woodward*, 15 N. C. 360 (1833).

**Same—Failure to Plead.**—A surety when sued is not bound to plead the statute of limitations, but may or may not according to his discretion. *Jones v. Blanton*, 41 N. C. 115 (1848); *Street v. Comrs.*, 70 N. C. 644 (1874); *Craven v. Freeman*, 82 N. C. 361 (1880). And if so, the withdrawal of such a plea or a waiver of it ought not to affect and does not affect the right to contribution. The design of that plea is to protect against a false and unjust claim or one of whose discharge the evidence is lost, but it is not obligatory in morals or law to use it to defeat a just debt. *Bright v. Lennon*, 83 N. C. 184 (1880).

A surety to a guardian bond, when sued by the wards, is not bound to avail himself of the statute of limitations and a failure to do so does not release co-sureties. *Jones v. Blanton*, 41 N. C. 115 (1848).

## B. Actions and Incidents Thereof.

**Action at Law for Aliquot Parts.**—An action at law by a surety for contribution lies only against the co-sureties, severally, for the aliquot part due from each. *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47 (1897).

Where two sureties on a note to a bank agreed, after the insolvency of their principal, to employ a broker to buy notes of the bank to an amount sufficient to pay the debt, and one of them paid the broker for notes purchased by him, and discharged the debt, it was held that he could maintain an action on the case against his co-surety for contribution. *DeRossett v. Bradley*, 63 N. C. 17 (1868).

**Surety Should Allege Principal's Insolvency.**—When one surety brings a bill for contribution against a co-surety, he should at least allege that the principal is insolvent, so that he can have no redress against him. For the equity of a plaintiff, seeking contribution from a co-surety, lies

in the insolvency of the principal. *Allen v. Wood*, 38 N. C. 386 (1844).

A surety has no right to call upon his co-surety in equity for contribution, without showing that he could not obtain satisfaction for the amount he has paid from their common principal. *Rainey v. Yarborough*, 37 N. C. 249 (1842).

**When Insolvency Not Alleged and Improper Relief Asked.**—Where a complaint in an action by a surety for contribution, joined the principals as parties, and alleged the contract of suretyship, payment by the plaintiff and demand of the co-sureties “for their contributive shares,” and asked judgment against all, but did not allege insolvency of the principal except by the averment that plaintiff was compelled to pay the debt, it was held that, though the proper relief was not asked, and the insolvency of the principals was imperfectly alleged, the cause of action will be construed, on demurrer, as equitable rather than legal, in order to confer jurisdiction below. *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47 (1897).

**Costs Paid by Plaintiff.**—In an action by a surety of an insolvent guardian for contribution against other sureties, it is proper to include in the sum adjudged to be raised by contribution costs which were paid by plaintiff in an action against him as a condition for leave to plead the statute of limitations. *Bright v. Lennon*, 83 N. C. 184 (1880).

**When Surety Must Show Actual Money Payment.**—Where a surety brings an action of assumpsit, for money paid for the use and at the request of the defendant, against his co-surety, to obtain contribution, it is not sufficient for him to show that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt. To entitle him to recover in this action, he must prove an actual payment in money, or in money's worth, such as bank notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it. *Brisendine v. Martin*, 23 N. C. 286 (1840).

**Notice.**—In an action for contribution by a surety against four different guardian bonds, with different penalties and different sureties, some solvent and some otherwise, it is not necessary that notice should be given before the action is brought. *Bright v. Lennon*, 83 N. C. 184 (1880).

**Right to Demand Waived.**—Where the plaintiff brings suit for contribution against a co-surety on a note, alleging his

liability as such, and that he had failed or refused reimbursement to the extent of his liability to the plaintiff, who had paid the same, and the defendant answers, denying liability, and there is no averment that demand had been previously made on the defendant, the right to a demand is waived by the answer, and the statement of the cause of action, being only defective, is cured. *Shuford v. Cook*, 164 N. C. 46, 80 S. E. 61 (1913).

**What Co-sureties Must Be Made Parties.**—A surety, who has been compelled to pay the debt of his principal, must make all his co-sureties parties to a bill for contribution, if they are in this State and solvent. But where one is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone. *Jones v. Blanton*, 41 N. C. 115 (1848).

**Principal or Executor Party Defendant.**—To a bill brought by one surety against his co-surety for contribution, their common principal, or, if he be dead, his executor or administrator should be made a party defendant. *Rainey v. Yarborough*, 37 N. C. 249 (1842).

**Bankruptcy of Principal.**—Where it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the surety who paid the note brought his action for contribution against his co-surety, who has paid nothing, the right of action given by Revisal, § 2844, now this section, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action. *Shuford v. Cook*, 164 N. C. 46, 80 S. E. 61 (1913).

**Interest on Collaterals.**—In an action against an alleged co-surety to recover money paid in settlement of their joint liability, the amount received by the plaintiff as interest on collaterals deposited, should be deducted from the amount paid by plaintiff. *Carr v. Smith*, 129 N. C. 232, 39 S. E. 831 (1901).

**Discharge of Levy by Co-surety.**—A, having a judgment against B, as principal, and C, as surety, C, without the consent of A, has an execution issued and levied upon B's property. A, has a right to withdraw the execution and discharge the levy, without making herself liable to C. *Forbes v. Smith*, 40 N. C. 369 (1848).

**Principal's Reputation to Show Insolvency.**—In an action for contribution by

a surety against his co-surety, the plaintiff may offer evidence of their principal's insolvency by showing his general reputation, and this even after direct evidence of the said principal's insolvency. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241 (1888).

**Record of Judgment in Evidence.**—A surety seeking contribution from a co-surety can offer in evidence the record of a judgment against the surety as such, which, in the absence of any suggestion of fraud or collusion in procuring the same, is prima facie proof of the damages

suffered by the said surety. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241 (1888).

**Operation of Parol Evidence Rule.**—The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution, parol evidence is admissible to show that they were really principals. *Williams v. Glenn*, 92 N. C. 253 (1885).

**§ 26-6. Dissenting surety not liable to surety on stay of execution.**—Whenever any judgment shall be obtained before a justice against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment. (1829, c. 6, ss. 1, 2; R. C., c. 110, s. 3; Code, s. 2095; Rev., s. 2845; C. S., s. 3966.)

**§ 26-7. Surety, indorser, or guarantor may notify creditor to take action.**—(a) After any note, bill, bond, or other obligation becomes due and payable, any surety, indorser, or guarantor thereof may give written notice to the holder or owner of the obligation requiring him to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation.

(b) The surety, indorser or guarantor who gives notice to the holder or owner of the obligation as provided by subsection (a) shall forthwith give written notice to all co-sureties, co-indorsers and co-guarantors of the fact that such notice is being given to the holder or owner of the obligation, and such co-sureties, co-indorsers and co-guarantors shall have ten days after receipt of the notice in which themselves to give written notice to the holder or owner of the obligation and to their co-sureties, co-indorsers, and co-guarantors, that they join in or adopt the notice given pursuant to subsection (a). Failure of such surety, indorser or guarantor to give the required notice to co-sureties, co-indorsers or co-guarantors whose names and residences are known to him or can be obtained by due diligence bars such surety indorser or guarantor from any of the benefits of G. S. 26-9.

(c) The holder or owner of the obligation shall on demand disclose to any surety, indorser, or guarantor of the obligation the names and addresses of all other sureties, indorsers and guarantors which appear on the obligation or of which he has knowledge.

(d) Nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity. (1868-9, c. 232, s. 1; Code, s. 2097; Rev., s. 2846; C. S., s. 3967; 1951, c. 763, s. 1.)

**Cross Reference.**—As to statute of limitations, see subdivisions 1 and 6 of § 1-52.

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

The cases cited below were decided prior to the amendment.

**Reasonable Compliance.**—The require-

ments of this section are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section, within thirty days causes the maker to be a party defendant, and it is made to appear that he is a non-resident. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94 (1923).



**Written Notice—Required.** — To have the benefit of the next preceding section and that there may be no controversy as to whether the demand is sufficient to have this effect, it must be a notice in writing given to the creditor; and its benefits are secured to such only as give the notice if there be more than one surety. *Bank v. Homesley*, 99 N. C. 531, 6 S. E. 797 (1888).

**Protection Secured.** — In *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772, (1891), it was held that payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations.

This section affords relief to securities in cases not provided for in the pre-existing law, by requiring the creditor, at the instance of the surety who considers himself in danger of loss from his contingent liability, to bring suit, and use reasonable diligence in making his money from the principal, and saving harmless the surety, at the hazard of losing his claim upon the latter, if negligent in doing so. But official bonds or securities held as collateral are excepted from the operation of the act; nor does it reach the present case, since the requirement of the sureties was verbal only, if in other aspects applicable to the present case. There is no error, and the judgment is affirmed. *Bank v. Homesley*, 99 N. C. 531, 6 S. E. 797 (1888).

Where an action was brought upon a negotiable instrument the defendants on its face being joint makers, the mere fact that the plaintiff had told one of the defendants, without the knowledge of the other, "that he would take up and carry the note until fall," was held to constitute an extension of payment for a "fixed and definite" period, which would operate as a release to such other from liability but his remedy is by quia timet notice under this section. *Roberson-Ruffin Co. v.*

*Spain*, 173 N. C. 23, 91 S. E. 361 (1917).

**Same—Endorser in Blank of Non-Negotiable Paper.** — The rights of an endorser in blank upon a non-negotiable note are sufficiently protected under the section which provides that a surety or endorser on any note, bill, bond or written obligation, except those held in trust or as collateral, may notify, in writing, the payee or holder, requiring him to bring suit and use all diligence to collect, and if the payee or holder refuses to bring action within thirty days, the surety or holder giving notice is discharged. *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23 (1911).

**Surety Released after Thirty Days.**— The surety can give the holder written notice quia timet to bring suit under this section, and if the holder does not do so within thirty days the surety will be released. *Cole v. Fox*, 83 N. C. 463 (1880); *Coffey v. Reinhardt*, 144 N. C. 509, 19 S. E. 370 (1907).

**Legal Duty of Principal.** — Except when required by written notice under this section it is not the legal duty of the principal to institute a suit against the debtor, or to pursue such a suit with diligence and to call to his aid all of the remedies provided by the law. *Bell v. Howerston*, 111 N. C. 69, 15 S. E. 891 (1892).

**When Inapplicable.**—Where there is an agreement in a negotiable note that the endorsers will continue to be bound notwithstanding an extension of time granted to the maker, the endorsers cannot avail themselves of the provisions of this section, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorsers, defendants in the action, and they have delayed to give the statutory notice until after action commenced. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94 (1923).

**§ 26-8. Notice; how given; prima facie evidence thereof.**—(a) Any notice authorized or required to be given by G. S. 26-7 shall—

(1) Be served by the sheriff by delivering a copy thereof to the person entitled to the notice, or

(2) Be sent by the person giving notice, by registered mail, with return receipt requested, to the last known address of the person being notified.

(b) Upon serving the notice, the sheriff shall return the original thereof, with his return thereon, to the person who caused the notice to be given.

(c) The sheriff's return, when the notice is served by the sheriff, or the return receipt, when the notice is sent by registered mail, shall be prima facie evidence of the giving of the notice. (1868-9, c. 232, s. 3; Code, s. 2099; Rev., s. 2848; C. S., s. 3968; 1951, c. 763, s. 2.)

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

§ 26-9. **Effect of failure of creditor to take action.**—(a) If the holder or owner of the obligation refuses or fails, within 30 days from the service or receipt of such notice, to take appropriate action pursuant thereto, the following persons shall be discharged on any such note, bond, bill or other obligation to the extent that they are prejudiced thereby:

(1) The surety, indorser or guarantor giving such notice, and

(2) All co-sureties, co-indorsers or co-guarantors joining therein or adopting such notice as provided by G. S. 26-7, and

(3) All the co-sureties, co-indorsers, or co-guarantors whose names or addresses such holder or owner of the obligation failed to disclose on demand as required by subsection (c) of G. S. 26-7.

(b) The fact that an instrument contains a provision waiving any defense of any surety, indorser or guarantor by reason of the extension of the time for payment does not prevent the operation of this section. Any such notice to the holder or owner of the obligation as is authorized by G. S. 26-7 may be given at or subsequent to the time such obligation is due or at or subsequent to the termination of a period of extension.

(c) The failure of any co-surety, co-indorser or co-guarantor to join in or adopt a notice to the holder or owner of the obligation as authorized by subsection (b) of G. S. 26-7 does not prevent such co-surety, co-indorser or co-guarantor from giving a separate notice as authorized by subsection (a) of G. S. 26-7. (1868-9, c. 232, s. 2; Code, s. 2098; Rev., s. 2847; C. S., s. 3969; 1951, c. 763, s. 3.)

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

**Extension of Time.**—Where a creditor enters into a binding contract with his principal debtor for an extension of time, without consent of sureties, this ipso facto discharges them, and also any security given for the debt. *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56 (1893); *Smith v. Building & Loan Ass'n*, 119 N. C. 257, 26 S. E. 40 (1896); *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239, 74 Am. St. Rep. 632 (1899); *Flemming v. Borden*, 127 N. C. 214, 37 S. E. 219, 53 L. R. A. 316 (1900). Receipt of interest in advance is prima facie evidence of a binding contract of forbearance. *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989 (1891); *Scott v. Fisher*, 110 N. C. 311, 14 S. E. 799, 28 Am. St. Rep. 688 (1892); *Smith v. Parker*, 131 N. C. 470, 42 S. E. 910 (1902).

Where a plaintiff creditor made a parol

contract with principal to extend the time of payment of bond beyond the date of the commencement of a suit thereon, without the knowledge or consent of the surety, it was held that such contract has the effect of suspending the plaintiff's right of action and of exonerating the surety from liability. *Carrier v. Duncan*, 84 N. C. 676 (1881).

**Reservation of Right against Surety.**—

An agreement with a principal on a sufficient consideration to forbear to sue for a fixed period, without reserving the right to proceed against the surety and made without his assent, will exonerate him from liability. *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817 (1887).

The exoneration grows out of the agreement to forbear and is not affected by the creditor's breach of it. *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817 (1887).

§ 26-10: Repealed by Session Laws 1943, c. 543.

§ 26-11. **Cancellation of judgment as to surety.**—Whenever a judgment shall be rendered in any court in accordance with the provisions of § 26-1 and the surety, endorser or other person shown in said judgment to be secondarily liable thereon and having the rights as by this chapter prescribed against the person or persons primarily liable, and the surety, endorser or other person so shown in the judgment to be secondarily liable, shall pay the said judgment or shall be compelled to pay an execution issued thereon and such fact shall appear to the satisfaction of the clerk of the superior court of the county in which the said judgment is rendered and docketed, such judgment shall be canceled as

to said surety, endorser or other person secondarily liable and shall cease to be a lien upon his real estate and other property, but such cancellation shall not have the force and effect nor operate as a cancellation and discharge of the judgment as to any other person against whom the said judgment shall be rendered and the person so paying the said judgment shall have all the rights given to a surety who has been compelled to pay a judgment against the principal debtor and co-sureties which are given in this chapter, notwithstanding the cancellation of the said judgment as herein provided for. (1925, c. 38.)

## Chapter 27.

### Warehouse Receipts.

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#### ARTICLE 1.

##### General Provisions.

§ 27-1. **Name of chapter.**—This chapter may be cited as the Uniform Warehouse Receipts act. (1917, c. 37, s. 62; C. S., s. 4036.)

§ 27-2. **Terms defined.**—In this chapter, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by merchantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership of two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

A thing is done “in good faith” within the meaning of this chapter, when it is in fact done honestly, whether it be done negligently or not. (1917, c. 37, s. 58; C. S., s. 4037.)

**Cross Reference.**—As to public warehouses in general, see §§ 66-35 through 66-40.

**What Constitutes Warehousemen.**—It matters not if a concern is a person or partnership. If the concern is engaged in the business and goods are stored for profit, this section applies. It matters not if the concern stores its own and also the goods of others. The receipt issued by

the concern under consideration terms itself “warehouse receipt” and shows on the face that the goods are stored for profit; it gives the “storage rates.” *Webb & Co. v. Friedberg*, 189 N. C. 166, 126 S. E. 508 (1925).

**Cited in** *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570 (1950).

§ 27-3. **Uniform construction.**—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1917, c. 37, s. 57; C. S., s. 4038.)

§ 27-4. **General law applied.**—In any case not provided for in this chapter, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1917, c. 37, s. 56; C. S., s. 4039.)

## ARTICLE 2.

### *Issue of Warehouse Receipts.*

§ 27-5. **Who may issue receipts.**—Warehouse receipts may be issued by any warehouseman. (1917, c. 37, s. 1; C. S., s. 4041.)

§ 27-6. **What receipt must contain.**—Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

1. The location of the warehouse where the goods are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.

4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.

5. The rate of storage charges.

6. A description of the goods or of the packages containing them.

7. The signature of the warehouseman, which may be made by his authorized agent.

8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required. (Rev., s. 3032; 1917, c. 37, s. 2; C. S., s. 4042.)

§ 27-7. **Other terms inserted; exceptions.**—A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—

1. Be contrary to the provisions of this chapter.

2. In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. (1917, c. 37, s. 3; C. S., s. 4043.)

§ 27-8. **Nonnegotiable receipts.**—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. (1917, c. 37, s. 4; C. S., s. 4044.)

§ 27-9. **Nonnegotiable receipts marked.**—A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it “nonnegotiable,” or “not negotiable.” In case of the warehouseman’s failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. (Rev., s. 3032; 1917, c. 37, s. 7; C. S., s. 4045.)

§ 27-10. **Negotiable receipts.**—A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provisions shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void. (Rev., s. 3032; 1917, c. 37, s. 5; C. S., s. 4046.)

Cited in *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570 (1950).

§ 27-11. **Duplicate negotiable receipts.**—When more than one negotiable receipt is issued for the same goods, the word “duplicate” shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. (1917, c. 37, s. 6; C. S., s. 4047.)

### ARTICLE 3.

#### *Obligations and Rights of Warehousemen on Receipts.*

§ 27-12. **Delivery of goods on proper demand.**—A warehouseman, in

the absence of some lawful excuse provided by this chapter, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

1. An offer to satisfy the warehouseman's lien;
2. An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (1917, c. 37, s. 8; C. S., s. 4048.)

§ 27-13. **To whom goods may be delivered.**—A warehouseman is justified in delivering the goods, subject to the provisions of §§ 27-14, 27-15, and 27-16, to one who is—

1. The person lawfully entitled to the possession of the goods, or his agent;
2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed upon the receipt or written upon another paper; or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. (1917, c. 37, s. 9; C. S., s. 4049.)

**Cross Reference.**—As to right of person injured to bring action on warehouseman's bond, see § 66-37.

§ 27-14. **Liability for wrong delivery.**—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (2) and (3) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable if prior to such delivery he had either—

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or
2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. (1917, c. 37, s. 10; C. S., s. 4050.)

§ 27-15. **Liability on receipt not taken up on delivery.**—Except as hereafter provided in this article, when the goods may have been sold to satisfy warehouseman's charges or because of their perishable or hazardous nature, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable, to any one who purchases for value and in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. (1917, c. 37, s. 11; C. S., s. 4051.)

§ 27-16. **Liability on receipt for partial delivery.**—Except when goods may have been sold to satisfy warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, where a warehouseman delivers a part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel the receipt or to place plainly upon it a statement

of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (1917, c. 37, s. 12; C. S., s. 4052.)

§ 27-17. **Effect of alteration of receipt.**—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

1. Immaterial,
2. Authorized, or
3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. (1917, c. 37, s. 13; C. S., s. 4053.)

§ 27-18. **Delivery in case of lost receipt.**—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties, to be approved by the court, to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. (1917, c. 37, s. 14; C. S., s. 4054.)

§ 27-19. **Effect of issuing duplicate receipt.**—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. (1917, c. 37, s. 15; C. S., s. 4055.)

§ 27-20. **Claim of title no defense for nondelivery; exceptions.**—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 16; C. S., s. 4056.)

§ 27-21. **Interpleader in conflicting claims.**—If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate, require all known claimants to interplead. (1917, c. 37, s. 17; C. S., s. 4057.)

§ 27-22. **Reasonable time to investigate conflicting claims.**—If some



one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. (1917, c. 37, s. 18; C. S., s. 4058.)

§ 27-23. **Title in third person no defense; exceptions.**—Except as provided in §§ 27-21 and 27-22 and except when the goods may have been delivered to the person authorized to have such delivery, as heretofore provided in this article, or when the goods may have been sold to satisfy the warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. (1917, c. 37, s. 19; C. S., s. 4059.)

§ 27-24. **Failure to deliver goods as described.**—A warehouseman shall be liable to the holder of a receipt issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. (1917, c. 37, s. 20; C. S., s. 4060; 1931, c. 358, s. 1.)

**Editor's Note.**—The 1931 amendment inserted in the first sentence the words "issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts."

§ 27-25. **Liability for negligence.**—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise; but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. (1917, c. 37, s. 21; C. S., s. 4061.)

§ 27-26. **Goods kept separate.**—Except as provided in § 27-27, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. (1917, c. 37, s. 22; C. S., s. 4062.)

§ 27-27. **Effect of confusion of goods.**—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. (Rev., s. 3034; 1917, c. 37, s. 23; C. S., s. 4063.)

§ 27-28. **Liability of warehouseman when goods confused.**—The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circum-

stances as if the goods had been kept separate. (1917, c. 37, s. 24; C. S., s. 4064.)

**§ 27-29. Goods not subject to attachment or execution.**—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. (1917, c. 37, s. 25; C. S., s. 4065.)

**Order Constituting Injunction.**—In view of § 1-490, an order of the judge operating to prevent the holder of warehouse certificates from disposing of them except under order of the court, is a sufficient com-

pliance with this section constituting it an injunction. *Standard Bonded Warehouse Co. v. Cooper*, 30 F. (2d) 842 (1929).

**§ 27-30. Creditor's remedy against receipt.**—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1917, c. 37, s. 26; C. S., s. 4066.)

**§ 27-31. Warehouseman's lien.**—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. (1917, c. 37, s. 27; C. S., s. 4067.)

**Cited in** *Champion Shoe Machinery Co.* (1929); *Standard Bonded Warehouse Co. v. Sellers*, 197 N. C. 30, 147 S. E. 674 v. *Cooper*, 30 F. (2d) 842 (1929).

**§ 27-32. Against what goods lien enforced.**—Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman's lien may be enforced—

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (1917, c. 37, s. 28; C. S., s. 4068.)

**§ 27-33. Loss of lien.**—A warehouseman loses his lien upon goods—

1. By surrendering possession thereof, or

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this chapter. (1917, c. 37, s. 29; C. S., s. 4069.)

**§ 27-34. What liens enforced against negotiable receipts.**—If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the re-

ceipt, unless the receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms for a warehouseman's lien as heretofore provided in this article, although the amount of the charges so enumerated is not stated in the receipt. (1917, c. 37, s. 30; C. S., s. 4070.)

§ 27-35. **Right to retain until liens satisfied.**—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. (1917, c. 37, s. 31; C. S., s. 4071.)

§ 27-36. **Other legal remedies for warehouseman.**—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (1917, c. 37, s. 32; C. S., s. 4072.)

§ 27-37. **Enforcement of liens.**—A warehouseman's lien for a claim which has become due may be satisfied as follows:

1. **Notice Given.**—The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

a. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

b. A brief description of the goods against which the lien exists;

c. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and

d. A statement that unless the claims are paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

2. **Sale of Goods.**—In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

3. **Right of Claimant to Pay Charges.**—At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this chapter, to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods ac-

ording to the terms of the original contract of deposit. (Rev., ss. 3036, 3037, 3038; 1917, c. 37, s. 33; C. S., s. 4073.)

§ 27-38. **Sale of perishable goods.**—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of § 27-37. (Rev., ss. 3039, 3040; 1917, c. 37, s. 34; C. S., s. 4074.)

§ 27-39. **Other remedies not excluded.**—The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. (Rev., s. 3041; 1917, c. 37, s. 35; C. S., s. 4075.)

Cited in Standard Bonded Warehouse  
Co. v. Cooper, 30 F. (2d) 842 (1929).

§ 27-40. **Liability discharged by sale for liens.**—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. (1917, c. 37, s. 36; C. S., s. 4076.)

#### ARTICLE 4.

##### *Negotiation and Transfer of Receipts.*

§ 27-41. **Negotiation by delivery.**—A negotiable receipt may be negotiated by delivery—

1. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or
2. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where by the terms of a negotiable receipt the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. (1917, c. 37, s. 37; C. S., s. 4077.)

Cited in Standard Bonded Warehouse  
Co. v. Cooper, 30 F. (2d) 842 (1929).

§ 27-42. **Negotiation by indorsement.**—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are by the terms of the receipt deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner. (1917, c. 37, s. 38; C. S., s. 4078.)

§ 27-43. **Transfer of nonnegotiable receipts.**—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. (1917, c. 37, s. 39; C. S., s. 4079.)

§ 27-44. **Who may negotiate a receipt.**—A negotiable receipt may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. (1917, c. 37, s. 40; C. S., s. 4080; 1931, c. 358, s. 2.)

**Editor's Note.**—The 1931 amendment rewrote this section. See 9 N. C. Law Rev. 404.

§ 27-45. **Rights acquired by negotiation.**—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (1917, c. 37, s. 41; C. S., s. 4081.)

§ 27-46. **Rights acquired by transfer.**—A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer. (1917, c. 37, s. 42; C. S., s. 4082.)

§ 27-47. **Right to compel indorsement.**—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. (1917, c. 37, s. 43; C. S., s. 4083.)

§ 27-48. **Warranties in negotiation and transfer.**—A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have

been implied if the contract of the parties had been to transfer without a receipt the goods represented thereby. (1917, c. 37, s. 44; C. S., s. 4084.)

§ 27-49. **Indorser not liable for failure of prior parties.**—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. (1917, c. 37, s. 45; C. S., s. 4085.)

§ 27-50. **No warranty by collection of debt secured by receipt.**—A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. (1917, c. 37, s. 46; C. S., s. 4086.)

§ 27-51. **Rights of bona fide holder not affected by fraud.**—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, or duress or conversion. (1917, c. 37, s. 47; C. S., s. 4087; 1931, c. 358, s. 3.)

**Editor's Note.**—The 1931 amendment changed this section to conform with § 27-44, as amended. See 9 N. C. Law Rev. 404.

**The negotiation of a warehouse receipt is not impaired by the fact that such negotiation was a breach of duty** on the part of the person making the negotiation if the person to whom the receipt was negotiated took same for value, in good faith, and without notice of the breach of duty. *Harris v. Fairley*, 232 N. C. 551, 61 S. E. (2d) 616 (1950).

**Fraudulent Negotiation by Superintendent.**—Warehouse receipts, issued under § 106-435, which, upon being returned endorsed, were negotiated by the superintendent of the warehouse as collateral for a loan to himself, in breach of his duty to cancel them, are directly within the force of this section. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316 (1925).

**In order for the transferee of warehouse receipts to be a bona fide holder** within the meaning of this section it is

necessary not only that he acquire same before maturity for value and without notice of fraud but also that he take same in good faith, which means honestly and without knowledge of facts which would negative good faith, particularly where he knows his transferrer occupied a relationship of trust. *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570 (1950).

**Instructions.**—An instruction to the effect that the burden is upon the transferee to show that he took the warehouse receipts in controversy for value and without notice of any defect, must be held for reversible error for omitting the element of good faith, notwithstanding a prior correct instruction, when the question of good faith is the focal point of the controversy upon plaintiff's evidence that the transferrer was its agent and transferred the receipts in discharge of his personal liability to the transferee on an unpaid check. *Locke Cotton Mills Co. v. Pate Cotton Co.*, 232 N. C. 186, 59 S. E. (2d) 570 (1950).

§ 27-52. **Subsequent purchasers protected.**—Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. (1917, c. 37, s. 48; C. S., s. 4088.)

§ 27-53. **Right of purchaser superior to seller's lien.**—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. (1917, c. 37, s. 49; C. S., s. 4089.)

#### ARTICLE 5.

##### *Criminal Offenses.*

§ 27-54. **Issuing receipt for goods not stored.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 50; C. S., s. 4090.)

§ 27-55. **Issuing receipt with false statement.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 51; C. S., s. 4091.)

§ 27-56. **Issuing fraudulent duplicates.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings for delivery as heretofore provided in this chapter, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. (1917, c. 37, s. 52; C. S., s. 4092.)

§ 27-57. **Failure to state in receipt the interest of warehouseman.**—Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 53; C. S., s. 4093.)

§ 27-58. **Delivering goods without obtaining receipt.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, except in the cases heretofore provided for in this chapter for the delivery of goods upon a lost receipt and for the sale of goods to satisfy the warehouseman's lien or because of their perishable or hazardous nature, shall be guilty of a crime, and upon conviction shall be punished for

each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 54; C. S., s. 4094.)

**Cross Reference.**—As to punishment for unlawful disposition of property stored, see also § 66-40.

§ **27-59. Fraudulent deposit and negotiation.**—Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both. (1917, c. 37, s. 55; C. S., s. 4095.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*June 12, 1953*

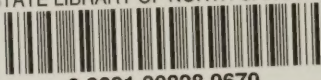
I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMULLAN,  
*Attorney General of North Carolina*





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