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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through
the Legislative Session of 1965

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

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

Under the Direction of

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Scope of Volume

Statutes:

Full text of Chapters 28 through 52A of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1965 heretofore contained in 1950 Recompiled Volume 2A of the General Statutes of North Carolina and the 1965 Cumulative Supplement thereto.

Annotations:

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

North Carolina Reports volumes 1-265 (p. 217).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-347 (p. 320).
Federal Supplement volumes 1-242 (p. 512).
United States Reports volumes 1-381 (p. 531).
Supreme Court Reporter volumes 1-85.
North Carolina Law Review volumes 1-43 (p. 665).

Abbreviations

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

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

Preface

Volume 2 of the General Statutes of North Carolina of 1943 was replaced in 1950 by recompiled volumes 2A, 2B and 2C, containing Chapters 28 through 105 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1949 Session. In 1958 a replacement volume 2C was published in which the statutes and annotations appearing in the recompiled volume 2C and in the 1957 Cumulative Supplement thereto were combined. In 1960 a replacement volume 2B was published in which the statutes and annotations appearing in the recompiled volume 2B and in the 1959 Cumulative Supplement thereto were combined. In 1965 replacement volumes 2B and 2C were replaced by replacement volumes 2B, 2C and 2D, which combine the statutes and annotations appearing in the previous volumes 2B and 2C and in the 1963 Cumulative Supplement thereto. The present volume replaces recompiled volume 2A and combines the statutes and annotations appearing in the recompiled volume and in the 1965 Cumulative Supplement.

Volume 2A contains Chapters 28 through 52A. Volume 2B contains Chapters 53 through 62. Volume 2C contains Chapters 63 through 96. Volume 2D contains Chapters 97 through 105.

In replacement volume 2A the form and the designations of subsections, subdivisions and lesser divisions of sections have in many instances been changed, so as to follow in every case the uniform system of numbering, lettering and indentation adopted by the General Statutes Commission. For example, subsections in the replacement volume are designated by lower case letters in parentheses, thus: (a). Subdivisions of both sections and subsections are designated by Arabic numerals in parentheses, thus: (1). Lesser divisions likewise follow a uniform plan. Attention is called to the fact that it has not, of course, been possible, except in replacement volume 3A, to make corresponding changes in any references that may appear in other volumes to sections contained in volume 2A.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5.1 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; 1953, c. 1098, s. 3.) 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.

This replacement volume has 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.

THOMAS WADE BRUTON,
Attorney General.

November 15, 1966.

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Article 22.**Estates of Missing Persons.**

- 28-193 to 28-201. [Repealed.]

ARTICLE 1.*Probate Jurisdiction.*

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

Editor's Note.—For case law survey on wills and administration, see 41 N.C.L. Rev. 530 (1963).

Original Probate Jurisdiction Is Vested in Clerk.—Original jurisdiction of proceedings to probate a will is vested in the clerk. In re Will of Belvin, 261 N.C. 275, 134 S.E.2d 225 (1964).

Character of Powers and Jurisdiction.—The powers and jurisdiction exercised by the clerk pursuant to this section are not those of a servant or ministerial officer or exercised as and for the superior court, but those of an independent tribunal of original jurisdiction. *Edwards v. Cobb*, 95 N.C. 4 (1886), followed in *In re Styers' Estate*, 202 N.C. 715, 164 S.E. 123 (1932).

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

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

This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950); *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

The clerk of the superior court has exclusive original jurisdiction to take proofs of wills of persons dying domiciled within his county, and the jurisdiction of the clerk to take proof of a particular will is not affected by its loss or destruction before probate. *Anderson v. Atkinson*, 234 N.C. 271, 66 S.E.2d 886 (1951). See *Anderson v. Atkinson*, 235 N.C. 300, 69 S.E.2d 603 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954).

The issue of whether an unprobated script is, or is not, a man's last will cannot be properly brought before the superior court for determination in an ordinary civil action. *Anderson v. Atkinson*, 234 N.C. 271, 66 S.E.2d 886 (1951). See *Anderson v. Atkinson*, 235 N.C. 300, 69 S.E.2d 603 (1952).

But Authority to Appoint Administrator Is Limited by Section.—Authority to appoint an administrator is vested in the clerk of the superior court, but such au-

thority is limited to the instances set forth in this section. In re Scarborough, 261 N.C. 565, 135 S.E.2d 529 (1964).

Petition Invoking Jurisdiction.—The jurisdiction of the clerk as probate judge is invoked by petition disclosing the requisite jurisdictional facts filed by some person entitled to qualify as executor or administrator. In re Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950).

When Jurisdiction Passes to Superior Court.—Where the respondents filed answer denying the petitioner's averment that the script offered for probate was the last will and testament of the decedent, such denial raised an issue of *devisavit vel non* and necessitated transfer of the cause to the civil issue docket for trial by jury, in accordance with § 1-273. This being so, jurisdiction to determine the whole matter in controversy, as well as the issue of *devisavit vel non*, passed to the superior court in term by authority of § 1-276. In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954).

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

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

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

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

May Adjudge Person Dead after Absence for Seven Years.—While the death of intestate must be established as a jurisdictional fact to empower the clerk of the superior court to issue letters of administration under this section and § 28-5, the clerk may, upon evidence that a person has

been absent from his domicile for seven years without being heard from by those who would be expected to hear from him, if living, adjudge that such person is dead and appoint an administrator of his estate. *Carter v. Lilley*, 227 N.C. 435, 42 S.E.2d 610 (1947).

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

The facts very generally recognized as jurisdictional are stated in this section, and where, on application for letters of administration, these facts appear of record, the question of the qualification of the appointee cannot be collaterally assailed. *Wharton v. New York Life Ins. Co.*, 178 N.C. 135, 100 S.E. 266 (1919). The only exception to this rule is that it may be shown collaterally that the person for

whom an administrator has been appointed is not in fact dead, but is still living. *Hines v. Foundation Co.*, 196 N.C. 322, 145 S.E. 612 (1928). In such case, the order making the appointment being void, it may be attacked collaterally. *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93 (1927), citing *Clark v. Carolina Homes*, 189 N. C. 703, 128 S.E. 20 (1925).

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

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

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

Cited in *Mitchell v. Downs*, 252 N.C. 430, 113 S.E.2d 892 (1960).

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

Grant in Any Other County Void.—Where the facts stated in this subdivision exist, a grant in any county other than that prescribed by the subdivision is absolutely void. *Collins v. Turner*, 4 N.C. 541 (1817); *Johnson v. Corpenning*, 39 N.C. 216 (1845).

The will of a resident of this State should be probated in the county of his domicile. In re Marks' Will, 259 N.C. 326, 130 S.E.2d 673 (1963).

Domicile.—See *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 99 S.E. 240 (1919),

contains an excellent discussion of "domicile" as distinguished from "residence," "inhabiting," etc. See also In re Estate of Cullinan, 259 N.C. 626, 131 S.E.2d 316 (1963).

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

- (2) Where the decedent at his death had places of residence in more than one county, the clerk of any such county has jurisdiction.
- (3) Where the decedent, not being domiciled in this State, died out of the State, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

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

The time and manner of bringing the assets into the jurisdiction are immaterial.

Shields v. Union Cent. Life Ins. Co., 119 N.C. 380, 25 S.E. 951 (1896).

Will of Nonresident May Be Probated Where Property Situated.—When the will of a nonresident dying outside the State disposes of property in the State, the will may be offered for original probate before

the clerk of the county in which the property is situated. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Appointment of Administrator Is Authorized Although Only Asset Is Wrongful Death Claim.—The language of subdivision (3) authorizes the appointment of an administrator when deceased was not a resident of this State, did not die in this State, and had no assets in this State other than a right of action for wrongful death occurring outside the State but which can be enforced in the State because of the presence of the tort-feasor. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

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

Provided, that in all cases where the clerk of the superior court is interested in an estate, the judge of the superior court resident in the district or the judge of the superior court holding the courts of the county by regular or special assignment shall have jurisdiction to take proof of wills and grant letters testamentary, letters of administration with the will annexed and letters of administration in cases of intestacy, to audit and approve the accounts of executors and administrators, to make orders and to do any and all things in connection with the administration of estates which the clerk of the superior court might or could have done, had he not been interested in the estate.

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

In General. — Where decedents were not domiciled in this State, but died intestate in Henderson County, leaving assets in the State, the clerk of the superior court of Henderson County had jurisdiction to grant letters of administration. *In re Franks*, 220 N.C. 176, 16 S.E.2d 831 (1941).

Cause of Action for Death by Wrongful Act Sufficient Asset.—Where a non-

Where Judgment in Personam Is Obtainable.—The fact that a personal representative can obtain a judgment in personam on a cause of action for wrongful death which arose in another state is sufficient to authorize the clerk of the superior court to appoint an ancillary administrator under subdivision (3). *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

Applied in *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

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

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

Where death occurred as a result of a tort committed in this State, the cause of action given by the statutes of this State was an asset within the meaning of this section. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

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

- (5) Where the decedent, not being domiciled in this State, was at the time of his death a party to an action pending in the county of such clerk. (R. C., c. 46, s. 1; C. C. P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C. S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765.)

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

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

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

Superior Court to Determine Proper

Grant. — Where two clerks of different counties have granted letters to different parties, and the judgments granting them have been respectively affirmed by the

superior court, that court will determine which of the letters were properly granted. *Tyer v. J. B. Blades Lumber Co.*, 188 N.C., 274, 124 S.E. 306 (1924).

§§ 28-2.1, 28-2.2: Repealed by Session Laws 1965, c. 815, s. 4.

§ 28-2.3. **Domiciliary and ancillary probate and administration.**—The domiciliary, or original, administration of the estates of all decedents domiciled in North Carolina at the time of death shall be under the jurisdiction of this State and of a proper clerk of the superior court in this State, and the original probate of all wills of such persons shall be in this State. Any administration of the estate and any probate of a will of such decedents outside North Carolina shall be ancillary only. All assets, except real estate (but including proceeds from the sale of real estate), subject to ancillary administration in a jurisdiction outside North Carolina, shall, to the extent such assets are not necessary for the requirements of such ancillary administration, be transferred and delivered by the ancillary administrator to the duly qualified executor or administrator in this State for administration and distribution by the domiciliary executor or administrator, and the domiciliary executor or administrator in this State shall have the duty of collecting all such assets from the ancillary administrator. The receipt of the domiciliary executor or administrator shall fully acquit the ancillary administrator with respect to the assets covered thereby. The domiciliary executor or administrator in North Carolina shall have the exclusive right and duty to pay all federal and North Carolina taxes owed by the estate of such decedent and to make proper distribution of all assets including those collected from the ancillary administrator. (1963, c. 634.)

ARTICLE 2.

Necessity for Letters and Their Form.

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

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

entered upon the administration of the estate without first obtaining letters therefor. Administration implies management, not the mere holding the possession of property. *Currie v. Currie*, 90 N.C. 553 (1884).

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

Time of Intermeddling.—One who intermeddles with goods of a decedent may be subject to liability as an executor de son tort although letters of administration afterwards issue. If administration is

committed to him it entitles him to retain. But an intermeddling after a grant of administration does not make an executor de son tort, because he is answerable to the administrator. *Norfleet v. Rid-*

dick, 14 N.C. 221 (1831); *McMorine v. Storey*, 20 N.C. 83 (1838).

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

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

Claim under Fraudulent Conveyance.—One who sets up a claim to goods of an intestate under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor de son tort. *Barnard v. Gregory*, 14 N.C. 223 (1831). But under such a conveyance, which is void as to creditors, he will be liable to the creditors of the estate as an executor de son tort. *Norfleet v. Riddick*,

14 N.C. 221 (1831); *McMorine v. Storey*, 20 N.C. 83 (1838).

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

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

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

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

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

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

ARTICLE 3.

Right to Administer.

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

The right to administer on the estate of an intestate is entirely statutory. Generally speaking, the right is given to the surviving spouse, the next of kin, the creditors, and other persons legally competent, in the order named. In *re Edwards' Estate*, 234 N.C. 202, 66 S.E.2d 675 (1951).

Persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and a party interested, wishing to quicken their diligence within that time, must do so by citation as prescribed by statute, or if a person, not preferred, applied for administration within six months, he must produce the written renunciation of the person or persons having prior right. *Royals v. Baggett*, 257 N.C. 681, 127 S.E.2d 282 (1962).

The term "next of kin" means those

persons who take the surplus of the personal estate of an intestate under the statute of distribution. In *re Edwards' Estate*, 234 N.C. 202, 66 S.E.2d 675 (1951).

Effect of Appointment Out of Order.—The appointment as administrator of a person other than the one designated by this section is not void, though the proper person has not renounced; but it may be set aside in favor of such proper person provided he has not waived his right to administer. *Garrison v. Cox*, 95 N.C. 353 (1886).

Where the executor dies, the next of kin, in the order named in the statute, or his appointee, is entitled to administration with the will annexed, in preference to the highest creditor. *Little v. Berry*, 94 N.C. 433 (1886).

Only Child of Decedent Who Left No Widow.—Since the decedent left no widow, the petitioner, as his only child,

would take the entire surplus of his personal estate under subdivision four of former § 28-149, since repealed [now see § 29-1 et seq.]. In consequence, the petitioner was the sole next of kin, and as such is the party primarily entitled to administration. Moreover, he had made timely application to the proper clerk, for

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

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

Estoppel against Widow. — Though the widow has a prior right to administration over a brother of the decedent, where it appears that at the time the letters were

appointment as administrator. These things being true, the petitioner had absolute legal right to receive letters of administration, unless he was disqualified. *In re Edwards' Estate*, 234 N.C. 202, 66 S.E.2d 675 (1951).

Cited in *In re Estate of Pitchi*, 231 N.C. 485, 57 S.E.2d 649 (1950).

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

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

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

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

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

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

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

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

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

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

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

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

- (4) To any other person legally competent.

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

Possessor of Insurance Policy. — The possession of a policy of life insurance

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

(b) Any person who renounces his right to qualify as administrator may at the same time nominate in writing some other qualified person to be named as administrator, and such designated person shall be entitled to the same priority of right to qualify as administrator as the person making the nomination. Pro-

vided, that the qualification of the appointee shall be within the discretion of the clerk of court. (R. C., c. 46, ss. 2, 3; C. C. P., s. 456; 1868-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C. S., s. 6; 1949, c. 22.)

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

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 413.

The proviso in subsection (b) of this section means that the clerk in his sound discretion may refuse to issue letters of administration to a nominee if and when it is made to appear that, regardless of his personal competency, the nominee's relation to the interested parties and the estate is such that the clerk does not consider him a proper party to administer the estate. Obviously, the word "appointee" as used in the proviso refers to a person nominated for appointment in accordance with the prior provisions of this statute. In *re Cogdill's Estate*, 246 N.C. 602, 99 S.E.2d 785 (1957).

Right to Renounce and Nominate Another for Appointment Recognized before Amendment. — Before the 1949 amendment there was no express provision requiring the clerk to recognize the right of one belonging to a preferred class

to renounce his right to qualify and at the same time nominate another for appointment in his stead, but this construction was uniformly applied by the courts and had become firmly embedded in the law of administration in North Carolina. In *re Estate of Smith*, 210 N.C. 622, 188 S.E. 202 (1936).

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

Appointee of Next of Kin Residing Abroad.—Before the 1949 amendment it was held that when the next of kin resided abroad, it was in the power and was the duty of the court to grant administration to the appointee of such next of kin. *Smith v. Munroe*, 23 N.C. 345 (1840). See *Ritchie v. McAuslin*, 2 N.C. 220 (1795).

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

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

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

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

Transfer of Right. — He may transfer

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

Death of Husband before Administering.—If the husband dies after his wife, without having administered, there is no authority to appoint an administrator upon her estate. In such a case the representative of the husband is to administer the wife's estate. *Wooten v. Wooten*, 123 N.C. 219, 31 S.E. 491 (1898).

Husband's Administrator as against Wife's Administrator.—Where a legacy is given to a trustee for the use of a married woman who dies without receiving the same, the personal representative of the husband (the husband surviving the wife,

but dying before receiving the legacy in his wife's favor) is entitled to the legacy as against the wife's administrator. *Coleman v. Hallowell*, 54 N.C. 204 (1854).

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

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

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

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

Annuity Payable to Wife.—Where the beneficiary of an annuity dies intestate before the death of the testator, leaving a

husband, the bequest which vests an interest in such beneficiary shall be paid to her husband. In *re Shuford's Will*, 164 N.C. 133, 80 S.E. 420 (1913).

Insurance Policies upon Husband's Life.—Insured named his wife as beneficiary in policies of insurance on his life. His wife predeceased him. There were no children born to the marriage. Upon the wife's death the husband was entitled to the wife's vested interest in the policies, even before reducing same to possession by administration, the provision of this section not having been modified by former § 28-149, since repealed [now see § 29-1 et seq.], in cases in which there are no surviving children; and upon the husband's death his heirs are entitled to the distribution of the proceeds of the policies. *Wilson v. Williams*, 215 N.C. 407, 2 S.E.2d 19 (1939).

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

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

Cited in *In re Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929).

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

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

A widow under 21 is not eligible to appointment as administratrix. The court may, however, appoint an administrator during her minority and, on arriving at full age, grant her the administration; or

it may give the office to her appointee. *Wallis v. Wallis*, 60 N.C. 78 (1863).

Cited in *In re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

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

Cross Reference.—As to ineligibility of foreign corporation to qualify as executor, administrator, etc., in this State, see § 55-132.

Editor's Note.—Until the Revisal of 1905, this subdivision disqualified "an alien who is a nonresident of this State." And prior to 1868 there was no disqualification imposed upon aliens or nonresidents. It was formerly held that if a nonresident administrator took the oath and gave the bond required by law, he was not included

in the disqualifications of this section. See *Moore v. Eure*, 101 N.C. 11, 7 S.E. 471 (1888).

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

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

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

Nonresidence and Adverse Interests.—Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. *In re Sams' Estate*, 236 N.C. 228, 72 S.E.2d 421 (1952).

(3) Has been convicted of a felony.

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

Finding of Incompetency Based on Undisclosed and Unrecorded Information.—Where the record shows that the conclusion of the clerk as to the alleged incompetency of the petitioner rests upon undisclosed and unrecorded information obtained by the clerk from third persons outside of court in the absence of the petitioner and his counsel, who were not apprised of the identity of such third persons or accorded any opportunity to cross-examine or confute them, the refusal of the clerk to issue letters of administration to the petitioner is error. *In re Edwards' Estate*, 234 N.C. 202, 66 S.E.2d 675 (1951).

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

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

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

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

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

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

Right to Nominate Depends upon the Right to Administer.—See *Boynton v. Heartt*, 158 N.C. 488, 74 S.E. 470 (1912).

Illiteracy as Incompetency.—Under this provision a person who cannot write or read, and has no experience in keeping accounts or in settling estates, is "incompetent." *Stephenson v. Stephenson*, 49 N.C. 472 (1857).

Collateral Attack for Disregard of This Subdivision.—When, in disregard of the requirements of this subdivision, letters are issued to a foreign executor, this is a mere irregularity and cannot be collaterally attacked in an action by the executor. *Batchelor v. Overton*, 158 N.C. 395, 74 S.E. 20 (1912).

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

§§ 28-10 to 28-12: Repealed by Session Laws 1961, c. 210, s. 2.

Cross Reference.—For provisions covering the subject matter of repealed sections, see §§ 31A-1 to 31A-15.

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

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

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

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

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

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

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

Revocation of Letters for Cause Only.—The clerk should revoke letters testamentary, where the executor has entered upon performance of his duties, only by reason of some unfitness or unfaithfulness on the part of trustee, and never simply because the parties desire it. *McIntyre v. Proctor*, 145 N.C. 288, 59 S.E. 39 (1907).

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

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

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

Renunciation by Some of Several.—Where there are several persons of the same class entitled to administer, renunciation by some of them does not affect the rights of those not renouncing to administer. In *re Jones' Estate*, 177 N.C. 337, 98 S.E. 827 (1919).

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

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

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

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

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

son to administer such estate. (C. C. P., s. 460(a); 1868-9, c. 203; Code, s. 1380; Rev., s. 12; C. S., s. 15.)

Cross Reference.—See note to § 28-20.

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

Persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and a party interested, wishing to quicken their diligence within that time, must do so by citation as prescribed by statute, or if a person, not preferred, applied for administration within six months, he must produce the written renunciation of the person or persons having prior right. *Royals v. Baggett*, 257 N.C. 681, 127 S.E.2d 282 (1962).

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

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

Unreasonable Delay.—No one who has precedence in a claim for letters loses such

rights by delay merely, but by unreasonable delay, which is a matter of law. *Hughes v. Pipkin*, 61 N.C. 4 (1866).

Renunciation Presumed after Six Months.—After the expiration of six months from the death of the decedent, those entitled to prior rights having failed to apply, all rights of preference may be treated as renounced, and a suitable person to administer upon the estate may be appointed. *Hill v. Alspaugh*, 72 N.C. 402 (1875).

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

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

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

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

Cited in *In re Estate of Loflin*, 224 N.C. 230, 29 S.E.2d 692 (1944); *In re Edwards' Estate*, 234 N.C. 202, 66 S.E.2d 675 (1951).

§ 28-16. Person named as executor failing to qualify or renounce.—When only one executor is appointed in a will and the person so appointed fails to qualify or renounce within thirty days after the will is admitted to probate, or when more than one executor is appointed in a will and all of the persons so appointed fail to qualify or renounce within thirty days after the will is admitted to probate, the clerk of the superior court on his own motion may issue, or on application of any interested party shall issue, a citation to each such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Where more than one executor is appointed in any last will and testament duly

probated in any court of this State, and one or more of such executors shall have qualified before the clerk of such court, and the other executor or executors shall have failed, within thirty days thereafter to qualify or shall have renounced in writing, then the qualifying executor or executors shall be clothed with all the powers, rights and duties, and be subject to all the obligations imposed upon all of said executors, in and by the terms of said will and the laws of this State, in like manner as if the nonqualifying executor or executors had not been named in said will. This paragraph shall apply to all wills heretofore or hereafter probated. (C. C. P., s. 451; Code, s. 2164; Rev., s. 13; C. S., s. 16; 1931, c. 183; 1953, c. 78, s. 1.)

Cross References.—See § 28-20 and note. As to exercise of powers of joint personal representatives by one or more than one, see § 28-184.1.

Editor's Note.—Section 2 of the 1953 amendatory act, which rewrote the first sentence, provided: "This act shall apply only in the case of wills admitted to probate on and after July 1, 1953, and wills admitted to probate prior to July 1, 1953, shall be governed by the law in existence at the time of admission to probate."

For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 377 (1953).

Sale by One of Joint Executors.—If one of the joint executors fails to qualify, a sale of lands by the one qualifying is sufficient to pass the estate, without its appearing that the other either has renounced the executorship or refused to join in the sale. *Wood v. Sparks*, 18 N.C. 389 (1835).

Cited in *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

ARTICLE 4.

Public Administrator.

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

Property Right.—The public administrator's office is a property right which cannot be divested without due process of law. *Trotter v. Mitchell*, 115 N.C. 190, 20 S.E. 386 (1894).

Not an Office within Constitutional Prohibition.—A public administrator is not a holder of a public office within the constitutional prohibition against holding more than one office, and hence a quo warranto proceeding will not lie against him simply because he is also holding the office of

recorder. *State v. Smith*, 145 N.C. 476, 59 S.E. 649 (1907).

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

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

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

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

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

Local Modification.—Forsyth: 1945, c. 58; Wake: 1957, c. 636.

notified to show cause. *Trotter v. Mitchell*, 115 N.C. 190, 20 S.E. 386 (1894).

Removal for Failure to Renew Bond.—A public administrator cannot be removed for failure to renew his bond without being

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

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

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

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

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

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

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

Prior Right of Others after Six Months.

- (2) When any stranger, or person without known heirs, shall die intestate in any county.
- (3) When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator. (1868-9, c. 113, s. 6; Code, s. 1394; Rev., s. 20; C. S., s. 20.)

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

§ 28-21. **Powers generally and on expiration of term.**—The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he has fully administered the same, if he then enters into a bond as required by law for administrators. (1868-9, c. 113, s. 7; 1876-7, c. 239; Code, s. 1395; Rev., s. 21; C. S., s. 21.)

ARTICLE 5.

Administrator with Will Annexed.

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

Editor's Note.—See 1 N.C.L. Rev. 315, as to effect of this section on § 28-6.

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

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

Appointment When There Is Executor. —An administrator cum testamento annexo cannot be appointed where there is an executor laboring under no disability, until the renunciation by the latter. And an appointment in derogation of this rule is void, not merely voidable. *Springs v. Ir-*

win, 28 N.C. 27 (1845). See *Suttle v. Turner*, 53 N.C. 403 (1861).

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

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

Applied in *In re Johnson's Estate*, 233 N.C. 570, 65 S.E.2d 12 (1951).

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

§ 28-24. **Administrator cum testamento annexo must observe will.**—Whenever letters of administration with the will annexed are issued, the will

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

Editor's Note.—For comment on the 1945 amendment, see 23 N.C.L. Rev. 362.

Administrator, d.b.n., c.t.a., Not on Same Footing with Executor in All Respects.—

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

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

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

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

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

An administrator c.t.a. has no greater rights and powers, and is not subject to greater duties, than the executor named in the will. Since an executrix named in a will became by the distribution of personal property, pursuant to the terms of the will, *functus officio* as to such property, necessarily the administrator c.t.a. appointed by the court after the death of executrix was also *functus officio* as to such property. *Darden v. Boyette*, 247 N.C. 26, 100 S.E.2d 359 (1957).

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

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

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

Power to Sell Real Estate.—An administrator c.t.a. may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor *virtute officii* or *nominatim*, unless

the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude

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

Applied in *Jones v. Warren*, 213 N.C. 730, 197 S.E. 599 (1938).

Quoted in *Mitchell v. Downs*, 252 N.C. 430, 113 S.E.2d 892 (1960).

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

ARTICLE 6.

Collectors.

§ 28-25. **Appointment of collectors.**—When, for any reason other than a situation provided for in chapter 28A entitled “Estates of Missing Persons,” a delay is necessarily produced in the administration [admission] of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43; 1965, c. 815, s. 2.)

Editor’s Note.—The 1965 amendment added “other than a situation provided for in chapter 28A entitled “Estates of Missing Persons,” and eliminated the former second sentence which had provided for the appointment of collectors in case of delay in the production of positive proof of the unknown death of any person which had been added by the 1924 amendment. As to effect of the 1924 amendment, see 3 N.C.L. Rev. 14.

The word “admission” which appears in brackets was substituted for “administration” which appeared in the 1965 Session Laws.

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

Pending Probate and Filing of Will.—

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

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

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

Applied in In re *Brauff’s Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

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

§ 28-27. **Powers of collectors.**—Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any

personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts. (R. C., c. 46, s. 6; C. C. P., s. 465; 1868-9, c. 113, s. 115; Code, s. 1385; Rev., s. 24; C. S., s. 26.)

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

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

Allowance of Counsel Fee.—A collector who resists the claim of the executor is not entitled to an allowance for counsel fees paid by him in such litigation, where the

executor prevails in the litigation. *Johnson v. Marcom*, 121 N.C. 83, 28 S.E. 58 (1897).

Cited in *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

ARTICLE 7.

Appointment and Revocation.

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

- (1) The death of the decedent and his intestacy.

Cross Reference.—As to appointment of resident process agent by nonresident executor, see § 28-186.

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

Appointment Based on Legal Presumption of Death.—Upon an affidavit showing

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

- (2) That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.
- (3) The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same cannot, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residences of such guardians, if known.

Such affidavit or other proof must be recorded and filed by the clerk. (C. C. P., s. 461; Code, s. 1381; Rev., s. 26; C. S., s. 28.)

§ 28-30. Right to contest application for letters; proceedings.—Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be trans-

ferred to the superior court for trial, or an appeal be taken, as in other special proceedings. (C. C. P., s. 462; Code, s. 1382; Rev., s. 27; C. S., s. 29.)

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

Title of Property Not Question of Fact.

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

Collateral Attack after Letters Issued.

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

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

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

Once the letters are issued and appointment made, they cannot be collaterally attacked. Thus in an action by the administrator against defendant for damages for killing the decedent negligently, the legality of his appointment on the ground of residence cannot be raised. Fann v. North Carolina R.R., 155 N.C. 136, 71 S.E. 81 (1911); Batchelor v. Overton, 158 N.C. 395, 74 S.E. 20 (1912).

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

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

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

§ 28-32. **Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default.**—If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that the surviving husband or widow or next of kin in the order of priority set out in subdivisions (1) and (2) of § 28-6 applies for letters of administration on said estate; and notwithstanding said applicants may have renounced their right to administer, if otherwise qualified, or that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in due execution of his office, or that issue of such letters was obtained by false representations made by such person, or that such person has removed himself from the State, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, or by return of such order, not executed but with endorsement by the sheriff of the county of last known address that such person cannot be found in the county, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease. (C. C. P., s. 470; Code, s. 2171; Rev., s. 38; C. S., s. 31; 1921, c. 98; 1953, c. 795.)

Cross References.—As to revocation of letters on failure to give new bond, see § 28-46. As to removal of fiduciaries who cannot be found, see § 28-118.1.

Editor's Note.—For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 377 (1953).

This section prescribes procedure for the removal of a particular person as ad-

ministrator for causes specified therein; and, upon removal of such person, the clerk must immediately appoint some other person to succeed in the administration of the estate under § 28-33. In re Bane, 247 N.C. 562, 101 S.E.2d 369 (1958).

"Legally Competent." — The lawmakers did not define the term "legally competent," but left the interpretation thereof

to the courts. In the sense used by the lawmakers, the term "legally competent" means fit or qualified to act as officer of the court and as trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department of government. In *re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

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

Clerk Has Primary and Original Jurisdiction.—The clerk under this section has original and primary jurisdiction of a probate judge to revoke letters, subject to review upon appeal by either party, and to this end he may require issues of fact to be tried by a jury in the superior court. *Murrill v. Sandlin*, 86 N.C. 54 (1882); *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956).

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

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

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

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

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

Refusal to Disclose Information.—Refusal on the part of the executor named in the will to disclose information as to the amount and nature of personalty coming into his possession, and as to other matters relative to his fitness, is a ground for withholding or revoking letters testamentary and granting them to some other person. In *re Will of Gulley*, 186 N.C. 78, 118 S.E. 839 (1923).

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

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

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

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

Adverse Interest.—Where there is no evidence of bad faith or fraudulent concealment, a claim by the administrator that he owned jointly with the decedent a part of the personal estate of the latter is not such an adverse interest as to disqualify

him in his office. *Morgan v. Morgan*, 156 N.C. 169, 72 S.E. 206 (1911).

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

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

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

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

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

Finding Sufficient to Support Revocation.—Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. *In re Sams' Estate*, 236 N.C. 228, 72 S.E.2d 421 (1952).

Order of revocation of letters testamentary was justified where the clerk made a

finding that executor had refused to pay widow her share from the sale of personal property, and that he had arbitrarily mixed and commingled funds of the estate with funds of the widow. *In re Boyles' Estate*, 243 N.C. 279, 90 S.E.2d 399 (1955).

Failure of Nonresident Executrix to Appoint Process Agent.—The failure and refusal by a nonresident executrix to appoint a process agent as required by § 28-186 is sufficient ground under this section for her removal. *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

Verified Petition for Removal.—The clerk of the superior court has jurisdiction to entertain verified petition for the removal of an administrator. *In re Estate of Johnson*, 232 N.C. 59, 59 S.E.2d 223 (1950).

Filling Vacancy.—Where, in proceedings for removal of an administrator, the administrator resigns, a vacancy occurs and the clerk has authority to appoint a successor. *In re Estate of Johnson*, 232 N.C. 59, 59 S.E.2d 223 (1950).

Appeal from Order of Clerk.—The powers of the clerk to remove executors and administrators, conferred by this section, are reviewable on appeal to the judge of the superior court of the county. *Wright v. Ball*, 200 N.C. 620, 158 S.E. 192 (1931).

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

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

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

Cited in *In re Estate of Suskin*, 214 N.C. 219, 198 S.E. 661 (1938); *In re Tatum's Will*, 233 N.C. 723, 65 S.E.2d 351 (1951); *In re Cogdill's Estate*, 246 N.C. 602, 99 S.E.2d 785 (1957).

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

Cross Reference.—See note to § 28-32.

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

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

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

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

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

ARTICLE 8.

Bonds.

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

not exceed one and one-fourth times the value of said real estate. (C. C. P., s. 468; 1870-1, c. 93; Code, s. 1388; Rev., s. 319; C. S., s. 33; 1935, c. 386; 1949, c. 971.)

Cross References.—As to mortgage in lieu of bond required to be given, see § 109-24. As to deposit of cash or securities in lieu of bond, see § 109-32. As to when evidence as to default of principal is admissible against sureties in actions on bonds of personal representatives, see § 109-38.

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 409.

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

Nor is the giving of the bond essential to the efficiency of the act of appointment itself. *Howerton v. Sexton*, 104 N.C. 75, 10 S.E. 148 (1889). See *Hoskins v. Miller*, 13 N.C. 360 (1830); *Spencer v. Cahoon*, 15 N.C. 225 (1833); *Spencer v. Cahoon*, 18 N.C. 27 (1834); *Garrison v. Cox*, 95 N.C. 353 (1886).

The giving of the bond is not an essential of the act of appointment itself. In re Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950).

The failure to give a bond or the giving of an insufficient bond is only an irregularity, in no way affecting the validity of the appointment. The irregularity makes the letters of administration voidable only—a condition which may be cured by full compliance with the statute since the letters once issued are not subject to collateral attack. In re Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950).

Irregularity Cured by Giving Proper Bond.—Where, upon service of order to show cause why letters of administration should not be revoked for failure of the administrator to give bond, the administrator files bond with sufficient surety which is approved by the clerk, the irregularity is cured and the denial of the motion to vacate the letters of administration is not error. In re Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950).

Effect of Failure to Give Proper Bond.—The mere fact that the bond of the representative is not justified before or approved by the clerk does not render the appointment void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. The only effect of noncompliance with these requirements is that the representative may be made to give the

proper bond required. *Garrison v. Cox*, 95 N.C. 353 (1886).

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

Amount of Bond.—The framers of this section must have contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Upon the examination the clerk may value the property at a higher figure than he has previously valued it. *Williams v. Neville*, 108 N.C. 559, 13 S.E. 240 (1891).

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

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

Action May Be Brought on Bond after Death or Removal of Administrator.—Where an administrator, who has not fully administered the estate of his intestate has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator d.b.n. of his intestate. *Tulburt v. Hollar*, 102 N.C. 406, 9 S.E. 430 (1889). The failure to account for and to pay such amount is a breach of the statutory bond. *State ex rel. Dunn v. Dunn*, 206 N.C. 373, 173 S.E. 900 (1934).

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

Stated in *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956).

Cited in *State ex rel. Hicks v. Purvis*, 208 N.C. 657, 182 S.E. 151 (1935); *Allen v. Currie*, 254 N.C. 636, 119 S.E.2d 917 (1961).

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

Cross References.—As to mortgage in lieu of bond required to be given, see § 109-24. As to deposit of cash or securities in lieu of bond, see § 109-32.

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

Insolvency known to the testator is no ground for requiring bond. *Neighbors v. Hamlin*, 78 N.C. 42 (1878).

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

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

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

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

"Estate" Includes Realty.—The use of the word "estate" in this subdivision denotes real as well as personal estate. *Glascock v. Gray*, 148 N.C. 346, 62 S.E. 433 (1908).

- (2) When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant letters of administration with the will annexed to some other person.

Executrix's Remarriage and Wasting the Assets.—Where it appeared that a wife, executrix of her first husband, remarried and was using the estate carelessly

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

Stated in State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

Cited in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

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

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

and without accounting therefor, it was held proper to require her to account and give bond. *Godwin v. Watford*, 107 N.C. 168, 11 S.E. 1051 (1890).

- (3) Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinafter provided, the court or clerk to whom application is made shall require, before granting any order of sale, such

executor to enter into bond. (R. C., c. 46, ss. 12, 13; Code, s. 1515; Rev., s. 28; C. S., s. 34.)

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

Cross Reference.—As to appointment of resident process agent by nonresident executor, see § 28-186.

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

Cross Reference.—As to appointment of resident process agent by nonresident executor, see § 28-186.

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

Cited in *Allen v. Currie*, 254 N.C. 636, 119 S.E.2d 917 (1961).

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

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

§ 28-39.1. Conveyances by foreign executors validated.—If any nonresident executor, acting under a power of sale contained in the last will and testament of a citizen and resident of another state or foreign country, executed according to the laws of this State and duly proven and recorded in the state or foreign country wherein the testator and his family and said executor resided,

and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to January first, one thousand nine hundred and fifty-seven, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor had given bond and obtained letters of administration in this State prior to the execution of such deed. (1945, c. 652; 1957, c. 320.)

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

Cross References.—As to form of oath, see § 11-11. As to effect of failure to give bond, see notes to §§ 28-34, 28-35.

Editor's Note.—See 1 N.C.L. Rev. 315. Cited in *In re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

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

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

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

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

But the objection to the omission to bring in State's name may be obviated by a motion to amend. *Wilson v. Pearson*, 102 N.C. 290, 9 S.E. 707 (1889). Amendment will be allowed even in the Supreme Court. *Grant v. Rogers*, 94 N.C. 755 (1886).

When an administrator dies, no one but an administrator de bonis non of his in-

testate can call his representative to account for the assets or sue on his bond. *Merrill v. Merrill*, 92 N.C. 657 (1885). See *Carlton v. Byers*, 70 N.C. 691 (1874); *State ex rel. Goodman v. Goodman*, 72 N.C. 508 (1875). And the next of kin cannot call for an account or settlement without having an administrator before the court. *Lansdell v. Winstead*, 76 N.C. 366 (1877). But see *Neal v. Becknell*, 85 N.C. 299 (1881), holding that the bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin.

Thus where an administrator sells lands for assets to pay debts, and expends only a part of the fund for that purpose, and dies before filing a final account, only an administrator de bonis non (not the next

of kin) of his intestate can maintain an action on the bond to recover the unexpended balance. *Neagle v. Hall*, 115 N.C. 415, 20 S.E. 516 (1894). See *Tulburt v. Hollar*, 102 N.C. 406, 9 S.E. 430 (1889). But where the administrator refuses to sue, creditors may sue, making him a party defendant. *Wilson v. Pearson*, 102 N.C. 290, 9 S.E. 707 (1889).

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

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

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

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

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

§ 28-44. **On revocation of letters, bond liable to successors.**—When the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not

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

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

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

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

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

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

exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them. (1868-9, c. 113, s. 88; Code, s. 1517; Rev., s. 31; C. S., s. 42.)

Cross Reference.—See note to § 28-42.

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

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

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

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

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

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

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

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

Cross Reference.—As to revocation of letters on application of surviving husband or widow or next of kin, or for disqualification or default, see § 28-32.

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

Notice to Show Cause Essential.—A judgment removing a public administrator for failure to renew his bond, without notice to show cause, is not only irregular but void. *Trotter v. Mitchell*, 115 N.C. 190, 20 S.E. 386 (1894).

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

ARTICLE 9.

Notice to Creditors.

§ 28-47. **Advertisement for claims.**—Every executor, administrator and collector within twenty days after the granting of letters, shall notify all persons, firms and corporations having claims against the decedent to exhibit the same to such executor, administrator or collector, on or before a day to be named in such notice; which day must be six months from the day of the first publication of such notice. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option

of the executor, administrator, or collector, the notice shall be published in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish the notices herein provided for when the deceased person did not own any real property or any interest in real property at the time of his death and the only assets of the estate consists of proceeds received for wrongful death. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C. S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1.)

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

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

Editor's Note. — For brief comment on the 1949 amendments, see 27 N.C.L. Rev. 414.

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

Advertisement Essential to Bar Claims.—The mere lapse of time does not bar the creditors' claims against the estate. Only where the advertisement provided under this section has been made does the statute of limitation begin to run. *Love v. In-*

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

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

Cited in *Park View Hosp. Ass'n v. People's Bank & Trust Co.*, 211 N.C. 244, 189 S.E. 766 (1937); *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

§ 28-47.1. Filing of final account after six months.—Upon the satisfaction of all the requirements set forth in G.S. 28-47 and at the expiration of the six-month period referred to therein, the personal representative may, if all claims filed for outstanding debts and obligations of the decedent are met and satisfied, in case of a solvent estate, or satisfied pro rata according to applicable statutes, in case of an insolvent estate file his final account with the clerk of superior court, said final account to be audited and recorded by the clerk; provided, however, this shall not limit the right of persons to file for an allowance under the provisions of North Carolina G.S. 30-15 and 30-17 within one (1) year. (1963, c. 168.)

Cross Reference.—As to representative petitioning for settlement after final account, see § 28-165.

§ 28-48. Proof of advertisement.—A copy of the advertisement directed to be posted or published in pursuance of G.S. 28-47, with an affidavit, taken before some person authorized to administer oaths, of one of the persons authorized by G.S. 1-600 (a), to make affidavit, to the effect that such notice was published for four weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy of the notice together with such affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as prima facie evidence of the fact of publication in all the courts of this

State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C. S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2.)

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

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

§ 28-49. Personal notice to creditor. — The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within three months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon. (1868-9, c. 113, s. 32; Code, s. 1424; 1885, c. 96; Rev., s. 41; C. S., s. 47; 1961, c. 741, s. 2.)

Cross Reference.—See note to § 28-47.

Applied in *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

ARTICLE 10.

Inventory.

§ 28-50. Inventory within three months. — Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk. (R. C., c. 46, s. 16; 1868-9, c. 113, s. 8; Code, s. 1396; Rev., s. 42; C. S., s. 48.)

Cross Reference.—As to accounts and accounting generally, see § 28-117 et seq.

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

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

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

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

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

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

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

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

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

Cross Reference.—See note to § 28-50.

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

Clerk Has Power to Remove Independent of Statute.—The clerk has power of removal for the failure of the administra-

tor to discharge the duties of his office as prescribed by law. And even without invoking the aid of statute the power of removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice. *Taylor v. Biddle*, 71 N.C. 1 (1874).

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

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

§ 28-53. Trustees in wills to qualify and file inventories and accounts.—Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision. (1907, c. 804; C. S., § 51; 1961, c. 519; 1965, c. 1176, s. 1.)

Cross Reference.—As to accounts and accounting generally, see § 28-117 et seq.

Editor's Note.—The 1965 amendment, effective July 1, 1965, inserted "which come into his hands" near the end of the first sentence and rewrote the last sentence. Section 2 of the amendatory act provides: "To the extent that G.S. 28-53, as amended by chapter 519 of the Session Laws of 1961, and as further amended by this act, would

require that trustees appointed by a will must first qualify under the laws applicable to executors, such requirement shall not apply to trustees appointed by any will executed prior to July 1, 1961, unless the will has been admitted to probate prior to the effective date of this act."

Stated in *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

ARTICLE 11.

Assets.

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

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

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

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

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

§ 28-55. Trust estate in personalty.—If any trustee, or any person interested in any trust estate, dies leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets. (1868-9, c. 113, s. 11; Code, s. 1043; Rev., s. 46; C. S., s. 53.)

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

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

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

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

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

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

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

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

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

§ 28-56.1. Federal income tax refunds; joint returns.—Upon the determination by the United States Treasury Department of an overpayment of income tax by a married couple filing a joint federal income tax return, one of whom has died since the filing of such return or where a joint federal income tax return is filed on behalf of a husband and wife, one of whom has died prior to the filing of the return, any refund of the tax by reason of such over-

payment, if not in excess of five hundred dollars (\$500.00), shall be the sole and separate property of the surviving spouse. In the event that both spouses are dead at the time such overpayment is determined, such refund, if not in excess of five hundred dollars (\$500.00), shall be the sole and separate property of the estate of the spouse who died last and may be paid directly by the Treasury Department to the executor or administrator of such estate, or, in the absence of such executor or administrator, to the clerk of the superior court of the county of the domicile of the last surviving spouse, to be disbursed by him as provided by G.S. 28-68 and G.S. 28-68.2 and 28-68.3. (1955, c. 720; 1957, c. 986.)

Cross References.—As to distribution generally, see § 28-153 et seq. As to agreements with taxing authorities to secure benefits of federal marital deduction, see § 28-158.2.

Editor's Note.—For brief comment on this section, see 33 N.C.L. Rev. 575 (1955).

§ 28-56.2. Same; separate returns. — Upon the determination by the United States Treasury Department of an overpayment of income tax by any married person filing a separate return, any refund of the tax by reason of such overpayment, if not in excess of two hundred fifty dollars (\$250.00), exclusive of interest, shall be the sole and separate property of the surviving spouse, and the United States Treasury Department may pay said sum directly to such surviving spouse, and such payment to the extent thereof shall operate as a complete acquittal and discharge of the United States Treasury Department. (1961, c. 643.)

Cross References.—As to distribution generally, see § 28-153 et seq. As to agreements with taxing authorities to secure benefits of federal marital deduction, see § 28-158.2.

§ 28-56.3. State income tax refunds.—Upon the determination by the Commissioner of Revenue of North Carolina of an overpayment of income tax by any married person, any refund of the tax by reason of such overpayment, if not in excess of two hundred dollars (\$200.00) exclusive of interest, shall be the sole and separate property of the surviving spouse, and said Commissioner of Revenue may pay said sum directly to such surviving spouse, and such payment to the extent thereof shall operate as a complete acquittal and discharge of the Commissioner of Revenue. (1961, c. 735.)

Cross References.—As to distribution generally, see § 28-153 et seq. As to agreements with taxing authorities to secure benefits of federal marital deduction, see § 28-158.2.

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

Editor's Note.—For note as to applicability of equitable conversion doctrine to proceeds of sale of lands, etc., by personal representative, see 35 N.C.L. Rev. 347 (1957).

Stamped with Character of Realty.—Proceeds of sale of realty are in fact per-

sonalty, although they are stamped with the character of realty to indicate the channel in which they shall go. *Lafferty v. Young*, 125 N.C. 296, 34 S.E. 444 (1899). **Applied in** *Linker v. Linker*, 213 N.C. 351, 196 S.E. 329 (1938).

§ 28-58. Surplus of proceeds of realty sold for debts is real asset.—All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, adminis-

trator or collector to such persons as would have been entitled to the land had it not been sold. (1868-9, c. 113, s. 13; Code, s. 1405; Rev., s. 49; C. S., s. 56.)

Cross Reference.—See note to § 28-57.

Recovering Surplus Proceeds from Representative of Deceased Administrator.—

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

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

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

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

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

§ 28-59. Personalty fraudulently conveyed recoverable. — If there are not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in anywise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns. (Rev., s. 50; C. S., s. 57.)

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

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

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

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

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

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

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

Claim for Unliquidated Damages Not a "Debt."—An action based on a claim for unliquidated damages, until reduced to

judgment liquidating the amount of the claim, is not a debt under this section. *Suskin v. Maryland Trust Co.*, 214 N.C. 347, 199 S.E. 276 (1938).

In a stockholders' derivative suit to recover from the directors and officers the damages which they caused a corporation to suffer by unlawfully distributing a portion of the corporation's profits under a bylaw alleged to be illegal, the action for unliquidated damages was not a debt with-

in this section. *Healey v. R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207 (M.D.N.C. 1942).

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

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

Executor as Sole Devisee and Legatee.—Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted an action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action was not against defendant as executrix but against her individually on a liability imposed upon her by this section as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix,

was properly denied. *Rose v. Patterson*, 218 N.C. 212, 10 S.E.2d 678 (1940).

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

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

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

Cited in *Davis v. Singleton*, 256 N.C. 596, 124 S.E.2d 563 (1962).

§ 28-62. **Extent of liability of heirs, etc.** — No person shall be liable, under § 28-61, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable. (1868-9, c. 113, s. 100; Code, s. 1529; Rev., s. 53; C. S., s. 60.)

Cross Reference.—See note to § 28-61.

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

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

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

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

§ 28-63. **Judgment against heirs, etc., apportioned; costs.**—In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defen-

dants, in proportion to the amount of the recovery against each of them. (1868-9, c. 113, s. 101; Code, s. 1530; Rev., s. 54; C. S., s. 61.)

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

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

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

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

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

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

§ 28-66. Debts paid taken as unpaid as against heirs, etc.—If any debts of a prior class to that in which the suit is brought, or of the same class, have been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in § 28-65. (1868-9, c. 113, s. 104; Code, s. 1533; Rev., s. 57; C. S., s. 64.)

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

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

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

Application to Tenants in Common.—

§ 28-68. Payment to clerk of money owed intestate.—(a) Any person indebted to an intestate may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the intestate—

(1) If no administrator has been appointed, and

- (2) If the amount owed by such person does not exceed one thousand dollars (\$1,000.00), and
- (3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the intestate exceed one thousand dollars (\$1,000.00).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one intestate would exceed one thousand dollars (\$1,000.00), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed one thousand dollars (\$1,000.00).

(c) If a sum tendered pursuant to this article would make the aggregate sum coming into the clerk's hands with respect to any one intestate exceed one thousand dollars (\$1,000.00), the clerk shall appoint an administrator.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to subsection (a) of G.S. 28-68.2 would not exhaust funds received pursuant to G.S. 28-68, he may, in his discretion, appoint an administrator in such case. (1921, c. 93; Ex. Sess. 1921, c. 65; C. S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1959, c. 795, ss. 1-4.)

Local Modification. — Burke: 1959, c. 346; Caswell: 1959, c. 594; Cumberland: 1957, c. 105; Pitt: 1937, c. 336; 1939, cc. 169, 383, 384; Alnior: 1959, c. 663.

Cross Reference.—For provisions stating that payment to clerk after one year discharges representative pro tanto, see § 28-160.

Editor's Note.—For comment on the 1951 amendment, see 29 N.C.L. Rev. 355.

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

Effect on Jurisdiction to Appoint Ad-

ministrator.—This section does not have the effect of fixing the sum of \$300 [now \$1000] as bona notabilia in determining jurisdiction of the clerk of the superior court to appoint an administrator for a person not domiciled in this State who dies leaving assets herein. In re Franks, 220 N.C. 176, 16 S.E.2d 831 (1941).

Section Not Applicable to Surplus Realized on Foreclosure Sale.—The limitation of the amount payable to the clerk under this section is not applicable to the surplus realized upon the foreclosure of a mortgage or deed of trust. Lenoir County v. Outlaw, 241 N.C. 97, 84 S.E.2d 330 (1954).

§ 28-68.1. Receipt of clerk.—The receipt from the clerk of the superior court of a payment purporting to be made pursuant to G.S. 28-68 is a full release to the debtor for the payment so made. (1951, c. 380, s. 1.)

Cross Reference.—For requirement that clerk receive money and sign receipt, see § 28-161.

§ 28-68.2. Disbursement by clerk.—(a) If no administrator has been appointed, the clerk of the superior court shall disburse the money received pursuant to G.S. 28-68 for the following purposes and in the following order:

- (1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
- (2) To pay any lawful claims for funeral expenses of the deceased, not to exceed six hundred dollars (\$600.00) as a preferred claim, or to reimburse any person for the payment thereof;
- (3) To pay any lawful claims for hospital, medical and doctor's bills for the last illness of the deceased, such period of last illness not to exceed twelve months, or to reimburse any person for the payment thereof.

(b) After the death of a spouse who died intestate and after the disbursements have been made in accordance with subsection (a) of this section, the balance in

his hands belonging to the estate of the intestate shall be paid to the surviving spouse, and if there is no surviving spouse, he shall pay same to the heirs or distributees in proportion to their respective interests.

(c) The clerk of the superior court shall not be required to publish notice to creditors. (1951, c. 380, s. 1; 1955, c. 1246, ss. 1-3; 1957, c. 491; 1965, c. 576, s. 1.)

Local Modification. — Edgecombe and Nash: 1953, c. 473, amended by 1955, c. 808; Greene: 1955, c. 808.

Cross References.—As to order of payment of debts, see § 28-105. As to intestate succession generally, see § 29-1 et seq.

Editor's Note.—The 1965 amendment

substituted "surviving spouse's" for "widow's" in subdivision (1) of subsection (a), rewrote subdivision (2) and added subdivision (3) in that subsection and rewrote subsection (b).

For brief comment on this section, see 36 N.C.L. Rev. 42 (1957).

§ 28-68.3. Transfer of funds to administrator; commissions.—Whenever an administrator is appointed after a clerk of the superior court has received any money pursuant to G.S. 28-68, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commission for making such payment to the administrator, and the administrator shall receive no commission for receiving such payment from the clerk. (1951, c. 380, s. 1.)

Cross Reference.—As to liability and compensation of clerk of superior court, see § 28-171.

§ 28-68.4: Repealed by Session Laws 1965, c. 576, s. 2.

ARTICLE 12.

Discovery of Assets.

§ 28-69. Examination of persons or corporations believed to have possession of property of decedent. — Whenever an executor or administrator makes oath before the clerk of the superior court of the county where the party to be examined resides or does business that he has reasonable ground to believe, setting forth the grounds of his belief, that any person, firm or corporation has in his or its possession any property of any kind belonging to the estate of his decedent, said clerk shall issue a notice to said person or the member of the firm or officer, agent or employee of the firm or corporation designated in the affidavit, to appear before said clerk at his office at a time fixed in said notice, not less than three days after the issuance of said notice, and be examined under oath by said executor or administrator or his attorney concerning the possession of said property. If upon such examination the person examined admits that he or the firm or corporation for which he works has in his or its possession any property belonging solely to the decedent, and fails to show any satisfactory reason for retaining possession of said property, the clerk of the superior court shall issue an order requiring said person, firm or corporation forthwith to deliver said property to said executor or administrator, and may enforce compliance with said order by an attachment for contempt of court, and commit said person to jail until he shall deliver said property to said executor or administrator: Provided, that in the case of a firm or corporation, whenever any person other than a partner or executive officer of such firm or corporation is examined, no such order shall be made until at least three days after service of notice upon a partner or executive officer of such firm or corporation to show cause why such order should not be made. (1937, c. 209, s. 1.)

Editor's Note.—The purpose of this section is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate

through and upon the authority of the probate court without having to resort, independently, to the rather slow and expensive proceeding of claim and delivery.

However, since the section seems to provide only for the situation where a party "admits" that the property held belongs to the decedent's estate and refuses for an inadequate reason to give it up, it would seem that the representative would still have to utilize claim and delivery proceed-

ings in the case where the party in possession of the property denies that it belongs to the estate of the deceased. It is doubtful that the section would, by inference, authorize the clerk to try the title to such property. 15 N.C.L. Rev. 352.

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

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

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

ARTICLE 13.

Sales of Personal Property.

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

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

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

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

v. Morris, 21 N.C. 559 (1837); Gray v. Armistead, 41 N.C. 74 (1849); Bradshaw v. Simpson, 41 N.C. 243 (1849); Cox v. First Nat'l Bank, 119 N.C. 302, 26 S.E. 22 (1896).

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

(1887); *Hendrick v. Gidney*, 114 N.C. 543, 19 S.E. 593 (1894).

Quoted in *Poindexter v. First Nat'l Bank*, 244 N.C. 191, 92 S.E.2d 773 (1956).

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

§ 28-75. **Terms and notice of public sale.**—All public sales of personal estate by executors or administrators shall be made on credit or for cash after ten days' notification posted at the courthouse and four public places in the county. (1868-9, c. 113, ss. 18, 19; Code, ss. 1410, 1411; Rev., s. 63; C. S., s. 68; 1949, c. 719, s. 2; 1951, c. 60.)

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

The case of *Wynns v. Alexander*, 22 N.C. 58 (1838), held that the common-law rule on this point is not repealed by this section and that the section is merely directory. See *Dickson v. Crawley*, 112 N.C. 629, 17 S.E. 158 (1893); *Cox v. First Nat'l Bank*, 119 N.C. 302, 26 S.E. 22 (1896); *Odell v. House*, 144 N.C. 647, 57 S.E. 395 (1907).

What Constitutes Sale Other than Public.—Giving a part of the standing crop for hauling the remainder does not, within the meaning of this section, constitute

selling otherwise than at public auction. *McDaniel v. Johns*, 53 N.C. 414 (1861).

Effect of Private Sale.—If the fiduciary sells at public sale, the price actually obtained is his justification. But if he sells at a private sale, he is liable for the true value without reference to the price obtained. *Cannon v. Jenkins*, 16 N.C. 422 (1930). See § 28-76.

It seems that a private sale of a chose in action if made in good faith, is valid; though it is safer to follow the direction of this section to avoid any personal liability in case the fiduciary fails to obtain as much from the private sale as he would have obtained had he sold at public sale. *Dickson v. Crawley*, 112 N.C. 629, 17 S.E. 158 (1893). See *Wynns v. Alexander*, 22 N.C. 58 (1838); *Gray v. Armistead*, 41 N.C. 74 (1849).

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

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

Cross Reference.—See note to § 28-75.

Editor's Note.—See 4 N.C.L. Rev. 19 as to effect of 1949 amendment.

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

Effect of Section upon Discretion of

Judge and Clerk.—The provisions of this section do not take away from the clerk, or the judge on appeal, the sound discretionary power of determining whether a public or a private sale would best subserve the interests of the parties, or prevent the clerk or judge from authorizing a private sale in proper cases. The section is permissive and not mandatory upon them. In *re Brown's Estate*, 185 N.C.

398, 117 S.E. 291 (1923); *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938).

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

Review by Federal Court.—Where the clerk of the superior court of a county,

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

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

Fair Sale at Inadequate Price.—In the absence of objection, where the sale is perfected in all fairness and in compliance with the law, the mere fact that the property was sold to the widow of the decedent at a nominal price, where the public would not bid, does not render the administrator liable for the inadequacy of

the price. *Woody v. Smith*, 65 N.C. 116 (1871).

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

§ 28-78. Security required; representative's liability for collection.—The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security, and such proceeds shall be collected as soon as practicable; otherwise the executor or administrator shall be answerable for the same. (1868-9, c. 113, s. 21; Code, s. 1413; 1893, c. 346, s. 2; Rev., s. 65; C. S., s. 71; 1949, c. 719, s. 2.)

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

What "Real Estate" Includes.—"Real estate," which the representative is authorized to lease under this section, has reference to leasehold estates which belonged to the decedent. *Reeves v. McMillan*, 101 N.C. 479, 7 S.E. 906 (1888). See *Lee v. Lee*, 74 N.C. 70 (1876).

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

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

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

Provisions Peremptory.—The provisions of this section are peremptory, and leave no discretion in the representative. *Pate v. Kennedy*, 104 N.C. 234, 10 S.E. 188

(1889). But for qualification to this rule, see note to § 28-75.

Not Applicable to Private Sales.—The provisions of this section do not apply to private sales. *Odell v. House*, 144 N.C. 647, 57 S.E. 395 (1907).

Strict Construction of Forfeiture Provision.—The part of this section which

provides for forfeiture must be construed strictly in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act to be penalized does not clearly fall within the spirit and letter thereof. See *Alexander v. Atlantic Coast Line R.R.*, 144 N.C. 93, 56 S.E. 697 (1907).

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

This section is merely directory in two respects: (1) In that the representative under it is merely empowered and not directed to sell; (2) in that a purchaser from the representative at a sale made not in compliance with the terms of the statute, e.g., a private sale, nevertheless gets good title. See *Odell v. House*, 144 N.C. 647, 57 S.E. 395 (1907); *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938).

Purpose of Statute.—This section was enacted to provide a way for the administrator to relieve himself of liability and

at the same time realize something from choses in action which are not collectible but which might have some prospective value. *Odell v. House*, 144 N.C. 647, 57 S.E. 395 (1907).

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

ARTICLE 14.

Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts; petition for partition.—When it is alleged and shown that the personal estate of a decedent is insufficient to pay all of his debts, including the charges of administration, it shall not be necessary that the personal property of such decedent be first exhausted, and the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

When it is alleged and shown that the real property of the decedent consists in whole or in part of an undivided interest in real property, and that sale of such undivided interest is necessary to make sufficient assets to pay debts, including the charges of administration, the personal representative of the decedent may, at the time of applying by petition to sell the real property to make assets, apply by petition for partition of the lands in which the decedent held an undivided interest. Such petition for partition may be joined as a part of the petition to sell the real property, and, when the personal representative petitions for the sale of such undivided interest to make assets, he is a proper party petitioner to the same effect as if he were a joint tenant or tenant in common. (1868-9, c. 113, s. 42; Code, s. 1436; Rev., s. 68; C. S., s. 74; 1923, c. 55; 1935, s. 43; 1937, c. 70; 1943, c. 637; 1949, c. 719, s. 2; 1955, c. 302, s. 1; 1959, c. 879, s. 7; 1963, c. 291, s. 1.)

Editor's Note.—The 1963 amendment added the second paragraph.

The 1955 amendment made it clear that personalty need not be exhausted prior to sale of realty. Section 2 of the 1955 amendatory act validated all sales of realty consummated under § 28-81 prior to March 24, 1955, to the extent that such sales were held without first exhausting the personal property.

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 513 (1955). See 15 N.C.L. Rev. 352 as to 1937 amendment.

Essential Fact Is Insufficiency of Personal Property to Pay Debts.—The essential fact to be found to enable an administrator to maintain a proceeding to sell land to make assets under this and sections following is the insufficiency of personal property to pay the debts of the decedent. Therefore there must be definite statements in the petition as to the amount of debts outstanding against the estate, and as to the personal estate, to enable the court to see that there is such insufficiency of personal property. And the respondents, heirs at law, who are required to be made parties to the proceeding, have the right to plead any defense against a debt for which sale of the lands are to be made. *Poindexter v. First Nat'l Bank*, 247 N.C. 606, 101 S.E.2d 682 (1958).

Section Not Applicable to Executor Authorized to Sell.—The provisions of this section do not apply where the executor has, under the will, full power to sell the realty. They apply only to cases where otherwise the creditor would be compelled to resort to a scire facias against the heirs. *Wiley v. Wiley*, 61 N.C. 131 (1867). See § 28-96.

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

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

He has, however, no concern with the realty until a situation justifying a sale thereof under this section exists. *Gilchrist v. Middleton*, 108 N.C. 705, 13 S.E. 227 (1891); *Coggins v. Flythe*, 113 N.C. 102, 18 S.E. 96 (1893).

Nature of Authority.—The authority of the representative under this section is a naked power without title or interest in the estate. He is a mere agent of the

court. *Floyd v. Herring*, 64 N.C. 409 (1870).

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

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

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

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

Personalty First Had to Be Exhausted Prior to the 1955 Amendment.—See *Tuck v. Walker*, 106 N.C. 285, 11 S.E. 183 (1890); *Baker v. Carter*, 127 N.C. 92, 37 S.E. 81 (1900); *Mahoney v. Stewart*, 123 N.C. 106, 31 S.E. 384 (1898); *Mosely v. Mosely*, 192 N.C. 243, 134 S.E. 645 (1926); *Wadford v. Davis*, 192 N.C. 484, 135 S.E. 353 (1926); *Parker v. Porter*, 208 N.C. 31, 179 S.E. 28 (1935); *Gurganus v. McLawhorn*, 212 N.C. 397, 193 S.E. 844 (1937).

But It Was Also Held That Sale Could Be Decreed on Mere Showing That Per-

sonalty Was Insufficient.—Even prior to the 1955 amendment, it was held that, this section, construed in connection with subdivision (2) of § 28-86, conferred upon the representative the duty and the power to apply for license whenever the insufficiency of personalty, whether before or after an actual application thereof, could be shown. *Shields v. McDowell*, 82 N.C. 137 (1880); *Blount v. Pritchard*, 88 N.C. 445 (1883); *Clement v. Cozart*, 107 N.C. 695, 12 S.E. 254 (1890). See note to § 28-86.

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

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

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

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

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

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

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

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

Even in such a case, however, prior to the 1955 amendment, the heirs or devisees could have shown that the personalty had not been administered, or remedies against the representative's bond for devastavit had not been exhausted. *Smith v. Brown*, 101 N.C. 347, 7 S.E. 890 (1888).

Former Phrase "May Apply to Superior Court" Construed.—See *Pelletier v. Saunders*, 67 N.C. 261 (1872); *Johnson v. Futrell*, 86 N.C. 122 (1882); *Moore v. Ingram*, 91 N.C. 376 (1884); *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891); *Creech v. Wilder*, 212 N.C. 162, 193 S.E. 281 (1937).

Special Proceeding before Clerk.—A proceeding to sell the land under this section is a special proceeding before the clerk, who has original and exclusive jurisdiction of the matter. If, however, equities are involved in the case upon which the superior court acquires jurisdiction of a part, it will determine the whole matter.

Baker v. Carter, 127 N.C. 92, 37 S.E. 81 (1900).

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

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

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

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

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

Contents of Petition Prior to 1955

Amendment.—See *Neighbors v. Evans*, 210 N.C. 550, 187 S.E. 796 (1936).

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

Parties and Their Defenses.—In proceedings to sell land heirs and devisees are necessary parties. They may resist the sale by showing sufficient personal assets, or that the debts are not due by the estate. In such a case the usual course is to refer the matter for determination. *Person v. Montgomery*, 120 N.C. 111, 26 S.E. 645 (1897). See § 28-87.

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

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

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

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

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

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

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

Applied in *Odom v. Palmer*, 209 N.C. 93, 182 S.E. 741 (1935); *Caffey v. Osborne*, 210 N.C. 252, 186 S.E. 364 (1936);

Toms v. Brown, 213 N.C. 295, 195 S.E. 781 (1938); *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954); *Nunn v. Gibbons*, 249 N.C. 362, 106 S.E.2d 499 (1959).

Cited in *Graham v. Floyd*, 214 N.C. 77, 197 S.E. 873 (1938); *In re Daniel's Estate*, 225 N.C. 18, 33 S.E.2d 126 (1945); *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955); *Robertson v. Robertson*, 253 N.C. 376, 116 S.E.2d 849 (1960); *Brenkworth v. Lanier*, 260 N.C. 279, 132 S.E.2d 623 (1963).

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

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

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

Subrogation of Representative Who Personally Pays Debts.—Where an administrator, in good faith pending the mortgaging of property of the estate to pay debts, personally pays the debts of the estate, he is entitled to be subrogated to the rights of the creditors whose debts

he had paid, and upon the execution of the mortgage, upon order of court, is entitled to repay himself from the proceeds of the loan. *Caffey v. Osborne*, 210 N.C. 252, 186 S.E. 364 (1936).

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

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

In the absence of fraud participated in by the grantee conveyances of real property by warranty deed executed by the heirs-at-law or devisees of resident or nonresident decedents, with the joinder of the personal representative, if made within two (2) years after the death of the decedent and at least six (6) months after first publication of notice as provided by G.S. 28-47, shall not be voidable as to the creditors of such decedents if all of the following conditions are complied with:

- (1) The personal representative shall have given increased bond in an amount equal to the net proceeds realized from the sale of the property;
- (2) All the proceeds from the sale of such real property are paid directly to the personal representative of the decedent;
- (3) All proceeds from the sale of such property are placed by the personal representative in a separate escrow account, or, under proper court order, are invested in approved securities pending final closing of the estate;
- (4) The instrument of conveyance carries a certification of the personal representative that he has received from the grantee, the full purchase price from the sale;
- (5) The sale is approved by an order of the clerk of the superior court of the county in which the administration of the estate is pending, pursuant to a determination by said clerk, supported by affidavits of at least two freeholders of the county in which said real property is located, that the sales price represents the fair market value of said real property.

Funds or other assets held by the personal representative under the provisions of subdivision (3) hereof after the payment of all debts and charges of adminis-

tration of the estate shall be distributed by the personal representative to the persons entitled, simultaneously with the filing and approval of the final account by such personal representatives. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into their hands, as may be necessary to discharge the claims of creditors.

A judicial sale of real property of a decedent hereafter made under order of a court of competent jurisdiction for partition shall be valid as to creditors, executors, administrators and collectors of such decedent irrespective of the time made. If such sale is made within two years of death of such decedent or before the estate shall have been fully administered the personal representative of such decedent must be joined as plaintiff or made a party defendant. The court shall in the order of confirmation of any sale made within two years of the death of a decedent set aside such part of the proceeds of sale representing the interest of such decedent for application upon the debts, if any, of the decedent by requiring payment of the same into the hands of such personal representative or of the court itself, to be held by such personal representative or the court subject to claims of creditors for a period of two years from date of death of decedent, or until such estate is fully administered. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into their hands, as may be necessary to discharge the claims of creditors. (1868-9, c. 113, s. 105; Code, s. 1442; Rev., s. 70; C. S., s. 76; 1935, c. 355; 1939, c. 16; 1943, cc. 411, 763; 1947, c. 112; 1963, c. 449.)

Editor's Note.—The 1963 amendment inserted all of this section between the first and last paragraphs.

For comment on 1943 amendments, see 17 N.C.L. Rev. 359.

Prior to the 1935 amendment, the limitation began to run from the grant of letters rather than the death of decedent.

Only Purchaser without Notice Protected.—Prior to 1869, a purchaser from the heirs after two years from the grant of letters [now two years of death of decedent], even though with notice of the existence of the debts, obtained a good title under this section. *Brandon v. Phelps*, 77 N.C. 44 (1877). It is noteworthy that under the present section he must be a bona fide purchaser without notice. *Hooker v. Yellowley*, 128 N.C. 297, 38 S.E. 889 (1901). For example, actual notice of insolvency was held to invalidate purchaser's title. But a judgment against the representative is not notice of insolvency. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894). Nor are proceedings for dower alleging insolvency such notice. *Lee v. Giles*, 161 N.C. 541, 77 S.E. 852 (1913).

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

Heirs Liable for the Price.—The heirs having sold the land, even after two years of the grant of letters [now two years of death of decedent], are liable to the creditor for the price received, and for the whole price, not for aliquot shares of the debt. *Hinton v. Whitehurst*, 71 N.C. 66

(1874); *Davis v. Perry*, 96 N.C. 260, 1 S.E. 610 (1887); *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887).

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

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

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

To What Extent Purchaser Protected.—The purchaser for value contemplated by this section is, with respect to consideration paid by him, to be assimilated to a purchaser for value under the statute of 13 Eliz., viz.: He need not have paid all of the purchase money. The test of "purchaser for value" is not the same under

this section with the test in certain equity cases where the purchaser is protected pro tanto, i.e., to the extent of his payment before he receives notice. Hence even a purchaser upon credit is a "purchaser for value." *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894). See *Beasley v. Bray*, 98 N.C. 266, 3 S.E. 497 (1887).

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

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

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

Agreement Consummated after Two Years.—An agreement by the heir for the sale of land, though entered into before

the expiration of two years, if consummated after such time is valid as against creditors of the estate. *Donoho v. Patterson*, 70 N.C. 649 (1874).

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

Admissibility of Evidence.—In proceedings for partition, defendants claimed sole seizin. The evidence tended to show that defendants' grantor owned an undivided interest in the locus in quo as tenant in common with her brother, that defendants' grantor was the sole heir at law of her brother and executed a deed to defendants purporting to convey the entire tract of land less than two months after her brother's death. Plaintiff introduced in evidence testimony of the brother's administrator that he had sold the brother's interest in the land to make assets to pay debts of the estate, and offered in evidence court records of the summons, pleadings, judgment and confirmation, and deed executed by the commissioner to plaintiff in the proceeding to sell lands to make assets, and the judgment in plaintiff's favor against the estate of the brother. Held: Since a deed by an heir executed within two years of the intestate's death is ineffective as against creditors of intestate's estate, the record evidence, properly authenticated, was competent to prove plaintiff's title as tenant in common. *Cox v. Wright*, 218 N.C. 342, 11 S.E.2d 158 (1940).

Cited in *Price v. Askins*, 212 N.C. 583, 194 S.E. 284 (1937); *Pulliam v. Thrash*, 245 N.C. 636, 97 S.E.2d 253 (1957).

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

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

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

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

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

Conveyance Must Be by the Deceased.—Where A, being in embarrassed circumstances, purchased land from B, and caused B to convey to his (A's) son, it was held that the land could not be sold

for the payment of A's debts. *Rhem v. Tull*, 35 N.C. 57 (1851).

Conveyance Must Be in Fraud of Creditors.—Under this section lands conveyed cannot be sold unless it can be shown that they were conveyed in fraud of creditors. *McCaskill v. Graham*, 121 N.C. 190, 28 S.E. 264 (1987).

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

Conveyance to Wife and Children.—Property conveyed by the decedent to his wife and children without consideration in fraud of his creditors while insolvent may, under this section, be recovered and sold by the administrator on behalf of the credi-

tors. *Webb v. Atkinson*, 122 N.C. 683, 29 S.E. 949 (1898); *Webb v. Atkinson*, 124 N.C. 447, 32 S.E. 737 (1899).

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

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

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

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

- (1) The amount of debts outstanding against the estate.
- (2) The value of the personal estate, and the application thereof.
- (3) A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.
- (4) The names, ages and residences, if known, of the devisees and heirs at law of the decedent. (1868-9, c. 113, s. 43; Code, s. 1437; Rev., s. 77; C. S., s. 79.)

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

Purpose of Requisites in Application.—The personal estate, in law, is the primary fund, and land is the secondary fund, for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands, in the requisites prescribed to a petition for a license to sell, evidently is to inform the court of the condition of the estate with reference to its debts and the value and application of the personal estate, so that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity to resort to the real estate to supply the

deficiency will then be apparent. *Shields v. McDowell*, 82 N.C. 137 (1880); *Neighbors v. Evans*, 210 N.C. 550, 187 S.E. 796 (1936). See *Barkley v. Thomas*, 220 N.C. 341, 17 S.E.2d 482 (1941).

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

"As Far as Can Be Ascertained".—The main and essential fact to be stated in the petition is that there is an insufficiency of assets to pay the debts, and in order that the court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "as far as can be ascertained," for these quoted words, according

to grammatical construction, qualify each of the subdivisions of this section. *Blount v. Pritchard*, 88 N.C. 446 (1883).

Indebtedness Must Be Ascertained.—

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

Petition Should Set Forth Value of Personalty and Application Thereof.—

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

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

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

But an allegation that the assets of the decedent were insufficient to pay the debts,

and that a sale of property fraudulently conveyed was necessary, was held sufficient in *Sullivan v. Field*, 118 N.C. 358, 24 S.E. 735 (1896).

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

Verification of Application.—In *Stradley v. King*, 84 N.C. 635 (1881), where the application for the sale of land was not verified by the administrator's oath, and the guardian for the infant defendant had not answered, the court said with regard to verification: "While we consider the statutory requirement that the petition for an order of sale of the decedent's lands shall be supported by oath and that an answer be put in on behalf of infant defendants, directory, and its nonobservance not fatal to the validity of the decree of sale made without, yet this departure from the statute, followed by the precipitate action of the court in confirming the sale on the very day when it was reported and without opportunity afforded for objection, in our opinion warrants the order which reopens the case for such defenses as the infant defendants may be able to set up."

Allegation That Decedent Left No Personal Estate.—Where the petition alleges that the decedent left no personal estate so far as could be ascertained, it is sufficient on this aspect, and demurrer on the ground that the petition failed to set forth the value of the estate, as near as may be ascertained, and the application thereof, is properly overruled. *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954).

Applied in *Nunn v. Gibbons*, 249 N.C. 362, 106 S.E.2d 499 (1959).

§ 28-87. Heirs and devisees necessary parties.—No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: Provided, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made parties defendant in the same as the unknown heirs of said decedent naming him, and as thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for the service of summons by publication in the superior court, and upon such service being had, the court shall appoint some discreet person as guardian ad litem, for said unknown heirs, and summons shall issue to him as such. Said guardian ad litem shall file answer for said un-

known heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons by name, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to actions now pending, and all proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated. (1868-9, c. 113, s. 44; Code, s. 1438; Rev., s. 74; C. S., s. 80; Ex. Sess. 1924, c. 3, s. 1.)

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

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

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

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

Heir Not Made Party May Attack De-

§ 28-88. Adverse claimant to be heard.—When the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly. (1868-9, c. 113, s. 47; Code, s. 1441; Rev., s. 76; C. S., s. 81.)

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

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

Claims of Undivided Interest.—One who

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

Issue of Law Submitted to Judge.—Where a demurrer is filed to the petition

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

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

Applied in Nunn v. Gibbons, 249 N.C. 362, 106 S.E.2d 499 (1959).

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

claims an undivided interest in lands sought to be sold to pay debts, may be properly made a party to the proceedings. McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913).

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

filed before the clerk, the issue of law thereby raised must, under this section,

be certified to the judge at chambers. Then the judge must transmit his decision thereon to the clerk; it is error for him to direct an order of sale after overruling the demurrer. *Jones v. Hemphill*, 77 N.C. 42 (1887).

Procedure.—The rulings or decisions of the clerk must be transferred for trial to the next succeeding term of the superior court, if determinative issues arise on the pleadings; and if there be issues of law or

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

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

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

Capacity of the Clerk.—The clerk of the superior court, for the purpose of decreeing a sale in case provided by this section, represents and is the court, and has authority to exercise the discretionary powers conferred. *Tillett v. Aydlett*, 90 N.C. 551 (1884).

Unsigned Decree of Sale.—It is not essential to the validity of the decree that

it should be signed. *Sledge v. Elliott*, 116 N.C. 712, 21 S.E. 797 (1895), decided under former statute.

Decree Not Conclusive of Debts.—The decree of the sale is not conclusive of the debts recited by the personal representative in his application for the sale of the land. *Latta v. Russ*, 53 N.C. 111 (1860), decided under former statute.

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

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

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

Editor's Note.—For decision under this section as it stood before the 1949 amend-

ment, see *Howard v. Ray*, 222 N.C. 710, 24 S.E.2d 529 (1943).

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

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

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

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

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

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

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

§ 28-95. Specifically devised realty; contribution.—If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter,

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

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

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

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

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

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

Upon the death or removal of the executors named in the will, the administrator c.t.a. succeeds to all rights, powers and duties of the executors, and he may exercise all powers of sale granted the executors by the will, regardless of whether they are given the executor *virtute officii* or *nominatim*, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an

executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude the exercise of the power of sale by the administrator c.t.a. *Wachovia Bank & Trust Co. v. W. H. King Drug Co.*, 217 N.C. 502, 8 S.E.2d 593 (1940).

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

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

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

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

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

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

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

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

Section Not Applicable to Restore Lost Deeds.—This section does not apply to cases where a deed is executed in performance of the condition of the bond to convey, but is lost after the death of the vendor and before its registration. *Hodges v. Hodges*, 22 N.C. 72 (1838).

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

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

Deed Inoperative.—A deed executed by the representative before the contract for sale has been proven and registered, and the purchase money paid in full, is in-

operative. *Taylor v. Hargrove*, 101 N.C. 145, 7 S.E. 647 (1888).

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

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

Judgment against Administrator Ineffectual against Heir.—Under Art. I, § 17, of the Constitution, a judgment cannot bind a person unless he comes or is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his rights. As an inexorable consequence of this constitutional provision, any judgment which may be rendered in an action against a decedent's administrator will be wholly ineffectual as against an heir of the decedent, who is not a party to such action, even though such action is predicated upon this section. *Scott v. Jordan*, 235 N.C. 244, 69 S.E.2d 557 (1952).

Remedy of Heirs for Purchase Money.—It was formerly held that the heirs might not enjoin the representative from making a deed, upon the ground that the purchase money had not been paid. Their remedy was to call the representative to account for the money, or call for specific performance of the contract. *White v. Hooper*, 59 N.C. 152 (1860). (But now see the proviso at the end of the section.)

Heirs as Necessary Parties to Suit by Representative.—In an action brought by the personal representative of an obligor in a bond for title to subject the land to the payment of the purchase money, the heirs of the obligor are necessary parties.

But if the bond is proved and registered and the section has been complied with, in proceedings for the sale of such land, the presence of the heirs is perhaps not

necessary. *Grubb v. Lookabill*, 100 N.C. 271, 6 S.E. 390 (1888).

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

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

Local Modification.—Brunswick: 1951, c. 8; Forsyth: 1947, c. 359; 1951, c. 8; Surry: 1947, c. 359.

§ 28-100. Sales of realty devised upon contingent remainder, executory devise or other limitation validated.—In all cases where real property devised upon contingent remainder, executory devise, or other limitation, shall have been sold and conveyed for a fair price in good faith by the executor named in said will, or by an administrator with the will annexed, for the purpose of making assets with which to pay the debts of said estate, under the mistaken belief that said will authorized such sale, and the proceeds of such sale shall have been applied to the payment of the indebtedness of such estate, and it shall be made to appear in any action brought by the purchaser of said land, or those claiming under such purchaser, that such executor, or other personal representative would have been entitled in a proper proceeding brought for that purpose to an order of court to sell said land for the purpose of making assets with which to pay the indebtedness of such estate, then such sale so made by such executor, or other representative, shall be valid and binding upon all such contingent remaindermen, executory devisees, or other person, who would have taken such property under said will upon the contingency or contingencies therein mentioned, notwithstanding said sale shall have been made by such executor or other personal representative without obtaining such order of the court. And in any such action instituted by the purchaser of such land, or those claiming under him, for the purpose of removing a cloud from the title thereto all contingent remaindermen, executory devisees, or other persons entitled to claim under any limitation in said will, if in being, and known to be residents of this State, shall be made parties defendant to such action, and served with summons as in other civil actions; all nonresidents, or persons whose names and residences are unknown, shall be served with summons by publications as now required by law, or such service in lieu of publication as now provided by law. In cases where the contingent remainder, executory devise, or other limitation will, or may, go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the superior court shall, in any such action brought for the purpose aforesaid, after due inquiry of persons who are in no way interested in or connected with such proceedings, designate and appoint some discreet person as guardian ad litem to represent such contingent remaindermen, or executory devisees, upon whom summons shall be served in such action as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such action, and when counsel is

needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. And all contingent remaindermen, executory devisees, or other persons, who may be entitled to claim a contingent interest in said land, whether known or unknown, in being or not in being, shall be conclusively bound by any final judgment entered in such action, if made parties thereto, and represented therein in the manner hereinbefore provided: Provided, however, that this law shall not apply to any sale of land made in which the executor or other personal representative shall have been either directly or indirectly the purchaser thereof. (1923, c. 70, s. 1; C. S., s. 92(a).)

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

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

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

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

Cross Reference.—See note under § 28-100.

Cited in *State v. Scoggin*, 236 N.C. 19, 72 S.E.2d 54 (1952).

Editor's Note.—This section is confined in application to sales occurring prior to January 1, 1925. See § 28-102.

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

Cross Reference.—See note under § 28-100.

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.—In all cases where sales of real estate have been made by administrators of deceased persons, in good faith and upon a valuable consideration, to obtain assets to pay debts of the estate, and deeds have been executed by such administrators to the purchasers, who have paid the purchase price thereof, and no action has been taken by the heirs of such deceased persons to annul such sales by litigation or otherwise, such sales are hereby validated. The recitals contained in such a deed that the sale was made under order or license of the court for the purpose of obtaining assets to pay debts of the estate and that the proceeds of sale of said land have been applied to the payment of the necessary indebtedness of the estate and the cost of administration thereof shall be presumed to be *prima facie* correct: Provided, however, that this section shall not apply to any sale of land in which the administrator of such deceased person shall have been directly or indirectly the purchaser

thereof, and nothing herein shall prevent such sale from being impeached for fraud.

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

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

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

As stated in 9 N.C.L. Rev. 404, the preamble of the act indicates that it is to apply where no order of court was obtained or where the court proceedings authorizing and confirming the sales have

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

Cited in *State v. Scoggin*, 236 N.C. 19, 72 S.E.2d 54 (1952).

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

ARTICLE 15.

Proof and Payment of Debts of Decedent.

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

Cross References.—As to disbursement by clerk of superior court, see § 28-68.2. As to commissions allowed representatives, see § 28-170. As to counsel fees allowable to attorneys serving as representatives, see § 28-170.1.

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

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

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

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

Strict Construction.—This section, being in derogation of the equity of a pro rata distribution, should be strictly construed so as not to confer a priority over other creditors unless it is clearly called for. *Baker v. Dawson*, 131 N.C. 227, 42 S.E. 588 (1902); *Park View Hosp. Ass'n v. People's Bank & Trust Co.*, 211 N.C. 244, 189 S.E. 766 (1937); *Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954).

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

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

Testator Cannot Change Statutory Priority.—A testator may not so dispose

of his estate as to avoid the payment of his debts in accordance with the priorities fixed by this section. *First Security Trust Co. v. Lentz*, 196 N.C. 398, 145 S.E. 776 (1928).

Section Does Not Affect Validity of Unrecorded Chattel Mortgage.—This statutory provision does not bear upon whether an unrecorded chattel mortgage, valid as against the intestate, is to like extent valid against his estate. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1952).

Section Construed to Favor Bankruptcy Rule.—Upon the death of an obligor the administration laws step in and determine the settlement of his estate. These have

heretofore been construed by the Supreme Court to favor the bankruptcy rule. Thus a secured creditor is required to exhaust his security and then prove his claim for any balance still remaining or unpaid. *Rierson v. Hanson*, 211 N.C. 203, 189 S.E. 502 (1937).

This section creates no preference for payment on bank stock out of the assets of the estate of a deceased stockholder, and none results from the application of the pertinent principles of equity. *Hood v. Darden*, 206 N.C. 566, 174 S.E. 460 (1934).

The fees of a referee taxed against an administrator are not a preferred debt under this section. *Cobb v. Rhea*, 137 N.C. 295, 49 S.E. 161 (1904).

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

The evident purpose of this section relating to debts of the first class is to benefit the estate, particularly the creditors thereof next in line for payment. *Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954).

No Equity Preserved in Land in Which Estate Has No Interest.—Since the priority of the first class is limited to a situation where the value of the property equals or exceeds the amount of the specific lien thereon, the personal representative may preserve any equity for the benefit of other creditors and of beneficiaries. But where the estate and its creditors and beneficiaries have no right, title or interest in the real property on which the creditor has a specific lien, no equity can be preserved. *Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954).

Notes Secured by Liens on Lands Held by Entireties.—Husband and wife were jointly and severally liable on notes secured by liens on lands held by them by entireties. Upon the death of the husband, the liability of his estate for one half the balance due on the notes at the time of his death is not a debt coming within the first class of priority, since even though the debt is secured by specific lien on the property, the property is not an asset of the estate. *Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954).

Holder of Secured Note Must Exhaust Security and Then File Claim for Balance.—The holder of a note executed or assumed by the deceased, and secured by a deed of trust or mortgage, must first exhaust the security and apply the same on the debt, and may then file a claim against the estate for the balance due, if any. But the holder of such note may not file claim and receive pro rata dividend on the basis

of the full claim. *Montsinger v. White*, 240 N.C. 441, 82 S.E.2d 362 (1954).

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

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

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

Where debtor's lands are sold under order of court to make assets, proceeds remain real estate until all liens are discharged, and are to be applied to payment of liens in the order of their priority, and only the residue, if any, is payable to administrator as personal property to be distributed in the order provided by this section. *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946), citing *Murchison v. Williams*, 71 N.C. 135 (1874). See *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Where realty sold under order of court to make assets is subject to a docketed judgment and a subsequently recorded mortgage, the judgment must be satisfied in full before application of any part of

the proceeds to the mortgage or to the payment of other debts. *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946).

Applied in State v. Oliver, 104 N.C. 467, 10 S.E. 709 (1889).

Second class. Funeral expenses to the extent of six hundred dollars (\$600.00). This limitation shall not include cemetery lot or gravestone.

Cross References.—As to authority to provide for gravestones, see § 28-120. As to perpetual care of cemetery lot, see § 28-120.1.

Editor's Note.—The 1955 amendment, effective July 1, 1955, added the limitation to funeral expenses. Section 1 of the amendatory act also provides: "Nothing herein contained shall be construed to affect the provisions of § 28-120, or 28-120.1." Section 3 thereof provides that "this act shall not apply to funerals contracted for prior to July 1, 1955."

Expenses of Debtor Only.—The funeral and medical expenses referred to in this paragraph and the paragraph designated "Sixth class" are those of the debtor, and

not of his wife, child or tenants. *Baker v. Dawson*, 131 N.C. 227, 42 S.E. 588 (1902).

See *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915), where it was held that the husband's estate is liable for the funeral expenses of his predeceased wife, in preference to the beneficiaries under his will.

Third Party Paying.—The provisions of this paragraph inure to the benefit of one who after having paid such expenses as a matter of affection and duty wants to recover the same from the estate. *Ray v. Honeycutt*, 119 N.C. 510, 26 S.E. 127 (1896).

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

Method of Collecting Taxes.—Section 105-412, construed in the light of this paragraph of this section, indicates that the ordinary methods of collecting taxes by a sheriff do not apply to collection of taxes from a decedent's estate. *Sherrod v. Dawson*, 154 N.C. 525, 70 S.E. 739 (1911).

Relation to and Effect of § 105-408.—The General Assembly, by enacting § 105-408, providing that taxes assessed against land be paid from the proceeds of a foreclosure sale, did not intend to abolish the method definitely prescribed by this section for administering the estate of a person deceased or to modify the statutory direction as to the order in which the decedent's debts should be paid. *Farmville Oil & Fertilizer Co. v. Bourne*, 205 N.C. 337, 171 S.E. 368 (1933).

Taxes Assessed against Life Tenant.—As a life tenant is liable for taxes assessed against the property during his lifetime, under § 105-410, when he dies without paying the same they constitute a claim against his estate and are payable in the third class. *Rigsbee v. Brogden*, 209 N.C. 510, 184 S.E. 24 (1936).

Tax-Sale Certificate Is Not a Preferred Claim.—A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate

is by foreclosure under the provisions of C.S., § 8028. *Rigsbee v. Brogden*, 209 N.C. 510, 184 S.E. 24 (1936). [C.S., § 8028 was repealed by Public Laws of 1939, c. 310, s. 1725. However, a similar provision now appears in § 105-391. Ed. note.]

Provisions of this section that taxes should be paid by the personal representative in the third class of priority have no application to the statutory action to foreclose a tax-sale certificate. *Guilford County v. Estates Administration*, 213 N.C. 763, 197 S.E. 535 (1938).

Nor Are Assessments for Public Improvements.—See *Rigsbee v. Brogden*, 209 N.C. 510, 184 S.E. 24 (1936).

This section has no application to the payment of assessments made against land by a municipality for the purpose of improving streets. *City of High Point v. Brown*, 206 N.C. 664, 175 S.E. 169 (1934); *Town of Saluda v. County of Polk*, 207 N.C. 180, 176 S.E. 298 (1934).

Or to Charges for Water and Gas Connections.—Charges for water and gas connections, incurred during the lifetime of a life tenant and unpaid at his death, do not constitute a preferred claim against his estate as taxes assessed on the estate prior to his death, since in no event would such charges stand upon a higher plane than assessments for permanent improvements. *Rigsbee v. Brogden*, 209 N.C. 510, 184 S.E. 24 (1936).

Fourth class. Dues to the United States and to the State of North Carolina.
Fifth class. Judgments of any court of competent jurisdiction within this State,

docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Application to Funds in Administrator's Hands.—The provision of this paragraph applies to funds in the administrator's hands. *Matthews v. Peterson*, 150 N.C. 134, 63 S.E. 721 (1909).

Judgments Paid Out of Personalty.—This paragraph does not mean that the judgment shall be paid out of the realty of the decedent upon which it has become a lien. When a debtor dies, against whom there is a judgment docketed, his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the whole estate is to be administered just as if there were no judgment, that is to say, the personal property must be sold, if necessary, and all the personal assets collected, and out of these personal assets all the debts must be paid, if there be enough to pay all docketed judgments as well as others. The reason for this mode of administration is that, although a lien on land exists, the judgment should be paid out of the personal estate, if any, in exoneration of the land for the benefit of the heir or devisee. *Lee v. Eure*, 82 N.C. 428 (1880).

Creditor Must File Claim.—If a judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, and to protect himself against the running of the statute of limitations as against the debt (§ 1-22), he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Extent of Lien.—If the real estate upon which the judgment is a lien is of less value than the amounts of the judgment, then the extent of the lien under this paragraph is the value of the land only. *Jenkins v. Carter*, 70 N.C. 500 (1874). And if, in such a case, a part of the lien has been paid out of the personalty (which is first liable for the payment) the extent of the lien is the difference between the value of the land and amount paid out of the personalty. It is not the difference between the amount of the lien and the amount paid from the personalty. *Murchison v. Williams*, 71 N.C. 137 (1874).

When Priorities Determined.—The priorities among judgment creditors, which are dependent upon the date of their respective recordation, are to be determined as they existed at the death of the debtor, after which they remain unaffected by lapse of time until barred by the statute of limitations or by executions issued upon the judgments. *Town of Tarboro v. Penders*, 153 N.C. 427, 69 S.E. 425, 636 (1910); *Farmville Oil & Fertilizer Co. v. Bourne*, 205 N.C. 337, 171 S.E. 368 (1933).

Statute of Limitations Not Affected.—The fact that under this paragraph judgments docketed and in force, which have become a lien upon decedent's property at the date of his death, have priority over certain other claims, does not stop the running of the statute of limitation upon such judgments. *Daniel v. Laughlin*, 87 N.C. 433 (1882).

The expiration of the judgment lien terminates the authority of the representative to pay such lien. The judgment lien must be in force at the time of payment. *Matthews v. Peterson*, 150 N.C. 132, 63 S.E. 721 (1909).

Where Debtor's Lands Are Sold under Order of Court to Make Assets.—See note under the paragraph designated "First class."

In such case no part of the proceeds may be taxed with costs of administration. However, a referee's fee by § 6-21 is taxable in the discretion of the court. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Application of Proceeds under a Consent Judgment to Sell Lands.—Where a consent judgment provided that a commissioner be appointed to sell certain lands of a deceased person and pay the net proceeds to the administratrix of the deceased to pay the debts of his estate, the distribution of these proceeds was thereunder to be made under the provisions of this section, and a judgment ordering them to be paid to satisfy the lien of a judgment creditor on the lands of the estate, adjudging it a prior lien, was reversible error. *First Nat'l Bank v. Mitchell*, 191 N.C. 190, 131 S.E. 656 (1926).

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding

the decease; for drugs and all other medical supplies necessary for the treatment of such deceased person during the last illness of such person, said period of last illness not to exceed twelve months.

Cross Reference.—See note under the paragraph designated “Second class.”

Editor's Note.—The 1941 amendment added to this paragraph the provision relating to drugs and medical supplies. For comment on the 1941 amendment, see 19 N.C.L. Rev. 546.

The words “medical services,” include all services rendered to the deceased, because of his illness, upon the advice of his physician, which were reasonably necessary for his care and comfort and for his proper treatment by his physicians. *Park View Hosp. Ass'n v. People's Bank & Trust Co.*, 211 N.C. 244, 189 S.E. 766 (1937).

Seventh class. All other debts and demands. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C. S., s. 93; 1941, c. 271; 1955, c. 641, s. 1.)

Federal Estate Tax.—The word “debts” as used in this section includes the federal estate tax. The statute specifically names “Dues to the United States” as debts of the decedent which must be paid, and concludes with the all-embracing clause “all other debts and demands.” The obligation to pay taxes is regarded as a personal debt due the United States. *Wachovia Bank & Trust Co. v. Green*, 236

Expenses of Decedent Only.—The funeral and medical expenses referred to in this paragraph and the paragraph designated “Second class” mean those of the debtor and not those of his wife, child, or tenants. *Baker v. Dawson*, 131 N.C. 227, 42 S.E. 588 (1902).

Board of Nurses Included in Medical Services.—The board of graduate nurses, who attended the deceased while he was a patient in plaintiffs' hospital, was a claim included in the term “medical services” as used in this section. *Park View Hosp. Ass'n v. People's Bank & Trust Co.*, 211 N.C. 244, 189 S.E. 766 (1937).

N.C. 654, 73 S.E.2d 879 (1953); *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963); *Adams v. Adams*, 261 N.C. 342, 134 S.E.2d 633 (1964).

Cited in *City of Statesville v. Jenkins*, 199 N.C. 159, 154 S.E. 15 (1930); *Brown v. Brown*, 199 N.C. 473, 154 S.E. 731 (1930); *Price v. Askins*, 212 N.C. 583, 194 S.E. 284 (1937); *Rodman v. Stillman*, 220 N.C. 361, 17 S.E.2d 336 (1941).

§ 28-105.1. **Satisfaction of debts other than by payment.**—Notwithstanding any provision of law to the contrary,

- (1) If a decedent was liable in person at the time of his death for the payment or satisfaction of any debt or the performance, satisfaction or discharge of any liability or obligation, whether joint or several, primary or secondary, direct or contingent, or enforceable in any other manner or form whatsoever, or
- (2) If only the property of a decedent or some part thereof was liable at the time of his death for the payment or satisfaction of any debt or the performance, satisfaction or discharge of any liability or obligation, whether joint or several, primary or secondary, direct or contingent, or enforceable in any other manner or form against the property of the decedent but not against him or his estate as a personal liability, and
- (3) If any person other than the personal representative of the decedent is willing to assume the liability of the decedent and of his estate or to receive or accept property of the decedent subject to such liability in cases where the decedent was not personally liable and the creditor, obligee or other person for whose benefit such liability exists is willing to accept an agreement with that effect and to discharge the personal representative of the decedent and the estate of the decedent from the payment, satisfaction or discharge of such liability, and
- (4) If such creditor, obligee or other person for whose benefit such liability exists and the person assuming the liability or the person receiving or accepting the property of the decedent subject to such liability shall execute, acknowledge and deliver in the form and manner required for deeds conveying real property in North Carolina, an agreement be-

tween themselves as to such assumption of liability or the receipt or acceptance of property of the decedent subject to such liability which shall contain a release, as hereinafter defined, discharging the personal representative of the decedent and his estate from the payment, satisfaction, or discharge of the liability, and thereafter the said creditor, obligee or other person for whose benefit such liability exists shall have no remedy for the enforcement thereof except against the person assuming it or against the property subject to it as provided in the said agreement;

then upon the filing with the clerk of superior court having jurisdiction over the estate and personal representative of one duplicate original of the said agreement, or of a certified copy thereof if it is a duly recorded instrument, the same shall be accepted in the same manner as a voucher showing payment or discharge of the said liability in the accounts of the personal representative of the decedent.

The word "person" as used in this § 28-105.1 shall include one or more natural persons, corporations, partnerships, or entities having the power to own property or to make contracts in regard thereto. The word "release" as used in this § 28-105.1 shall include a covenant not to sue in any case in which an unqualified release or discharge of one obligee would discharge another, and if the liability involved is a negotiable instrument or other instrument transferable to a holder in due course, such release shall not be effective unless notice thereof is endorsed on the instrument involved, dated and signed by the creditor or the holder of the indebtedness or person for whose benefit the property is encumbered. (1965, c. 1149.)

§ 28-106. No preference within class.—No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class. (1868-9, c. 113, ss. 25, 26; Code, ss. 1417, 1418; Rev., s. 88; C. S., s. 94.)

Editor's Note. — The prohibition embodied in this section is against the representative. Hence, a solvent person in his lifetime may by his will make preferences in favor of persons who would otherwise be postponed. But, as upon his death his effects and property vest in his representative who must pay the debts first, if the estate is insolvent the representative cannot assent to the payment of preferences before the payment of prior debts as prescribed in the preceding section. The result is that preferences made by an insol-

vent decedent are rendered ineffective for all purposes. See *Moore v. Byers*, 65 N.C. 240 (1871).

Paying by Honest Mistake.—If the representative pays a debt belonging to an inferior class in preference to a superior debt, even though he does it through an honest mistake, he is chargeable for the same. *Moye v. Albritton*, 42 N.C. 62 (1850).

Cited in *Park View Hosp. Ass'n v. People's Bank & Trust Co.*, 211 N.C. 244, 189 S.E. 766 (1937).

§ 28-107. When payment out of class held valid.—Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought. (1869-70, c. 150; Code, s. 1496; Rev., s. 96; C. S., s. 95.)

Section Declaratory of Existing Law.—Even in the absence of this section the principal which it declares would hold

true under legal and equitable principles. *Coggins v. Flythe*, 113 N.C. 102, 18 S.E. 96 (1893).

§ 28-108. Debts due representative not preferred.—No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts. (1868-9, c. 113, s. 28; Code, s. 1420; Rev., s. 89; C. S., s. 96.)

§ 28-109. Debts not due rebated.—Debts not due may be paid on a rebate of interest thereon for the time unexpired. (1868-9, c. 113, s. 27; Code, s. 1419; Rev., s. 90; C. S., s. 97.)

§ 28-110. Affidavit of debt may be required.—Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit. (1868-9, c. 113, s. 33; Code, s. 1425; Rev., s. 91; C. S., s. 98.)

§ 28-111. Disputed debt may be referred.—If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it. (1868-9, c. 113, s. 34; 1872-3, c. 141; Code, s. 1426; Rev., s. 92; C. S., § 99.)

Purpose of Section.—The section was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators or collectors and claimants against the estates of testators and intestates may be settled and determined. *State v. Potter*, 107 N.C. 415, 12 S.E. 55 (1890); *In re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942).

The proceeding authorized by this section is based upon agreement of the parties. It is not an action, nor a consent reference under the Code. It lacks the ordinary incidents of a special proceeding which is begun before the clerk. *In re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942).

Not Applicable to Creditor's Suit under § 28-122.—The proceedings authorized by this section are between a creditor and the personal representative, and have no application to creditor's bill under § 28-122 instituted to take the administration into the hands of the court. *Dunn v. Beaman*, 126 N.C. 766, 36 S.E. 172 (1900).

Effect of Agreement to Arbitrate.—An agreement to arbitrate and to award under this section is competent evidence to prove the indebtedness of the estate. Such an agreement is, where there is no fraud

or collusion, binding upon the heirs even though they were not parties to the proceedings. *Lassiter v. Upchurch*, 107 N.C. 411, 12 S.E. 63 (1890).

Finding of Arbitrators as Judgment.—The finding of arbitrators under this section is equivalent to a judgment, and the proceedings in which it is rendered can be impeached only for fraud or collusion. *Lassiter v. Upchurch*, 107 N.C. 411, 12 S.E. 63 (1890).

Under a fair interpretation of this section, the award of the referees, unless impeached for fraud and collusion, should have at least the effect of determining and putting an end to the controversy, if not the effect of a judgment in an action between the parties. *In re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942).

Who May Impeach.—Only those having a pecuniary interest in the estate may be heard to impeach the result for collusion or fraud. *In re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942).

Appeal.—Where a claimant and the personal representative voluntarily execute a written agreement referring the claim to disinterested persons under this section, the referees are not required to decide the matter according to law, and their report is

conclusive and neither party is entitled to appeal therefrom upon exceptions, there being no provision in this section for appeal, and the proceeding being neither a civil action nor a special proceeding nor a judicial order. In *re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942).

Vacation of Reference.—Where clerk appointed a referee to hear claims against the estate of a deceased under this section, and thereafter approved the report of the referee, but on appeal the superior court ruled that the clerk had no authority in the premises and this ruling was unchal-

lenged, such ruling vacated the supposed reference, and ended the matter. In *re Shutt*, 214 N.C. 684, 200 S.E. 372 (1939).

Effect of Failure to Refer Claim.—Where a claim against an executor is rejected by him in writing and is not referred in accordance with the provisions of this section, an action thereon is barred under § 28-112 if not brought within six months after the rejection of the claim by the executor. *Batts v. Batts*, 198 N.C. 395, 151 S.E. 868 (1930).

Cited in Craver v. Spaugh, 226 N.C. 450, 38 S.E.2d 525 (1946).

§ 28-112. Disputed debt not referred, barred in three months.—If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in § 28-111, the claimant must, within three months, after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. (1868-9, c. 113, s. 35; Code, s. 1427; Rev., s. 93; 1913, c. 3, s. 1; C. S., s. 100; 1961, c. 742.)

Cross Reference.—As to effect of admission of claim by personal representative upon running of statute of limitations, see § 1-22.

The language of this section is positive and explicit, and the section must be enforced in accordance with the plain meaning of its terms. *Morrissey v. Hill*, 142 N.C. 355, 55 S.E. 193 (1906); *Rutherford v. Harbison*, 254 N.C. 236, 118 S.E.2d 540 (1961).

Rejection of Claim Must Be Absolute and Unequivocal.—The rejection of a claim against an estate must be absolute and unequivocal in order to start the running of the six months [now three months] statute of limitation. *Rutherford v. Harbison*, 254 N.C. 236, 118 S.E.2d 540 (1961).

Counterclaim Barred.—A claim barred under this section cannot be pleaded even by way of counterclaim, in an action by the representative against the claimant, and this regardless of the fact that the general notice provided for in § 28-47 had not been given. *Morrissey v. Hill*, 142 N.C. 355, 55 S.E. 193 (1906).

Husband's Claim for Funeral Expenses of Wife.—While § 28-105 classifies funeral expenses as a debt of the estate, the amount due therefor cannot be regarded

as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor, and the claim is rejected, and is not referred in accordance with § 28-111, an action on the claim is barred by failure to bring it within six months [now three months] from the time of rejection of the claim by the executor. *Batts v. Batts*, 198 N.C. 395, 151 S.E. 868 (1930).

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contends were secured by the assignment is not barred, under this section, from asserting such right after the lapse of more than six months [now three months] as against the administrator of the deceased insured in the administrator's action to recover the funds, the defense not constituting a prosecution of a claim against the administrator which had been denied. *Sellers v. First Nat'l Bank*, 214 N.C. 300, 199 S.E. 266 (1938).

Applied in Craver v. Spaugh, 226 N.C. 450, 38 S.E.2d 525 (1946); *Craver v. Spaugh*, 227 N.C. 129, 41 S.E.2d 82 (1947); *Bourne v. Edwards*, 238 N.C. 261, 77 S.E.2d 616 (1953); *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

§ 28-113. If claim not presented in six months, representative discharged as to assets paid.—In an action brought on a claim which was not presented within six months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector. (1868-9, c. 113, s. 37; Code, s. 1428; Rev., s. 94; C. S., s. 101; 1961, c. 741, s. 3.)

The purpose of this section is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same as to claims not presented within the prescribed time, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons. *Mallard v. Patterson*, 108 N.C. 255, 13 S.E. 93 (1891).

Effect of Failure to Present Claim within Time Limit.—Under this section a claimant who has not presented his claim within twelve months [now six months] from the first publication of the general notice to creditors is allowed to assert his demand only as against undistributed assets of the estate, and without cost against the executor. In *re Estate of Bost*, 211 N.C. 440, 190 S.E. 756 (1937).

Representative Is Discharged as to Assets Paid Out.—By the provisions of this section, if a claim is not presented in six months, the representative is discharged as to assets paid. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

§ 28-114. **No lien by suit against representative.**—No lien shall be created by the commencement of a suit against an executor, administrator or collector. (1868-9, c. 113, s. 41; Code, s. 1432; Rev., s. 95; C. S., s. 102.)

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

§ 28-115. **When costs against representative allowed.**—No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which case the court may award such costs against the defendant personally, or against the estate, as may be just. (1868-9, c. 113, s. 38; Code, s. 1429; Rev., s. 97; C. S., s. 103.)

The purpose of this section is to urge the representative to an early and prompt settlement of claims against the deceased, and to protect the estate, when proper diligence was used, from cost needlessly incurred by the creditors in prosecuting their claims. *May v. Darden*, 83 N.C. 239 (1880).

Exception to §§ 6-18 to 6-20.—This section forms an exception to §§ 6-18 to 6-20, which are general provisions as to cost. *Whitaker v. Whitaker*, 138 N.C. 205, 50 S.E. 630 (1905). See also *Bailey v. Hayman*, 222 N.C. 58, 22 S.E.2d 6 (1942).

Not Applicable When Funds Misapplied.—In proceedings to subject a representative to liability for misapplication of the funds, as distinguished from proceedings to recover a debt out of the estate, this section does not apply, and the representative is chargeable with the cost. *Valentine v. Britton*, 127 N.C. 57, 37 S.E. 74 (1900).

But Claim Can Be Asserted against Undistributed Assets.—This section, if applicable, would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate and without cost against the administratrix c.t.a. of the estate. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Administrator May Hold Funds for Full Period.—Under this section a bank, acting as an administrator, has a legal right to hold the funds of the estate for one year [now six months] after appointment and to refuse to settle claims of heirs during this period. *Security Nat'l Bank v. Bridgers*, 207 N.C. 91, 176 S.E. 295 (1934).

Cited in *Jackson v. Thomas*, 211 N.C. 634, 191 S.E. 327 (1937); *Strayhorn v. Aycock*, 215 N.C. 43, 200 S.E. 912 (1939), treated under § 1-49; *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954); *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Unreasonable Delay or Neglect.—Where an action was brought within fifty-two days of the qualification of the administrator, it was held that payment had not been "unreasonably delayed or neglected" within the meaning of this section. *Whitaker v. Whitaker*, 138 N.C. 205, 50 S.E. 630 (1905). A fortiori the same rule was applied, in *May v. Darden*, 83 N.C. 239 (1880), when the suit was instituted twenty days after appointment. See also *Morris v. Morris*, 94 N.C. 613 (1886).

Land Chargeable with Cost.—In proceedings by the creditor to subject the land to the payment of debts, the land is subject to the payment of the cost, wherever the representative can be charged with the cost under the circumstances referred to in this section. *Long v. Oxford*, 108 N.C. 280, 13 S.E. 112 (1891).

Burden of Proof.—The burden is on the plaintiffs to show that they are en-

titled to recover costs under this section. *Whitaker v. Whitaker*, 138 N.C. 205, 50 S.E. 630 (1905).

Appeal.—Although the general rule is that an appeal lies from a judgment for

cost only, there is an exception to this rule in favor of fiduciaries, inferred from this section. *May v. Darden*, 83 N.C. 239 (1880).

§ 28-116. **Obligations binding heirs collected as other debts.**—Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter. (1868-9, c. 113, s. 12; Code, s. 1404; Rev., s. 98; C. S., s. 104.)

ARTICLE 16.

Accounts and Accounting.

§ 28-117. **Annual accounts.**—Every executor, administrator and collector shall, within thirty days after the expiration of one year from the date of his qualification or appointment and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (C. C. P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C. S., s. 105; 1957, c. 783, s. 5.)

Cross References. — As to inventory within three months, see § 28-50. As to requirement that trustees in wills file inventories and accounts, see § 28-53.

The word "account" as used in this section means "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates." It does not include the idea of payment and settlement. *State v. Dunn*, 134 N.C. 663, 46 S.E. 949 (1904).

Account Necessary before Transferring Funds to Another Jurisdiction.—The administrator in this State of the estate of a nonresident dying in his own state, before transferring the funds to the state of the domicile, must comply with the provisions of this section. *Grant v. Rogers*, 94 N.C. 755 (1886).

A report showing all debts paid except a mortgage indebtedness cannot constitute a final account, since the duties and obligations of administration continue until all debts are paid or all assets exhausted. *Creech v. Wilder*, 212 N.C. 162, 193 S.E. 281 (1937).

Duty of Clerk to Accept Executor's Annual Account.—Where property is devised or bequeathed by a will, upon certain trusts, and the testator does not appoint a trustee, it is the duty of the executor to

carry out the provisions of the will. It is error for the clerk to refuse to accept an annual account tendered by the executor for a year more than two years after the executor qualified but during the life of the trust estate. In *re Wachovia Bank & Trust Co.*, 210 N.C. 385, 186 S.E. 510 (1936). See § 28-121 and the note thereto.

Meaning of "Auditing Accounts."—The provision as to auditing the accounts has reference to the duty of examining the accounts to see that the account of charges corresponds with the inventories, passing upon the vouchers, and striking a balance after allowing commissions. *Heilig v. Foard*, 64 N.C. 713 (1870).

Ex Parte Proceeding.—The jurisdiction for auditing accounts conferred upon the clerk by this section is an ex parte jurisdiction of examining the accounts and vouchers of such persons, and does not conclude parties interested or affect suits inter partes upon the same matter. *Heilig v. Foard*, 64 N.C. 713 (1870); *Grant v. Hughes*, 94 N.C. 231 (1886); *Bean v. Bean*, 135 N.C. 92, 47 S.E. 253 (1904).

Recorded Account Is Competent Evidence in Collateral Suit.—The account required by this section must be recorded as required in § 2-42. Such account therefore is not hearsay but is competent evi-

dence in a collateral suit. *Braddy v. Pfaff*, 210 N.C. 248, 186 S.E. 340 (1936).

Prima Facie Evidence Only.—The sworn account referred to in this section is only prima facie evidence. It is not conclusive as against any person adversely interested. The statute merely shifts the burden of proof. *Allen v. Royster*, 107 N.C. 278, 12 S.E. 134 (1890); *In re Hege*, 205 N.C.

625, 172 S.E. 345 (1934); *Braddy v. Pfaff*, 210 N.C. 248, 186 S.E. 340 (1936).

The representative himself is not estopped to impeach the account. *Bean v. Bean*, 135 N.C. 92, 47 S.E. 232 (1904).

Cited in *State v. Scoggin*, 236 N.C. 19, 72 S.E.2d 54 (1952); *Davis v. Davis*, 246 N.C. 307, 98 S.E.2d 318 (1957).

§ 28-118. **Clerk may compel account.**—If any executor, administrator or collector omits to account, as directed in § 28-117, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (C. C. P., s. 479; Code, s. 1400; Rev., s. 100; C. S., s. 106; 1933, c. 99.)

Original Jurisdiction.—Under this section the clerk has original jurisdiction to remove. *Edwards v. Cobb*, 95 N.C. 5 (1886).

Court which appointed fiduciary may, ex mero motu, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Or Accounting May Be Compelled by Special Proceedings or Civil Action.—An executor or administrator, as well as a

trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, or the court which appointed them may, ex mero motu, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

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

§ 28-118.1. **Removal of fiduciaries who cannot be found.**—Whenever any inventory, account or report required by law to be filed with the clerk of the superior court by any executor, administrator, collector, guardian, trustee, personal representative or other fiduciary accountable to the clerk of the superior court is overdue, and citation or notice issued by the clerk to be served in the county of the address last reported by such fiduciary to the clerk is returned unserved because the fiduciary cannot be found, the clerk may, after ten (10) days following the return of such citation unserved, order his removal without further notice. A copy of such citation shall be served on the surety or sureties, if any, of such fiduciary, if the surety be found in the county of his last known address. (1961, c. 418.)

Cross Reference.—As to revocation of band or widow or next of kin, or for disqualification on application of surviving husband or widow or next of kin, or for disqualification or default, see § 28-32.

§ 28-119. **Vouchers presumptive evidence.**—Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character. (C. C. P., s. 480; Code, s. 1401; Rev., s. 101; C. S., s. 107.)

Independent of this section receipts of living persons are not strictly legal evidence to show a full administration. *Drake v. Drake*, 82 N.C. 443 (1880).

Vouchers Are Presumptive Though Not Primary Evidence.—While this section

makes the vouchers presumptive proof, it by no means provides that they shall be primary evidence, and therefore actual payment may still be established in the same way as before the enactment of this section, when the receipts of living persons

were not strictly legal evidence to show a full administration. *Costen v. McDowell*, 107 N.C. 546, 12 S.E. 432 (1890). See *Drake v. Drake*, 82 N.C. 443 (1880).

What Vouchers Must Show.—This section makes vouchers presumptive evidence of disbursements actually made, but not of their nature and purpose and the necessity for them. To make such vouchers presumptive evidence, they should state with reasonable particularity their purpose, the particular account upon which they were

made, the time, etc., so as to make it appear that the expenditure or disbursement was a proper one. *McLean v. Breese*, 109 N.C. 564, 13 S.E. 910 (1891).

Proof of Handwriting.—The handwriting of the person signing the voucher need be proven only when the voucher is relied on as presumptive evidence under this section. *Costen v. McDowell*, 107 N.C. 546, 12 S.E. 432 (1890).

Cited in State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952).

§ 28-120. **Gravestones authorized.**—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The costs thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than four hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. Provided, however, that if the net estate is of a value in excess of twenty-five thousand dollars (\$25,000), the executor or administrator may, in his discretion, expend not more than eight hundred dollars (\$800) for this purpose without securing the order of court required herein. (1905, c. 444; Rev., s. 102; C. S., s. 108; 1925, c. 4; 1941, c. 102; 1951, c. 373.)

Cross Reference.—As to proof and payments of debts of decedent, see § 28-105 et seq.

This section was held inapplicable where executors, in obedience to testamentary instructions, expended more than \$100 [now

\$400] for a gravestone without order of court, when the estate appeared to be solvent, though in fact it was insolvent. In re Estate of Bost, 211 N.C. 440, 190 S.E. 756 (1937).

§ 28-120.1. **Perpetual care of cemetery lot.**—It shall be lawful for an executor or administrator to provide for perpetual care for the lot upon which is located the grave of his testator or intestate, and the cost thereof shall be paid and credited as such in final accounts: Provided, that the provisions of this section shall be applicable to an interment made in a cemetery authorized by law to operate as a perpetual care cemetery or association, and the cost thereof shall be in the sound discretion of the executor or administrator having due regard to the value of the estate and to the interest of the widow and legatees or distributees of the estate. Provided, where the executor or administrator desires to spend more than two hundred fifty dollars (\$250.00) for such purpose he shall file his petition before the clerk of the superior court and such order as will be made by the court shall specify the amount to be expended for such purpose. (1945, c. 756.)

Cross Reference.—As to proof and payments of debts of decedent, see § 28-105 et seq.

§ 28-121. **Final accounts.**—An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk. (C. C. P., s. 481; Code, s. 1402; Rev., s. 103; C. S. s. 109.)

Cross Reference.—See note to § 28-117. **Jurisdiction.**—Formerly the probate court had jurisdiction to make the representative account. *Rowland v. Thomp-*

son, 65 N.C. 110 (1871). Under this section the clerk of the superior court has jurisdiction. *McNeill v. Hodges*, 105 N.C. 52, 11 S.E. 265 (1890).

When Section Not Applicable.—This statutory requirement is not applicable where the duties imposed upon the executor by the will cannot be fully performed within two years from his qualification. In *re Wachovia Bank & Trust Co.*, 210 N.C. 385, 186 S.E. 510 (1936). See § 28-192.

Review of Order to File Final Account and Turn Over Assets.—Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon the facts found and not as a matter of discretion, the order is reviewable by the superior court upon appeal. In *re Wachovia Bank & Trust Co.*, 210 N.C. 385, 186 S.E. 510 (1936).

Auditing a Judicial Act.—The phrase “audit an account” means something more than the statement of an account by an unauthorized person. It means the act of a court. Hence the auditing under this section must be performed by the clerk, and not by one of his ministerial officers, for a clerk for his judicial functions can have no deputy. *Rowland v. Thompson*, 65 N.C. 110 (1871).

Appeal from Audit.—This section, which directs that the probate judge (now the clerk) shall “audit” the account, implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Consequently an appeal may not be had from the decision of the probate judge (now the clerk) upon every question collaterally arising in the course of his investigation, in view of the

inconveniences incident to such practice peculiar to the common-law action of account, now superseded by the more expeditious proceedings in equity. *Rowland v. Thompson*, 64 N.C. 714 (1870).

Ex Parte Proceeding Works No Estoppel.—The auditing by the clerk, whether under this or under § 28-117, is an ex parte proceeding, and does not work an estoppel upon the parties as a judgment in inter parte proceedings would. In this respect this section and the section just referred to are alike. *Bean v. Bean*, 135 N.C. 92, 47 S.E. 232 (1904).

Ex Parte Account Presumed Correct.—When ex parte accounts are filed under this section, they are, as a matter of law, to be taken as correct until shown to be erroneous. *Turner v. Turner*, 104 N.C. 566, 10 S.E. 606 (1889).

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

Limitation of Action against Representative.—An action against an administrator or executor is barred in ten years after the two years allowed under this section, even though no express demand is made by any party interested for the settlement of the estate. *Edwards v. Lemmond*, 136 N.C. 329, 48 S.E. 737 (1904).

Applied in *Security Nat’l Bank v. Bridgers*, 207 N.C. 91, 176 S.E. 295 (1934).

Cited in *In re Hege*, 205 N.C. 625, 172 S.E. 345 (1934); *Davis v. Davis*, 246 N.C. 307, 98 S.E.2d 318 (1957).

§ 28-121.1. Final accounts; immediate settlement.—The personal representative of a deceased person who did not own any real property or any interest in real property at the time of his death may file his final account for settlement at any time within one year after his appointment when the only assets of the estate consist of proceeds received for wrongful death. (1949, c. 63, s. 2.)

Editor’s Note.—For brief comment on this section, see 27 N.C.L. Rev. 414.

Report on Disposition of Proceeds.—Pursuant to this section it is the practice that a personal representative, who has re-

ceived proceeds for wrongful death, shall file a report in the probate court of the disposition made of such proceeds. *King v. Cooper Motor Lines, Inc.*, 142 F. Supp. 405 (D. Md. 1956).

§ 28-122. Creditor’s proceeding for accounting.—Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively. (1871-2, c. 213; 1876-7, c. 241, s. 6; Code, s. 1448; Rev., s. 104; C. S., s. 110.)

The purpose of this section was to unite in order to bring the personal representative to an account after two years and to

compel an application of the assets by payment to the creditors whose debts have been ascertained. *Graham v. Tate*, 77 N.C. 120 (1877).

Proceedings authorized by § 28-111 have no application to situations arising under this section, whose primary object is to take the administration into the hands of the court. *Dunn v. Beaman*, 126 N.C. 766, 36 S.E. 172 (1900).

Special Proceedings or Civil Action Optional.—Originally this section authorized the creditor to bring a "special proceeding," but the amendment of 1876-77 inserted the words "civil action." The effect of the amendment was to give the creditor an option to bring his action either before the clerk or at a regular term of the superior court. See *Clement v. Cozart*, 107 N.C. 695, 12 S.E. 254 (1890).

Concurrent Jurisdiction of Courts.—The act of 1876-77, ch. 241, § 6, which embodied also this section, and which provided that action against the personal representative may be brought originally to the superior court at term time, and stipulated for the repeal of conflicting laws, is not in conflict with the jurisdiction of the probate court (before the clerk), and the jurisdiction is concurrent. Hence the court first acquiring jurisdiction of the controversy will retain it. Thus, where under this section special proceedings were instituted by a creditor, in the superior court, and the representative thereafter instituted proceedings in the probate court (before the clerk) for the sale of land, it was held that the superior court had acquired jurisdiction of the matter and the representative could be restrained from further proceeding in the probate court. *Haywood v. Haywood*, 79 N.C. 42 (1878); *Pegram v. Armstrong*, 82 N.C. 326 (1880).

Nature of Superior Court's Jurisdiction.—Under this section the superior court has original jurisdiction over proceedings instituted against the representative. *State ex rel. Bratton v. Davidson*, 79 N.C. 423 (1878).

Jurisdiction of Judge in Term.—The proceedings under this section are exceptions to the rule that the judge in term has no jurisdiction over the settlement of an intestate's estate. *Moore v. Ingram*, 91 N.C. 376 (1884).

Equitable Character of Proceedings.—The special proceedings under this section are of equitable character. Hence the court may in the same proceedings make the heirs and the next of kin parties, and compel the latter to account for the personalty received by him, or may order the realty

to be sold for the payment of the debts. *Devereux v. Devereux*, 81 N.C. 12 (1879); *Warden v. McKinnon*, 94 N.C. 378 (1886).

All fiduciaries may be compelled by appropriate proceedings to account for their handling of properties committed to their care. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

By Special Proceedings, Civil Action or Attachment for Contempt.—An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, or the court which appointed him may, *ex mero motu*, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Remedy against Settlement before Payment of Debts.—If an administrator should file a petition for the settlement of the estate before he has paid the debts the remedy of the creditor is by a creditor's bill in accordance with this section, or an action upon the administration bond. They cannot seek to be made parties to the settlement proceedings. *Carlton v. Byers*, 93 N.C. 302 (1885); or to a petition by the representative to sell land for the payment of debts. *Dickey v. Dickey*, 118 N.C. 956, 24 S.E. 715 (1896).

Creditor's Suit Distinguished.—A special proceeding under this section differs from a creditor's bill in that in the latter case all the creditors may make themselves parties, while in the former case they are required to do so. *Patterson v. Miller*, 72 N.C. 516 (1875).

Other Creditors May Come In.—Where a creditor has instituted a special proceeding under this section, all or any of the creditors not designated by name are at liberty to come in and share the benefits of the suit. Every creditor has an inchoate interest in the suit, and is, in an essential sense, a party to the action. *Dobson v. Simonton*, 93 N.C. 268 (1885).

Enjoining Creditor's Independent Action.—A creditor who chooses not to come in, and resorts to an independent action, may be enjoined by the court as soon as the decree for an account is rendered in the main suit. *Dobson v. Simonton*, 93 N.C. 268 (1885).

Process or General Notice Essential.—Unless personally served with notice, or unless a general notice is published as prescribed by § 28-126, creditors are not bound by special proceedings instituted under this section by another creditor.

Hester v. Lawrence, 102 N.C. 319, 8 S.E. 915 (1889).

Summons and Complaints Necessary.—Special proceedings under this section must be by summons and complaint in the first instance. But creditors subsequently coming in need not file a complaint unless their claim is denied. *Isler v. Murphy*, 76 N.C. 52 (1877).

The mere filing by a creditor of a claim with the clerk gives him a standing in the court, and is all that is required of him unless the claim is contested. *Warden v. McKinnon*, 94 N.C. 378 (1886).

Each Complaint a Distinct Proceeding.—In proceedings under this section each complaint of the several creditors constitutes a distinct proceeding to be proceeded in separately. *Graham v. Tate*, 77 N.C. 120 (1877).

Institution of Proceedings Stops Running of Limitations.—Proceedings under this section instituted by one creditor prevent the running of the statute of limitations not only as to the claim of that creditor, but also as to the claims of those in whose behalf the proceedings are instituted. *Dobson v. Simonton*, 93 N.C. 268 (1885).

Allegations Necessary to Compel Representative to Sell Lands.—This section cannot be construed to empower a creditor or creditors to institute or maintain an action (where objection is raised by demurrer, certainly) to compel the personal representative to sell the lands of a decedent to make assets, unless it is alleged in the complaint that the personal estate is insufficient to discharge the debts, or has been exhausted and is no longer available for their satisfaction. *Clement v. Cozart*, 107 N.C. 695, 12 S.E. 254 (1890); *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891).

Termination of Special Proceedings.—Special proceedings commenced under this section are not terminated by being let

off the docket, but continue until all the debts are discharged and there is a final judgment. When so dropped from the docket, they may be brought forward on a motion. *Warden v. McKinnon*, 94 N.C. 378 (1886).

Nor does the termination of collateral issues, such as on contested claims, terminate such proceedings. *Warden v. McKinnon*, 94 N.C. 378 (1886).

Personal Judgment against Representative.—It is intimated that in special proceedings under this section the clerk has jurisdiction to render a personal judgment against the representative, where the latter has committed devastavit, as well as a judgment in his representative capacity. *Hester v. Lawrence*, 102 N.C. 319, 8 S.E. 915 (1889).

The costs of proceedings under this section are determined by the same provisions as are applicable to other proceedings. *Patterson v. Miller*, 72 N.C. 516 (1875).

Effect of Irregularities.—Where, under this section, the court has jurisdiction of the person and the subject matter, mere irregularities in the proceedings will not render them void, no objection being made as to such irregularities. *Brooks v. Brooks*, 97 N.C. 136, 1 S.E. 487 (1887).

Thus where the plaintiff does not purport to sue for himself and on behalf of all other creditors, in the absence of objection, the proceedings are not void. *Brooks v. Brooks*, 97 N.C. 136, 1 S.E. 487 (1887).

Motion to Issue Execution.—In view of the remedy given to the creditors under this section and other sections of this chapter, a motion for leave to issue execution against the estate of a decedent cannot be allowed. *Cowles v. Hall*, 113 N.C. 359, 18 S.E. 329 (1893).

Cited in *In re Hege*, 205 N.C. 625, 172 S.E. 345 (1934); *Buchanan v. Oglesby*, 207 N.C. 149, 176 S.E. 281 (1934).

§ 28-123. Rules which govern creditor's proceeding.—The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter. (1871-2, c. 213, s. 2; Code, s. 1449; Rev., s. 105; C. S., s. 111.)

Cross Reference.—For general statutes governing procedure in special proceedings, see § 1-393 et seq.

Summons and Complaint.—As the proceedings under the preceding section are not ex parte proceedings within the contemplation of § 1-400, but are adverse within the meaning of § 1-394, they must,

under the provisions of this section, be commenced by summons and complaint. *Isler v. Murphy*, 76 N.C. 52 (1877).

A creditor subsequently coming in, however, need not file a new complaint, unless his claim is denied. *Isler v. Murphy*, 76 N.C. 52 (1877).

§ 28-124. When and where summons returnable.—The summons in said special proceeding shall be returnable before the clerk of the superior court

of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof. (1871-2, c. 213, s. 3; Code, s. 1450; Rev., s. 106; C. S., s. 112.)

Effect of Irregularity in Time of Return.—Notwithstanding the irregularity in the time of the return as required by this section, the proceedings are valid unless objected to. *Brooks v. Brooks*, 97 N.C. 136, 1 S.E. 487 (1887).

§ 28-125. **Clerk to advertise for creditors.**—On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (1871-2, c. 213, s. 4; Code, s. 1451; Rev., s. 107; C. S., s. 113.)

It is the duty of the clerk to advertise as directed by statute. *Warden v. McKinnon*, 94 N.C. 378 (1886).

The mode of advertisement under this section is regulated by the provisions of § 28-126. *Hester v. Lawrence*, 102 N.C. 319, 8 S.E. 915 (1889).

Failure to Publish Is Assignable on Appeal.—Failure to publish as required by this and the succeeding section is an error which may be assigned by the repre-

sentative in an appeal from a judgment of the clerk to the superior court in term, even though no exception on this ground has been taken before the clerk. *Hester v. Lawrence*, 102 N.C. 319, 8 S.E. 915 (1889).

The proceedings, however, are not void for lack of advertisement (which is considered as a mere irregularity), unless objected to. *Brooks v. Brooks*, 97 N.C. 136, 12 S.E. 487 (1887).

§ 28-126. **Publication of advertisement.**—The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication. (1871-2, c. 213, s. 5; Code, s. 1452; 1903, c. 134; Rev., s. 108; C. S., s. 114.)

Cross Reference.—See note to § 28-125.

Advertisement Both Published and Posted.—The advertisement under this section must be both published in a news-

paper, and posted at the courthouse door. *Hester v. Lawrence*, 102 N.C. 319, 8 S.E. 915 (1889).

§ 28-127. **Creditors to file claims and appoint agent.**—The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office. (1871-2, c. 213, s. 6; Code, s. 1453; Rev., s. 109; C. S., s. 115.)

§ 28-128. **Proof of claims.**—If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given. (1871-2, c. 213, s. 7; Code, s. 1454; Rev., s. 110; C. S., s. 116.)

§ 28-129. **Representative to file claims; notice to creditors.**—On the day of his appearance the personal representative shall on oath give to the clerk

a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address. (1871-2, c. 213, s. 8; Code, s. 1445; Rev., s. 111; C. S., s. 117.)

§ 28-130. Clerk to exhibit to representative claims filed.—On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof. (1871-2, c. 213, s. 9; Code, s. 1456; Rev., s. 112; C. S., s. 118.)

§ 28-131. If representative denies claim, creditor notified.—Within five days thereafter the personal representative shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases. (1871-2, c. 213, s. 10; Code, s. 1457; Rev., s. 113; C. S., s. 119.)

Each Complaint a Distinct Proceeding.—Where, under this section, the claims of two or more creditors have been disputed and the issue joined upon the complaints sent to the superior court in pursuance of the succeeding section, the com-

plaint of each creditor constitutes a distinct proceeding, to be proceeded in separately so as to "let each tub stand on its own bottom." *Graham v. Tate*, 77 N.C. 120 (1877).

§ 28-132. Issues joined; cause sent to superior court.—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial. (1871-2, c. 213, s. 11; Code, s. 1458; Rev., s. 114; C. S., s. 120.)

Title of the Proceeding.—When, under this section, issues upon several complaints have been sent to the superior court, although the title of the cause should be in the name of the creditors who instituted the special proceedings, it is proper to make a further title setting out the name of the creditor upon whose

complaint the issues are raised. For example: "X, (the original creditor) v. Y., administrator. Issues on the complaint of Z." In this way the complaints of the several creditors will be kept separate and unnecessary confusion avoided. *Graham v. Tate*, 77 N.C. 120 (1887).

§ 28-133. When representative personally liable for costs.—If any personal representative denies the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue is finally decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it appears that he had reasonable cause to contest the claim and did so bona fide. (1871-2, c. 213, s. 12; Code, s. 1459; Rev., s. 115; C. S., s. 121.)

Cross Reference.—See note to § 28-115.
Correlation of This and § 28-122.—This section applies to cases where the admin-

istrator unreasonably denies a claim filed under § 28-122. *Valentine v. Britton*, 127 N.C. 57, 37 S.E. 74 (1900).

§ 28-134. Court may permit representative to appear after return day.—If the personal representative fails to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just. (1871-2, c. 213, s. 13; Code, s. 1460; Rev., s. 116; C. S., s. 122.)

§ 28-135. Clerk to state account.—Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the

estate of his deceased according to the course of his court. (1871-2, c. 213, s. 14; Code, s. 1461; Rev., s. 117; C. S., s. 123.)

§ 28-136. Exception to report; final report and judgment.—After the clerk has stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice. (1871-2, c. 213, s. 15; Code, s. 1462; Rev., s. 118; C. S., s. 124.)

Applied in *In re Estate of Bost*, 211 N.C. 440, 190 S.E. 756 (1937).

§ 28-137. Appeal from judgment; security for costs.—Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking. (1871-2, c. 213, s. 17; Code, s. 1464; Rev., s. 119; C. S., s. 125.)

Applied in *In re Estate of Bost*, 211 N.C. 440, 190 S.E. 756 (1937).

§ 28-138. Papers on appeal filed and cause docketed.—On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term. (1871-2, c. 213, s. 18; Code, s. 1465; Rev., s. 120; C. S., s. 126.)

§ 28-139. Prior creditors not affected by appeal may docket judgments.—If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon. (1871-2, c. 213, s. 19; Code, s. 1466; Rev., s. 121; C. S., s. 127.)

§ 28-140. Judgment where assets sufficient to pay a class.—If upon taking the account it is admitted, or is found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class is in litigation, the amount of such claim, with the probable cost of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended. (1871-2, c. 213, s. 20; Code, s. 1467; Rev., s. 122; C. S., s. 128.)

§ 28-141. Judgment where assets insufficient to pay a class.—If the assets are insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class. (1871-2, c. 213, s. 21; Code, s. 1468; Rev., s. 123; C. S., s. 129.)

§ 28-142. Contents of judgment; execution.—All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

- (1) The certain amount of the creditor's demand.
- (2) The amount of assets which the personal representative has applicable to such demand.

Execution may issue only for this last sum with interest and costs. (1871-2, c. 213, s. 22; Code, s. 1469; Rev., s. 124; C. S., s. 130.)

§ 28-143. **When judgment to fix with assets.**—No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets. (1871-2, c. 213, s. 23; Code, s. 1470; Rev., s. 125; C. S., s. 131.)

A judgment against an executor or administrator in his representative capacity merely establishes the debt sued on, and does not constitute a lien upon the lands of the estate, in the absence of a stipulation in the judgment to the contrary, until leave of court is granted for execution for failure of the representative to pay the ratable part of such judgment. *Tucker v. Almond*, 209 N.C. 333, 183 S.E. 407 (1936).

An absolute judgment against the representative neither fixes the defendant with assets nor disturbs the order of administration. It merely ascertains the debt sued on. *Dunn v. Barnes*, 73 N.C. 273 (1875).

Where a warranty deed was not regis-

tered until several years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor, and the grantee in the deed sold the land after the judgments had been docketed to a purchaser for value by warranty deed, it was held that under the provisions of this and §§ 28-144 and 28-148 the judgments did not constitute a lien on the land in violation of the warranty against encumbrances. *Tucker v. Almond*, 209 N.C. 333, 183 S.E. 407 (1936).

Applied in *Holmes v. Foster*, 78 N.C. 35 (1878); *Grant v. Bell*, 91 N.C. 495 (1884); *Hood v. Stewart*, 209 N.C. 424, 184 S.E. 36 (1936).

§ 28-144. **Form and effect of execution.**—All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally. (1871-2, c. 213, s. 24; Code, s. 1471; Rev., s. 126; C. S., s. 132.)

§ 28-145. **Report is evidence of assets only at date.**—The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates. (1871-2, c. 213, s. 25; Code, s. 1472; Rev., s. 127; C. S., s. 133.)

§ 28-146. **Creditor giving security may show subsequent assets.**—Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed so far as the same may be necessary. (1871-2, c. 213, s. 26; Code, s. 1473; Rev., s. 128; C. S., s. 134.)

§ 28-147. **Suits for accounting at term.**—In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require. (1876-7, c. 241, s. 6; Code, ss. 215, 1511; Rev., s. 129; C. S., s. 135.)

Extent of Jurisdiction Generally.—While the clerk of the superior court has exclusive original jurisdiction as to matters of probate and the judge has no

power therein unless the matter is brought before him by appeal, the superior court in term is by this section constituted a forum for the settlement of controversies

over estates. *State v. Griggs*, 223 N.C. 279, 25 S.E.2d 862 (1943); *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E.2d 651 (1951).

The superior court is given concurrent jurisdiction with the probate courts, that is, clerks of the superior courts, in actions of the class mentioned in this section. *Maryland Cas. Co. v. Lawing*, 223 N.C. 8, 25 S.E.2d 183 (1943); *Rudisill v. Hoyle*, 254 N.C. 33, 118 S.E.2d 145 (1961).

This section was construed in *Haywood v. Haywood*, 79 N.C. 42 (1878); *Fisher v. Southern Loan & Trust Co.*, 138 N.C. 91, 50 S.E. 592 (1905), and other cases, in all of which it is held that concurrent original jurisdiction with the probate court is conferred on the superior court in a civil action to settle estates and subject real estate to the payment of debts. *Bratton v. Davidson*, 79 N.C. 423 (1878); *Pegram v. Armstrong*, 82 N.C. 326 (1880); *Shober v. Wheeler*, 144 N.C. 403, 57 S.E. 152 (1907). The jurisdiction of the clerk of the superior court in such cases is not exclusive, but concurrent with that of the superior court. *State ex rel. Salisbury Morris Plan Co. v. McCanless*, 193 N.C. 200, 136 S.E. 371 (1927). See *Privette v. Morgan*, 227 N.C. 264, 41 S.E.2d 845 (1947).

Power of Judge in Term.—The expression in *Moore v. Ingram*, 91 N.C. 376 (1884), that "the judge in term has no jurisdiction over the settlement of intestates' estates" was made by inadvertence and only with reference to the situation presented in that case, not with reference to this section, which confers such jurisdiction in express terms. *Tillett v. Aydllett*, 93 N.C. 15 (1885).

Jurisdiction by Consent of Parties.—"A special proceeding before the clerk, instituted by the personal representative of a decedent to sell land to make assets, is, by consent, converted into an administration suit and heard by the judge. *Rigsbee v. Brogden*, 209 N.C. 510, 184 S.E. 24 (1936). If the parties are content to proceed in this way, perhaps the court ought not to object *sua sponte*. Its jurisdiction is not questioned. *Tillett v. Aydllett*, 93 N.C. 15 (1885)." *Edney v. Mathews*, 218 N.C. 171, 10 S.E.2d 619 (1940).

The jurisdiction and powers of the court are very comprehensive in actions of this nature as to the purposes contemplated by them. Hence the court is vested with all powers, such as the power to grant injunctions, appoint receivers, etc., to effectuate a just and equitable settlement of the controversy. *Godwin v. Watford*, 107 N.C. 168, 11 S.E. 1051 (1890).

Under this section the superior court

has jurisdiction to entertain suits brought not only by creditors, but also by any party interested in the proper administration of an estate. It may bring the creditors in as defendants and protect the rights of the parties by the appointment of a receiver. *Fisher v. Southern Loan & Trust Co.*, 138 N.C. 91, 50 S.E. 592 (1905).

Court May Safeguard Rights of All Parties—In an action by the beneficiaries to recover assets of the estate alleged to have been wrongfully dissipated by defendant administrator to the profit of the other defendants, alleged to have been in collusion with him, the fact that the administrator has been discharged will not preclude plaintiff's right to maintain the action for want of a personal representative to administer any recovery that might be had, since the court has power by proper action to safeguard the rights of all parties. *Johnson v. Hardy*, 216 N.C. 558, 5 S.E.2d 853 (1939).

Having Acquired Jurisdiction, Court May Retain the Cause.—In an action instituted under this section to declare a trust and to adjudge the liability of certain lands to the payment of legacies, the superior court (and also the Supreme Court) once having acquired jurisdiction of the controversy may retain the cause and incidentally grant the application of the personalty. *Devereux v. Devereux*, 81 N.C. 12 (1879).

All fiduciaries may be compelled by appropriate proceedings to account for their handling of properties committed to their care. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, or the court which appointed them may, *ex mero motu*, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Section Authorizes Actions in Nature of Bills to Surcharge and Falsify Accounts.—This section authorizes actions in the superior court in the nature of bills in equity to surcharge and falsify the accounts of administrators. *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

Suit in Nature of Creditor's Action.—An action to compel an executor to account and make settlement is necessarily a suit in the nature of a creditor's action.

Davis v. Davis, 246 N.C. 307, 98 S.E.2d 318 (1957).

Discretion of Court.—The matter of the approval of an agreement settling a widow's year's allowance and dower claim rests in the sound discretion of the superior court. *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E.2d 651 (1951).

Necessary and Proper Parties.—An action to compel the executors to account may be instituted by a legatee or heir. Executors are jointly liable for maladministration. They are necessary parties. All others interested in the settlement of the estate—creditors of the testator, as well as his legatees and other beneficiaries of the estate—are at least proper parties and in some instances may be necessary parties. *Davis v. Davis*, 246 N.C. 307, 98 S.E.2d 318 (1957).

Actions to surcharge and falsify the accounts of administrators may be instituted by creditors, or by legatees, or by distributees. Where the action is for maladministration of the estate of an intestate, the administrator and the sureties on his bond are necessary and proper parties. *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

This section is not confined to actions pertaining to final settlement in the administration of estates of deceased persons. *Maryland Cas. Co. v. Lawing*, 223 N.C. 8, 25 S.E.2d 183 (1943); *Rudisill v. Hoyle*, 254 N.C. 33, 118 S.E.2d 145 (1961).

Suit in Nature of Bill in Equity.—A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify the executor's account. *Thigpen v. Farmers' Banking & Trust Co.*, 203 N.C. 291, 165 S.E. 720 (1932).

An action for the breach of a representative's bond and for an account may, under this section, be brought before the superior court in term, without first seeking an account in the probate court. *Bratton v. Davidson*, 79 N.C. 423 (1878).

Under this section the distributees of an estate may bring suit originally in the su-

perior court against the administrator for an accounting and for a breach of his bond. *Leach v. Page*, 211 N.C. 622, 191 S.E. 349 (1937). See *Privette v. Morgan*, 227 N.C. 264, 41 S.E.2d 845 (1947).

Setting Aside Order Discharging Personal Representative.—Where it is made to appear that the administrator c.t.a. has funds in his hands belonging to the estate, a prior order of the clerk discharging the personal representative may be set aside by motion in the cause, and an action asserting a claim, which if established would constitute a debt of the estate, may be treated as such motion. *Mitchell v. Downs*, 252 N.C. 430, 113 S.E.2d 892 (1960).

Action by Surety on Guardian's Bond.—Where a guardian uses guardianship funds to improve and keep up property in which she is individually interested along with the wards, contributing nothing from her own funds, but taking her share of the rents, and violates her obligations as guardian in other respects, the surety on the guardian's bond may maintain an action in the superior court at term time prior to termination of the guardianship to enforce the liability of the guardian in exoneration of the surety, and to surcharge and correct the guardian's accounts, either at common law or under this section. *Maryland Cas. Co. v. Lawing*, 223 N.C. 8, 25 S.E.2d 183 (1943).

An action to recover for personal services rendered testator's wife is properly brought in the superior court, where it involves a construction of the will and an accounting. *Meares v. Williamson*, 209 N.C. 448, 184 S.E. 41 (1936).

The venue of an action under this section is the county of decedent's last domicile, where the will is probated. No objection as to the wrong venue, however, can be raised on an appeal if not raised in the court below. *Devereux v. Devereux*, 81 N.C. 12 (1879).

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

Cited in *Gurganus v. McLawhorn*, 212 N.C. 397, 193 S.E. 844 (1937); *Maryland Cas. Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).

§ 28-148. Proceedings against land, if personal assets fail.—If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceed-

ing shall be as is directed in other like cases. (1871-2, c. 213, ss. 27, 28; Code, ss. 1474, 1475; Rev., ss. 130, 131; C. S., s. 136.)

Necessity of Summons.—In a case falling under the provisions of this section it is unnecessary for the clerk to issue the summons referred to in this section where the parties are all in court. *Dickey v. Dickey*, 118 N.C. 956, 24 S.E. 715 (1896).

Insufficiency of Personalty.—Whether the proceedings to sell the real estate are under this section or § 28-122, it is essen-

tial that the insufficiency of the personalty be made to appear. *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891).

Applied in *Hood v. Stewart*, 209 N.C. 424, 184 S.E. 36 (1936).

Cited in *Gurganus v. McLawhorn*, 212 N.C. 397, 193 S.E. 844 (1937); *Pearson v. Pearson*, 227 N.C. 31, 40 S.E.2d 477 (1946).

ARTICLE 17.

Distribution.

§§ 28-149 to 28-152: Repealed by Session Laws 1959, c. 879, ss. 1, 14.

Cross References. — For present provisions as to order of distribution in cases of intestacy, advancements and next of

kin of illegitimates, see §§ 29-1 to 29-29. See Editor's Note under § 29-1.

§ 28-153. **Allotment to after-born child in real estate.**—The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there is enough for that purpose; and if there is none undevise, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child. (1868-9, c. 113, s. 108; Code, s. 1536; Rev., s. 138; C. S., s. 141.)

Cross References. — As to compelling contribution among heirs, see § 28-67. As to effect of after-born or after-adopted child on will, see § 31-5.5.

§ 28-154. **Allotment to after-born child in personal property.**—The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose; and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child. (1868-9, c. 113, s. 109; Code, s. 1537; Rev., s. 139; C. S., s. 142.)

After-Born Child of Intestate Shares in Estate. — This statutory provision clearly assumes and contemplates that an after-born child of an intestate shares in the estate, both real and personal, of such intestate. *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

Child Born to Intestate's Widow More Than 280 Days after His Death.—When it is asserted on behalf of a child born of the woman to whom the intestate was married and with whom he was living at the time of his death that the intestate was her father, the fact that such child was born more than ten lunar months or 280 days after the intestate's death, standing alone, does not preclude the child as a matter of law from receiving a child's share in the distribution of the intestate's personal estate, absent a statute so providing. Whether such child is the child of

intestate is determinable as an issue of fact. *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

If, under all relevant circumstances, a child is born more than ten lunar months or 280 days after the death of the intestate, the presumption is that the child was not en ventre sa mere when the intestate died. In the absence of evidence to the contrary, this presumption is determinative but this presumption may be rebutted by evidence tending to show that intestate was in fact the father of the child. Thus, when the issue is raised, the burden of proof rests upon such child to establish by the greater weight of the evidence that the intestate was the father. *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

As of What Time Contributions Made. —Contributions to make up the share of a child born after the execution of his fa-

ther's will, must be made by the legatees in proportion to their respective interests under the will, dated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time. *Johnson v. Chapman*, 54 N.C. 130 (1853).

Child Not en Ventre Sa Mere.—Before a child can be entitled to a distributive

share under the statute of distribution, it must appear that he was either in being or en ventre sa mere at the time of the death of the intestate. Thus a half brother of the intestate born ten months and a half after her death is not entitled to a distributive share, though born before distribution. *Grant v. Bustin*, 21 N.C. 77 (1835).

§ 28-155. Allotment of personalty from proceeds of realty.—If, after satisfaction of the child's share of real estate out of undeviseed lands, there is a surplus of such lands, and there is no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undeviseed land, or as much as may be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both deviseed and descended; and the same shall be set apart and secured as real estate to such child, if an infant or non compos. (1868-9, c. 113, s. 110; Code, s. 1538; Rev., s. 140; C. S., s. 143.)

§ 28-156. Effect of allotment of realty; contribution to equalize burden.—Upon the allotment of such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every one of them equitable, and in the ratio of the values of the several devisees and legacies. (1868-9, c. 113, s. 111; Code, s. 1539; Rev., s. 141; C. S., s. 144.)

Cross Reference.—As to compelling contribution among heirs, see § 28-67.

§ 28-157. After-born child on allotment deemed devisee or legatee.—An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels deviseed or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit. (1868-9, c. 113, s. 112; Code, s. 1540; Rev., s. 142; C. S., s. 145.)

§ 28-158. Before settlement executor may have claimants' shares in estate ascertained.—In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares

and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly. (1868-9, c. 113, s. 113; Code, s. 1541; Rev., s. 143; C. S., s. 146.)

Cited in *Sheppard v. Kennedy*, 242 N.C. 529, 88 S.E.2d 760 (1955).

§ 28-158.1. Distribution of assets in kind in satisfaction of bequests and transfers in trust for surviving spouse.—Whenever under any will or trust indenture the executor, trustee or other fiduciary is required to, or has an option to, satisfy a bequest or transfer in trust to or for the benefit of the surviving spouse of a decedent by a transfer of assets of the estate or trust in kind at the values as finally determined for federal estate tax purposes, the executor, trustee or other fiduciary shall, in the absence of contrary provisions in such will or trust indenture, be required to satisfy such bequest or transfer by the distribution of assets fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of such bequest or transfer. (1965, c. 764, s. 1.)

Editor's Note.—Section 1½ or c. 764, probated and trust indentures created after Session Laws 1965, provides that the provisions of this section shall apply to wills after June 1, 1965.

§ 28-158.2. Agreements with taxing authorities to secure benefit of federal marital deduction.—The executor, trustee, or other fiduciary having discretionary powers under a will or trust indenture with respect to the selection of assets to be distributed in satisfaction of a bequest or transfer in trust to or for the benefit of the surviving spouse of a decedent shall be authorized to enter into agreements with the Commissioner of Internal Revenue of the United States of America, and other taxing authorities, requiring the fiduciary to exercise the fiduciary's discretion so that cash and other properties distributed in satisfaction of such bequest or transfer in trust will be fairly representative of the net appreciation or depreciation in value on the date, or dates, of distribution of all property then available for distribution in satisfaction of such bequest or transfer in trust. Any such fiduciary shall be authorized to enter into any other agreement not in conflict with the express terms of the will or trust indenture that may be necessary or advisable in order to secure for federal estate tax purposes the appropriate marital deduction available under the Internal Revenue Laws of the United States of America and to do and perform all acts incident to such purpose. (1965, c. 744.)

Cross Reference.—As to federal and State income tax refunds and returns, see §§ 28-56.1 to 28-56.3.

§ 28-159. Legacy or distributive share recoverable after two years.—Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceeding therein conducted as prescribed in other cases of special proceedings. (1868-9, c. 113, s. 83; Code, s. 1510; Rev., s. 144; C. S., s. 147.)

When Suit for Legacy May Be Maintained.—Only after final account is filed or after the lapse of two years can a suit for a legacy be maintained. *King v. Richardson*, 136 F.2d 849 (4th Cir. 1943).

What Court Has Jurisdiction.—Under this section the probate court (i.e., the clerk of the superior court) has exclusive

jurisdiction of proceedings for the recovery of legacies and distributive shares. When, however, a specific pecuniary legacy has been given, and has been assented to by the executor, it becomes a debt, and must be recovered by action brought to the regular term of the superior court. *Hendrick v. Mayfield*, 74 N.C. 626 (1876).

Under this section the clerk of the superior court has original jurisdiction by special proceedings for the recovery of legacies, etc. But where an action is brought for the same to the regular term of the superior court, the defect is cured by the Act of 1870-'71, ch. 108 (Bat. Rev. ch. 17, ss. 425, 426). *Bell v. King*, 70 N.C. 330 (1874).

Proof of Assets.—While under this section a petition for the recovery of a legacy may be filed before the clerk of the superior court and prosecuted as in other cases of special proceedings, unless the personal representative has assented to the legacy or the admission of assets is otherwise made to appear, a recovery can be had only upon proof that assets either have come or should have come into his hands applicable to the payment of the legacy. Unless this is done a judgment in the legatee's favor is reversible error. *York*

§ 28-160. Payment to clerk after one year discharges representative pro tanto.—It is competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid. (1881, c. 305, s. 1; Code, s. 1543; Rev., s. 145; C. S., s. 148.)

Cross References.—As to payment to clerk of money owed intestate, see § 28-68. As to receipt of clerk, see § 28-68.1.

The purpose of this section is to provide a safe public depository for such moneys and the exoneration of the personal representative. *Ex parte Cassidey*, 95 N.C. 225 (1886).

Provisions Directory. — The provisions of this section are directory, and not mandatory. *Moore v. Eure*, 101 N.C. 11, 7 S.E. 471 (1888); *Thomas v. Connelly*, 104 N.C. 342, 10 S.E. 520 (1889).

Clerk's Responsibility.—Moneys paid to the clerk under this section do not pass into the jurisdiction of the superior court, but the clerk receives and is chargeable with them, not, however, by virtue of his duties in connection with the court as a clerk, but as a safe public depository. *Ex parte Cassidey*, 95 N.C. 225 (1886).

He receives them by virtue of his office as a clerk, and hence (his bond covering all moneys coming into his hands by virtue or color of his office) he is liable for them upon his bond. *Presson v. Boone*, 108 N.C. 78, 12 S.E. 897 (1891). See *Thomas v. Connelly*, 104 N.C. 342, 10 S.E. 520 (1889).

Liability for Interest.—Where funds be-

v. McCall, 160 N.C. 276, 76 S.E. 884 (1912).

In special proceedings to remove an administratrix, her rights as distributee may not be determined, such rights being determinable only in an action or proceeding in which both she and the administrator are parties. In *re Banks' Estate*, 213 N.C. 382, 196 S.E. 351 (1938).

Where executors never delivered stock to the trustees of a trust, they are not protected by the conveyance made by the trustees to the holder of the life interest, who was one of their number, but they too are liable for the value of the stock, since as executors they held it as trustees for those to whom it was devised. *King v. Richardson*, 136 F.2d 849 (4th Cir. 1943).

Applied in *Security Nat'l Bank v. Bridgers*, 207 N.C. 91, 176 S.E. 295 (1934).

longing to a minor are paid into the hands of the clerk of the superior court by an administrator under the provisions of this section, discharging the administrator and his sureties from liability in regard thereto, it is not required by §§ 2-46 and 28-166 that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested; but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody. *Williams v. Hooks*, 199 N.C. 489, 154 S.E. 828 (1930).

Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of this section, the case will be remanded for a specific finding in regard thereto. *Williams v. Hooks*, 199 N.C. 489, 154 S.E. 828 (1930).

Deposit of Moneys of Heirs.—The deposit authorized by this section refers to

moneys belonging to the legatees or distributees of the estate. It does not refer to funds belonging to the heirs, such as proceeds of realty after payment of debts, which by the terms of § 28-58 are considered as realty belonging to the heirs

or devisees. *Thomas v. Connelly*, 104 N.C. 342, 10 S.E. 520 (1889).

Applied in *Hunter v. Nunnamaker*, 230 N.C. 384, 53 S.E.2d 292 (1949).

Cited in *In re Estate of Perry*, 256 N.C. 65, 123 S.E.2d 99 (1961).

§ 28-160.1. Special proceeding against unknown heirs or next of kin of decedent before distribution of estate.—If there may be other heirs or next of kin, born or unborn, of the decedent, other than those known to the executor or administrator and whose names and residences are unknown, before distributing such estate the executor or administrator is authorized to institute a special proceeding before the clerk making all unknown heirs or next of kin of said decedent parties thereto and such unknown heirs or next of kin shall be served with summons by publication as provided by law for the service of summons by publication in the superior court but as a condition precedent to the issuance of the order of publication, the executor or administrator shall not be required to make affidavit to the effect that there are such unknown heirs or next of kin or that he believes that there are such persons, but only that there may be. Upon such service being had, the court shall appoint some discreet person to act as guardian ad litem for said unknown heirs or next of kin and summons shall issue as to such guardian ad litem. Said guardian ad litem shall file answer upon behalf of said unknown heirs or next of kin and he may be paid for his services such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem all such unknown heirs and next of kin shall be before the court for the purposes of the proceeding to the same extent as if each had been served with summons by name, and any judgment entered by the court in such proceeding shall be as binding upon said unknown heirs or next of kin as if they were personally before the court and any payment or distribution made by the executor or administrator under orders of the court shall have the effect of fully discharging such executor or administrator and any sureties on his official bond to the full extent of such payment or distribution as ordered. (1957, c. 1248.)

The purpose of giving notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice. *Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).

Strict Compliance Required.—Service by publication is in derogation of the common law and strict compliance is required. *Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).

Sufficiency of Notice.—Notice merely to

known and unknown heirs is insufficient if more definite identification is available. *Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).

Next of kin have a right to be heard before the court decrees they are precluded from sharing in the estate of their next of kin who dies intestate, and are entitled to such notice of the hearing as the law provides, which may be by proper publication in the event personal service cannot be had. *Bank of Wadesboro v. Jordan*, 252 N.C. 419, 114 S.E.2d 82 (1960).

§ 28-161. On payment clerk to sign receipt.—It is the duty of the clerk, in the cases provided for in § 28-160, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office. (1881, c. 305, s. 3; Code, s. 1544; Rev., s. 146; C. S., s. 149.)

Cross References.—See note, to § 28-160. As to receipt of clerk of superior court, see § 28-68.1.

Recovery of Moneys Paid into Clerk's Office.—A proceeding similar to that provided in §§ 28-147 and 28-159 may be maintained against the clerk, either by special proceedings or by civil action in

the superior court, in cases where a representative has paid the money in his hands into the office of the clerk under § 28-160. *Ex parte Cassidey*, 95 N.C. 225 (1886).

Cited in *In re Estate of Perry*, 256 N.C. 65, 123 S.E.2d 99 (1961).

ARTICLE 17A.

Uniform Simultaneous Death Act.

§ 28-161.1. **Disposition of property where no sufficient evidence of survivorship.**—Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this article. (1947, c. 1016, s. 1.)

§ 28-161.2. **Beneficiaries of another person's disposition of property.**—Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived. (1947, c. 1016, s. 2.)

§ 28-161.3. **Joint tenants or tenants by the entirety.**—Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one half as if one had survived and one half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants. (1947, c. 1016, s. 3.)

§ 28-161.4. **Insurance policies.**—Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. (1947, c. 1016, s. 4.)

§ 28-161.5. **Article does not apply if decedent provides otherwise.**—This article shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this article. (1947, c. 1016, s. 6.)

§ 28-161.6. **Uniformity of interpretation.**—This article shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it. (1947, c. 1016, s. 7.)

§ 28-161.7. **Short title.**—This article may be cited as the Uniform Simultaneous Death Act. (1947, c. 1016, s. 8.)

ARTICLE 18.

Settlement.

§ 28-162. **Representative must settle after two years.**—No executor, administrator, or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased; and the clerk of the superior court in each county shall require settlement of the balance in hand due distributees as shown by the final account of any administrator, executor, or guardian, and shall audit same: Provided, that the several clerks of the superior courts of this State may, in their dis-

cretion, for good cause shown, extend the time for the final settlement of any administrator or executor; provided, that nothing herein contained shall relieve any such administrator or executor of the duty of administering and distributing such funds and property in his hands as may be available for such purposes; provided, further, that any party having an interest in any such estate may, within ten days from the entry of an order extending the time for final settlement, appeal from such order to the resident or presiding judge of the district, which appeal shall be heard as is now or may hereafter be prescribed by law for the hearing of other appeals from the clerk. (1868-9, c. 113, s. 59; Code, s. 1488; Rev., s. 147; 1919, c. 69; C. S., s. 150; 1933, c. 188; 1935, c. 377.)

Editor's Note.—The allowance of two years in this section is intended as a maximum limitation beyond which the representative may not retain any part of the estate; it is not a permissive limitation for a period of two years. It is based upon the supposition that many estates which are complicated cannot be settled in less time. Hence where there are no debts due from the estate, the representative will not be permitted to suspend the settlement for a period of two years. See *Turnage v. Turnage*, 42 N.C. 127 (1850).

This section merely marks the utmost limit of time in which the representative must settle; it does not authorize him to withhold settlement for that length of time (two years) where there is no justification therefor. Hence the parties interested may call on him to account within that period. *Snow v. Boylston*, 185 N.C. 321, 117 S.E. 14 (1923). See *Clements v. Rogers*, 91 N.C. 63 (1884).

The final account always precedes the settlement, for without it there is no way of telling what is due. *Self v. Shugart*, 135 N.C. 185, 47 S.E. 484 (1904).

Statute of Limitation.—After ten years from the expiration of the two years' period prescribed by this section, an action

for settlement against the personal representative will be barred by the statute of limitation. *Edwards v. Lemmond*, 136 N.C. 329, 48 S.E. 737 (1904).

This section gives the personal representative two years to make a final settlement, but he may be sued within ten years thereafter. *Healey v. R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207 (M.D.N.C. 1942).

Representative May Terminate Administration before Expiration of Two Years.—An executrix had a legal right to terminate administration of estate without waiting for the expiration of two years from her qualification as executrix. *Darden v. Boyette*, 247 N.C. 26, 100 S.E.2d 359 (1957).

Legatee Seeking to Recover Legacy Must First Surcharge Final Account.—When an executor has filed his final account which omits a legacy, the legatee must, in an action to recover it from the executor, first surcharge his final account. *Davis v. Singleton*, 259 N.C. 148, 130 S.E.2d 10 (1963).

Stated in *Allen v. Currie*, 254 N.C. 636, 119 S.E.2d 917 (1961).

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

§ 28-163. Extension of time for final accounts when funds are in closed banks.—Where as much as twenty-five percent of the estate of any decedent is represented by deposits in a bank or trust company in course of liquidation, the personal representative of such decedent shall, in the discretion of the clerk of the superior court, have ninety days after the payment of the final dividend in which to file his final account. The several clerks of the superior court of this State may, in their discretion, upon good cause shown, extend the time for the final settlement of any executor or administrator: Provided, that this section shall not relieve any personal representative of the duty of administering and distributing other funds and property in his hands, as now required by law. (1935, c. 244.)

§ 28-164. Retention of funds to satisfy claims not due or in litigation.—If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allow-

ing such sum to be retained must specify the amount and nature of the claim. (1868-9, c. 113, s. 60; Code, s. 1489; Rev., s. 148; C. S., s. 151.)

No Allowance for Contingent Liabilities.—Claims for which an allowance will be made to the representative, within the contemplation of this section, are such claims as are existing and capable of being ascertained, and not a mere contin-

gent liability which may never ripen into a cause of action, such as the contingent liability of a surety or cosurety on an administration bond. *Miller v. Shoaf*, 110 N.C. 319, 14 S.E. 800 (1892).

§ 28-165. After final account representative may petition for settlement.—An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right. (1868-9, c. 113, s. 96; Code, s. 1525; Rev., s. 150; C. S., s. 152.)

Cross Reference.—As to filing of final account after six months, see § 28-47.1.

Payment of Debts Necessary.—The personal representative should pay all debts before beginning a proceeding under this section. *Carlton v. Byers*, 93 N.C. 302 (1885).

Allegations of Petition.—Where the petition filed under this section does not state that the personal representative has filed a final account or that he has the funds ready in hand for distribution, the petition will be dismissed. *Moore v. Rankin*, 172 N.C. 599, 90 S.E. 759 (1916). See *Self v. Shugart*, 135 N.C. 185, 47 S.E. 484 (1904).

Judgment as to Personalty Advancements Not Bar to Proceedings to Determine Realty Advancements.—Petition was filed by the administrator under this section for direction in the distribution of the surplus of personalty in view of advancements made by intestate to the heirs and distributees either in money, or land, or both. Judgment was entered that intestate had advanced money in a certain sum to

certain of the distributees and directed the administrator to disburse the personalty after adjustment for such advances, with further provision that the order was made without prejudice to the interests of the heirs at law in the realty. There was no allegation that any heir had been advanced realty over and above the share of realty which might come to the other heirs. It was held that the question of advancements of realty was neither presented nor could it have been properly determined in the administrator's proceeding for direction in the distribution of the personalty, and therefore it does not bar a subsequent proceeding by some of the heirs to charge others in the partition of the lands of the estate with advancements in realty. *King v. Neese*, 233 N.C. 132, 63 S.E.2d 123 (1951).

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

Cited in *In re Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929); *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E.2d 327 (1950).

§ 28-166. Payment into court of fund due infant.—When any balance of money or other estate which is due an infant without guardian is found in the hands of an executor, administrator or collector who has filed his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such infant. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C. S., s. 153; 1965, c. 815, s. 3.)

Cross Reference.—As to the manner of investment of funds in the hands of clerks of court under color of their office, see § 2-54 et seq. It has been suggested in 9 N.C.L. Rev. 399 that this section is implicitly repealed in part by those sections.

Editor's Note. — The 1965 amendment

eliminated "absent defendant or" preceding "infant" near the beginning of the section, substituted "filed" for "preferred" near the middle of the section and eliminated "absent person or" preceding "infant" at the end of the section.

§ 28-167: Repealed by Session Laws 1965, c. 815, s. 4.

§ 28-168. **Parties to proceeding for settlement.**—In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record. (1893, c. 206; Rev., s. 154; C. S., s. 155.)

§ 28-169. **When legacies may be paid in two years.**—It is in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund. (Code, s. 1512; Rev., s. 155; C. S., s. 156.)

Expiration of Two Years Not Prerequisite to Payment.—The provision of this section is only a legislative affirmance of the law as it existed before the Code. The allowance of two years to the representative is intended as an indulgence; it does not authorize him to defer the settlement until the expiration of that time, without necessity. *Clements v. Rogers*, 91 N.C. 63 (1884).

It follows that in a petition filed against the representative for settlement absence of allegation that two years have elapsed

since his qualification is immaterial, where it is alleged that the estate is solvent and that there is no reason why the representative should further retain the fund. *Leonard v. Leonard*, 107 N.C. 168, 11 S.E. 1051 (1890).

Call for Account within Two Years.—The representative may be called upon by the legatees or the next of kin to account for the distributive shares and legacies even before the expiration of two years from the time of grant of administration. *Hobbs v. Craige*, 23 N.C. 332 (1840).

§ 28-170. **Commissions allowed representatives; representatives guilty of misconduct or default.**—Executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries shall be entitled to commissions to be fixed in the discretion of the clerk not to exceed five percent upon the amount of receipts, including the value of all personalty when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. Provided, however, when the gross value of an estate is two thousand dollars (\$2,000.00) or less, the clerk is authorized and empowered to fix the commission to be received by the executor, administrator, testamentary trustee, creditor or other personal representative in an amount as he, in his discretion, deems just and adequate. In determining the amount of such commissions, both upon personalty received and upon expenditures made, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. Where land is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies. The clerk may make allowances on account of commissions on receipts of personalty and expenditures at any time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit herein fixed. Nothing in this section shall prevent the clerk allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate. Nothing in this section shall be construed to allow commissions on distribution of the shares of heirs, on distribution of the shares of distributees of personal property or on

distribution of shares of legatees; and nothing herein contained shall be construed to abridge the right of any interested party to such administration to appeal from the clerk's order to the judge of the superior court. No executor, administrator, testamentary trustee, collector or other personal representative or fiduciary, who shall have been guilty of such default or misconduct in the due execution of his office as would justify revocation of his appointment under the provisions of G.S. 28-32, shall be entitled to any commission under the provisions of this section. For the purpose of computing commissions whenever any portion of the dividends, interest, rents or other amounts payable to an executor, administrator, trustee, collector or other personal representative or fiduciary is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to have been received and expended. (1868-9, c. 113, s. 95; 1869-70, c. 189; Code, s. 1524; Rev., s. 149; C. S., s. 157; 1941, c. 124; 1953, c. 855; 1959, c. 622; c. 879, s. 8; 1961, cc. 362, 575.)

Cross Reference.—As to proof and payment of debts of decedent, see § 28-105 et seq.

Editor's Note.—For comment on the 1941 amendment, see 19 N.C.L. Rev. 543.

Authority of Clerks of Court Where Representative Qualifies.—The clerk of the superior court where the personal representative qualifies has authority to fix the amount of fees to which an executor or administrator is entitled. *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963).

Discretion of Clerk.—The allowance of commissions, by way of compensation, to an executor requires the exercise of judicial discretion and judgment by the clerk of the superior court. It is he who has original jurisdiction. If any interested party conceives that the allowance made by him is either inadequate or excessive, or is made under an erroneous conception of the law, he may appeal. But the Supreme Court, upon review of the compensation allowed, cannot perform the function of the clerk, for it has no original jurisdiction in such matters. *Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E.2d 151 (1953).

Section Controls in Absence of Testamentary Provision.—In the absence of an effective testamentary provision on the subject, the right of the personal representative of a decedent to compensation is controlled by this section. In *re Ledbetter*, 235 N.C. 642, 70 S.E.2d 667 (1952).

A testator may stipulate in his will the compensation to be paid the person appointed executor with power to settle his estate. When this is done the provisions of the will are binding on all interested parties. But an executor has no right to fix and determine the compensation to be received by him. *Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E.2d 151 (1953).

Maximum Percentage Set by Will Controls.—Where the will does not fix or purport to fix the compensation to be paid testator's executor as compensation for services in settling his estate, but merely fixes the maximum percentage on receipts and disbursements at $2\frac{1}{2}\%$, it is the duty of the clerk to make an allowance to the executor subject to the maximum limitation stipulated in the will rather than the maximum fixed by this section. *Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E.2d 151 (1953).

The terms "receipts" and "expenditures," as used in this section, refer to the actual receipts and the actual expenditures of the personal representative. An administrator has no lawful claim to commissions on the credits or offsets deducted by a consent judgment from the indebtedness of his testate. This is so for the reason that the deductions were neither actually received nor actually expended by the administrator. In *re Ledbetter*, 235 N.C. 642, 70 S.E.2d 667 (1952).

Section Does Not Affect Powers of Clerk as to Fees of Commissioners.—This section does not divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of § 1-408 with respect to the fees of commissioners appointed for the sale of land as provided therein. *Welch v. Kearns*, 259 N.C. 367, 130 S.E.2d 634 (1963).

Representative Not Entitled to Commissions at All Events.—The representative is not, under this section, entitled to commission at all events. He must have earned them by a just and reasonable discharge of his duties. It must appear that the "receipts and expenditures" referred to have been fairly made in the course of administration. The law will not allow compensation to one who disregards its

commands. *Grant v. Reese*, 94 N.C. 720 (1886).

When Commissions and Charges Should Not Be Allowed.—The compensation is allowed to the representative in order to reward him not only for his time, labor and trouble but also for the responsibility incurred, and the fidelity with which he discharged the duties of his trust. It should not be allowed where due to his neglect the estate has suffered loss. *Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905).

This same rule applies to the allowance of necessary charges and disbursements, such as counsel fees, *Kelly v. Odum*, 139 N.C. 278, 51 S.E. 953 (1905); for example, where the representative resists a claim which has been adjudged against him in a prior litigation. *Johnson v. Marcom*, 121 N.C. 83, 28 S.E. 58 (1897).

Commissions are allowed where one person is both administrator and guardian of distributee. *Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).

Attorney as Executor.—When a lawyer voluntarily becomes executor he assumes the office cum onere, and the exercise by him of his professional skill in the management of the estate does not entitle him to counsel fees, but his compensation is limited to the five percent maximum allowed by this section. *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942).

Commission on Both Receipts and Disbursements. — Commissions may be allowed to the representative on both receipts and disbursements, as separate acts. *Battery Park Bank v. Western Carolina Bank*, 126 N.C. 531, 36 S.E. 39 (1900).

Commission on Specific Property Administered. — It was formerly held that specific articles merely inventoried by an executor and delivered to the legatee, were not "receipts," within the meaning of this section, upon which a commission was to be calculated. It was held that it might

be proper, in estimating the commission, to take into consideration the trouble of managing such articles, but that the value of such articles was not to be the basis of such computation. *Walton v. Avery*, 22 N.C. 405 (1839), decided prior to the 1941 amendment to this section, which, among other changes, inserted the words "including the value of all personalty when received" in the first sentence.

Dower as an "Interest in the Estate".—Manifestly, a claim of dower is an "interest" in the estate. Hence the wording of this section lends direct support to a judgment giving priority to commissions due executors, reasonable attorney's fees and costs. *Parsons v. Leak*, 204 N.C. 86, 167 S.E. 563 (1933).

Necessary Charges. — Besides commissions, the representative is allowed to retain his expenses for necessary charges and disbursements in the settlement of the estate. Among these necessary charges fees paid to counsel are embraced. *Hester v. Hester*, 38 N.C. 9 (1843); *Love v. Love*, 40 N.C. 201 (1848); *Fairbairn v. Fisher*, 58 N.C. 385 (1860).

Order for Commissions Final Judgment.—An order allowing commissions is a final judgment upon which an appeal may be taken. *Battery Park Bank v. Western Carolina Bank*, 126 N.C. 531, 36 S.E. 39 (1900).

Appeal on Commission under 5%. — Notwithstanding the fact that the amount of commissions allowed in a given case has not exceeded 5% on the receipts and disbursements, the allowance is reviewable upon appeal for inadequacy or excessiveness. It cannot strictly be said that the lower court has exclusive discretion within the limit of 5%. *Battery Park Bank v. Western Carolina Bank*, 126 N.C. 531, 36 S.E. 39 (1900).

Applied in *In re Hege*, 205 N.C. 625, 172 S.E. 345 (1934); *Welch v. Kearns*, 261 N.C. 171, 134 S.E.2d 155 (1964).

§ 28-170.1. Counsel fees allowable to attorneys serving as representatives.—The clerk, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as an executor, administrator, testamentary trustee, collector, or other personal representative or fiduciary (in addition to the commissions allowed him as such representative or fiduciary) where such attorney in behalf of the estate or trust he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative or fiduciary not himself licensed to practice law. (1957, c. 375.)

Cross Reference.—As to proof and payment of debts of decedent, see § 28-105 et seq.

§ 28-171. **Liability and compensation of clerk.**—Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow. (1868-9, c. 113, s. 98; Code, s. 1527; Rev., s. 152; C. S., s. 158.)

Cross Reference.—As to transfer of funds to administrator and for provision stating that clerk shall receive no commis-

sion for making such payment, see § 28-68.3.

ARTICLE 19.

Actions by and against Representative.

§ 28-172. **Action survives to and against representative.**—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate. (1868-9, c. 113, s. 63; Code, s. 1490; Rev., s. 156; C. S., s. 159.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—For a discussion of this section, see note to Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946), in 25 N.C.L. Rev. 84. For note on survival of actions for alienation of affections and criminal conversation, see 35 N.C.L. Rev. 428 (1957).

Section Changes Common Law.—The rule of the common law that a personal right of action dies with the person has been changed by this section and § 1-74, and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. *Suskin v. Maryland Trust Co.*, 214 N.C. 347, 199 S.E. 276 (1938). See *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350 (1906).

The rule of the common law that a personal right of action dies with the person has been changed by § 1-74 and this section. *Paschal v. Autry*, 256 N.C. 166, 123 S.E.2d 569 (1962).

This section clearly manifests a two-fold legislative purpose: (1) To declare what causes of action survive the death of the person in whose favor or against whom they have accrued; and (2) to designate the persons who may sue or be sued upon such surviving causes of action. *McIntyre v. Josey*, 239 N.C. 109, 79 S.E.2d 202 (1953).

The collector of the estate of a deceased tort-feasor can be sued in his representative capacity upon a cause of action under this section. *McIntyre v. Josey*, 239 N.C. 109, 79 S.E.2d 202 (1953).

Relation of Revival and Survival.—The

general rule is that wherever an action can be revived against the representative, it will also survive against him. *Butner v. Keelhn*, 51 N.C. 60 (1958).

A cause of action which survives against successor personal representatives of an estate likewise survives in favor of successor personal representatives of the estate. *Harrison v. Carter*, 226 N.C. 36, 36 S.E.2d 700 (1946), citing *Suskin v. Maryland Trust Co.*, 214 N.C. 347, 199 S.E. 276 (1938).

All Causes of Action Survive Except Those Specified in § 28-175.—It appears that under this section all causes of action survive the death of the person in whose favor or against whom they have accrued, except the causes of action specified in G.S. 28-175. *McIntyre v. Josey*, 239 N.C. 109, 79 S.E.2d 202 (1953).

Cause of Action for Tortious Injury to Personal Property.—Since it is not one of the causes of action enumerated in G.S. 28-175, a cause of action for a tortious injury to personal property survives the death of either party. *McIntyre v. Josey*, 239 N.C. 109, 79 S.E.2d 202 (1953).

Generally Debt Due Decedent Can Be Collected Only by Administrator.—If a debt is due a decedent, it can be collected only by his administrator. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

Since pending the administration of an estate title to personal property of an intestate vests in his administrator and not his next of kin, it necessarily follows that the administrator, and not creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property.

Spivey v. Godfrey, 258 N.C. 676, 129 S.E.2d 253 (1963).

Injuries to Person Not Causing Death.

—It was formerly held that this section did not change the common-law rule that a right of action sounding in tort for personal injuries does not survive the tortfeasor or the injured person where the injury did not cause death, in view of the express terms of the statute from which § 28-175 is derived, which then provided that injuries to the person not causing death to the injured party shall not survive. See *Harper v. Commissioners of Nash County*, 123 N.C. 118, 31 S.E. 384 (1898); *Strauss v. Wilmington*, 129 N.C. 99, 39 S.E. 772 (1901); *Bolick v. Southern R.R.*, 138 N.C. 370, 50 S.E. 689 (1905); *Watts v. Vanderbilt*, 167 N.C. 567, 83 S.E. 813 (1914). And under the same provision, it was held that an action for mental anguish caused by failure to deliver a telegram did not survive. *Morton v. Western Union Tel. Co.*, 130 N.C. 299, 41 S.E. 484 (1902).

But the said provision no longer appears, and the fact that the injury in suit did not cause the death of the injured party, but that death resulted from another cause, does not now prevent the survival of an action for negligent injury. *Fuquay v. A.&W. Ry.*, 199 N.C. 499, 155 S.E. 167 (1930).

The breach of a condition subsequent contained in a deed entitles the grantor during his life, or his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, this section not being applicable. *Barkley v. Thomas*, 220 N.C. 341, 17 S.E.2d 482 (1941).

This section does not revive the action against a distributee, but against the personal representative. *Healey v. R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207 (M.D.N.C. 1942).

Bank Deposit Vests in Personal Representative.—Where a bank was obligated in an unstated amount to its depositor, when he died, the relationship theretofore subsisting was that of debtor and creditor, and the title to said account vested in the depositor's personal representative for collection and administration. *Monroe v. Dietenhoffer*, 264 N.C. 538, 142 S.E.2d 135 (1965).

To the general rule that the administrator must bring suit there are certain exceptions. If the administrator has refused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative—par-

ticularly if the latter is insolvent; or, if some other peculiar circumstance warrants it, the creditors or next of kin may bring the action which the personal representative should have brought. However, in such a case the administrator must be a party defendant. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

Suit by Next of Kin to Collect His Share of Decedent's Funds in Hands of Third Party.—A suit by one of the next of kin to collect his share of decedent's funds in the hands of a third person is no different from a suit by a creditor of the estate to collect a debt due it. In the absence of allegations bringing the suit within one of the exceptions, this has never been permitted. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

Without alleging that the administrator has refused to bring suit or that there was collusion, one of six next of kin of an intestate, by making his administrator a party defendant, may not maintain an action against another of the next of kin for his distributive share of decedent's money which that other is wrongfully withholding. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

Removal of Personal Representative for Failure to Prosecute or Defend Action.—In a proper case, a personal representative may be removed for failure to prosecute or defend actions in behalf of the estate he represents, but clearly a request to sue and a refusal would be conditions precedent. *Spivey v. Godfrey*, 258 N.C. 676, 129 S.E.2d 253 (1963).

Action for Wrongful Cutting and Removal of Timber.—If a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to the deceased, in whole or in part, accrued during his lifetime, the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees. *Paschal v. Autry*, 256 N.C. 166, 123 S.E.2d 569 (1962).

Vindictive Damages.—Though the cause of action for trespass may survive against the representative of the trespasser, no vindictive damages may be recovered in such action. *Rippey v. Miller*, 33 N.C. 247 (1850).

Applied in *James Baird Co. v. Boyd*, 41 F.2d 578 (4th Cir. 1930); *Hoke v. Atlantic Greyhound Corp.*, 227 N.C. 412, 42 S.E.2d 593 (1947); *Inman v. Mears*, 247 N.C. 661, 101 S.E.2d 692 (1958).

Cited in Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937); Morgan v. Carolina Coach Co., 225 N.C. 668, 36 S.E.2d 263 (1945); Clark v. Lambreth, 235 N.C. 578, 70 S.E.2d 828 (1952); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955); Mozingo v. Consolidated Constr. Co., 171 F. Supp. 396 (E.D. Va. 1959).

§ 28-173. Death by wrongful act; recovery not assets; dying declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars (\$500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence. (R. C., c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70, 72, 115; Code, ss. 1498, 1500; Rev., s. 59; 1919, c. 29; C. S., s. 160; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136.)

- I. In General.
- II. Limitation of the Action.
- III. Parties to the Action.
- IV. Distribution of Recovery.
- V. Admission of Declarations.

I. IN GENERAL.

Cross Reference.—See note to § 1-183.

Editor's Note.—The 1951 amendment removed the one year after death time limitation on bringing the action. See notes under analysis line II.

For critical appraisal of this section, see 11 N.C.L. Rev. 263. And see 16 N.C.L. Rev. 211. For a discussion of the right of husband or wife to recover damages for the loss of consortium by reason of injury or death, see 3 N.C.L. Rev. 98. For note on possibility of recovery for wrongful death of unborn child, see 28 N.C.L. Rev. 245. As to necessity prior to the 1951 amendment for alleging that action for wrongful death was instituted within one year, see 28 N.C.L. Rev. 334. For note on action for death based upon breach of warranty of fitness in sale of drug, see 30 N.C.L. Rev. 478 (1952).

Purpose of Section.—The purpose of this section was to withdraw claims of this kind from the effect and operation of the maxim *actio personalis moritur cum persona*, and to continue, as the basis of the claim of his estate, the wrongful injury to the person resulting in death.

Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Section Creates New Cause of Action.

The cause of action for personal injuries ceases with the death of the injured party and the action under this section is not a survival of the former but an entirely new action. Harper v. Commissioners of Nash County, 123 N.C. 118, 31 S.E. 384 (1898); Bolick v. Southern R.R., 138 N.C. 370, 50 S.E. 689 (1905). See Taylor v. Cranberry Iron & Coal Co., 94 N.C. 525 (1886).

This section creates a new cause of action, however, only in the sense that at common law the right did not survive to the personal representative. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

The wrongful death statutes (now this and the following section) confer a new right of action with damages limited to fair and just compensation for the pecuniary injury resulting from death, recoverable by the personal representative for the benefit of the next of kin. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946). See McCoy v. Atlantic Coast Line R.R., 229 N.C. 57, 47 S.E.2d 532 (1948).

In North Carolina the action for wrongful death exists only by virtue of this and the following section. In re Ives' Estate, 248 N.C. 176, 102 S.E.2d 807 (1958).

The right of action for wrongful death

is purely statutory. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

In North Carolina a right of action to recover damages for wrongful death is given by this section and § 28-174, and in this jurisdiction the action for wrongful death exists only by virtue of these statutes. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

No Such Right Existed at Common Law.—The right of recovery for death by wrongful act did not exist at common law, and rests entirely upon this section. *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912); *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925); *Wilson v. Massagee*, 224 N.C. 705, 32 S.E.2d 335 (1944); *Webb v. Eggleston*, 228 N.C. 574, 46 S.E.2d 700 (1948); *Lewis v. North Carolina State Highway & Pub. Works Comm'n*, 228 N.C. 618, 46 S.E.2d 705 (1948); *Bryant v. Atlantic Coast Line R.R.*, 248 N.C. 43, 102 S.E.2d 393 (1958).

No right of recovery for death by wrongful act existed at common law. *Colyar v. Atlantic States Motor Lines*, 231 N.C. 318, 56 S.E.2d 647 (1949).

The right to maintain an action for wrongful death is purely statutory. No such right existed at common law, and the provisions of this section authorizing the institution and maintenance of such an action are no more binding upon the courts than the provisions of this section which direct how the recovery in such action shall be distributed. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947).

Construction.—This section is not penal but remedial in its nature, and it should be given such construction as will effectuate the intention of the legislature in enacting it. *Vance v. Southern R.R.*, 138 N.C. 460, 50 S.E. 860 (1905); *Hall v. Southern R.R.*, 149 N.C. 108, 62 S.E. 899 (1908).

This section does not regard the family relation, and is not for the purpose of compensating the families of persons killed by accident. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900).

Right of Action a Property Right.—This section gives clear indication of the purpose of the legislature to impress upon the right of action the character of property as a part of the intestate's estate. *Neill v. Wilson*, 146 N.C. 242, 59 S.E. 674 (1907); In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

What Constitutes a Cause of Action.—It is entirely immaterial for the purpose of establishing a cause of action under the provisions of this section whether the act was wanton or cruel. Facts showing a legal duty and neglect thereof on the

part of defendant with a resulting injury to the plaintiff are sufficient to constitute a cause of action. *Western Union Tel. Co. v. Catlett*, 177 Fed. 71 (4th Cir. 1910).

Plaintiff must show failure on part of defendant to exercise proper care in performance of some legal duty which the defendant owed plaintiff's testator under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of injury which produced death—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the existing facts. *Tysinger v. Coble Dairy Prods.*, 225 N.C. 717, 36 S.E.2d 246 (1945); *Rogers v. Green*, 252 N.C. 214, 113 S.E.2d 364 (1960).

Where Deceased Is an Infant.—Under this section the administrator may sue for the death of an infant a few months old. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900); *Davis v. Seaboard Air Line R.R.*, 136 N.C. 115, 48 S.E. 591 (1904).

No Action Where Decedent Fully Compensated before Death.—Where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of action arising from the same injury will not lie after his death for further damages for the benefit of his estate. *Edwards v. Interstate Chem. Co.*, 170 N.C. 551, 87 S.E. 635 (1916).

Recovery of Burial Expenses.—A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947).

Killing in Georgia of North Carolina Resident.—The wrongful death statute of Georgia is not so dissimilar from this section in scope, meaning, and practical application as to deprive the trial courts of this State of jurisdiction to hear and determine a cause for the negligent killing in the state of Georgia of a resident of this State. *Rodwell v. Camel City Coach Co.*, 205 N.C. 292, 171 S.E. 100 (1933).

Right Must Be Asserted in Conformity with Section.—The right to maintain an action for damages for wrongful death must be asserted in conformity with this section. *Webb v. Eggleston*, 228 N.C. 574, 46 S.E.2d 700 (1948); *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955).

Authority to Compromise. — Ordinarily, an executor or administrator has the right to compromise any disputed or doubtful claim of his decedent provided he acts honestly and exercises the care of an ordinarily prudent person. And this rule is applicable to a purely statutory cause of action for wrongful death. *McGill v. Bison Fast Freight, Inc.*, 245 N.C. 469, 96 S.E.2d 438 (1957).

Action against Physician Barred by Settlement with Original Tort-Feasors. — Where a plaintiff institutes an action to recover damages for the wrongful death of his intestate against persons alleged to be solely responsible for intestate's injuries and death, and thereafter the action is compromised by the entry of a consent judgment for a substantial sum, the judgment is a bar to the plaintiff's right to maintain a subsequent action for the wrongful death of his intestate against a physician or surgeon for negligent treatment of the original injuries, such treatment being known to plaintiff when the first suit was filed. *Bell v. Hankins*, 249 N.C. 199, 105 S.E.2d 642 (1958).

Writ of Attachment May Issue.—A writ of attachment will issue under § 1-440, subsection 4 [now § 1-440.1], to enforce the right created by this section. *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921).

Nonsuit.—In a civil action under this and the succeeding section to recover damages for alleged wrongful death, where issues of fact are raised which the jury alone may decide, it is error for the court to allow a motion for judgment as of nonsuit. *Henson v. Wilson*, 225 N.C. 417, 35 S.E.2d 245 (1945).

Action in Federal Court in Virginia.—A North Carolina administrator, not qualified in Virginia, was held unable to maintain an action in a federal district court in Virginia under either the North Carolina or Virginia death by wrongful act statutes. *Mozingo v. Consolidated Constr. Co.*, 171 F. Supp. 396 (E.D. Va. 1959).

Applied in *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631 (1937); *Lemings v. Southern Ry.*, 211 N.C. 499, 191 S.E. 39 (1937); *Mack v. Marshall Field & Co.*, 217 N.C. 55, 6 S.E.2d 889 (1940); *Hoke v. Atlantic Greyhound Corp.*, 227 N.C. 412, 42 S.E.2d 593 (1947); *Hahn v. Perkins*, 228 N.C. 727, 46 S.E.2d 854 (1948); *Graham v. Atlantic Coast Line R.R.*, 240 N.C. 338, 82 S.E.2d 346 (1954); *Barnes v. Caulbourne*, 240 N.C. 721, 83 S.E.2d 898 (1954); *Little v. Power Brake Co.*, 255 N.C. 451, 121 S.E.2d 889 (1961); *Hines v. Frink*, 257

N.C. 723, 127 S.E.2d 509 (1962); *Hardbarger v. Deal*, 258 N.C. 31, 127 S.E.2d 771 (1962); *Stegall v. Catawba Oil Co.*, 260 N.C. 459, 133 S.E.2d 138 (1963); *Davis v. Parnell*, 260 N.C. 522, 133 S.E.2d 169 (1963); *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 133 S.E.2d 222; *Rosser v. Smith*, 260 N.C. 647, 133 S.E.2d 499 (1963); *Scott v. Clark*, 261 N.C. 102, 134 S.E.2d 181 (1964); *Burkey v. Kornegay*, 261 N.C. 513, 135 S.E.2d 204 (1964); *Scarlett v. Abernethy*, 261 N.C. 514, 135 S.E.2d 212 (1964); *Dove v. Lawson*, 261 N.C. 516, 135 S.E.2d 216 (1964); *Harrington v. Nance*, 261 N.C. 654, 135 S.E.2d 661 (1964); *Loomis v. Torrence*, 261 N.C. 741, 135 S.E.2d 785 (1964); *Bullock v. McFerran*, 261 N.C. 742, 136 S.E.2d 84 (1964); *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964); *Thomas v. Morgan*, 262 N.C. 292, 136 S.E.2d 700 (1964); *Badger v. Medley*, 262 N.C. 742, 138 S.E.2d 401 (1964); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965); *United Servs. Auto. Ass'n v. Wharton*, 237 F. Supp. 255 (W.D.N.C. 1965).

Cited in *Harper v. Bullock*, 198 N.C. 448, 152 S.E. 405 (1930); *Hawkins v. Rowland Lumber Co.*, 198 N.C. 475, 152 S.E. 169 (1930); *Wilson v. E. H. Clement Co.*, 207 N.C. 541, 177 S.E. 797 (1935); *Peterson v. McManus*, 208 N.C. 802, 182 S.E. 483 (1935); *Winslow v. Carolina Conference Ass'n of Seventh Day Adventists*, 211 N.C. 571, 191 S.E. 403 (1937); *Taylor v. Atlantic Coast Line R.R.*, 213 N.C. 671, 197 S.E. 159 (1938); *Barber v. Minges*, 223 N.C. 213, 25 S.E.2d 837 (1943); *Morgan v. Carolina Coach Co.*, 225 N.C. 668, 36 S.E.2d 263 (1945); *Martin v. Currie*, 230 N.C. 511, 53 S.E.2d 447 (1949); *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950); *Caldwell v. Abernethy*, 231 N.C. 692, 58 S.E.2d 763 (1950); *Call v. Stroud*, 232 N.C. 478, 61 S.E.2d 342 (1950); *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *McHarney v. Wooten*, 234 N.C. 110, 66 S.E.2d 692 (1951); *Snowden v. Wooten*, 234 N.C. 111, 66 S.E.2d 693 (1951); *Read v. Young Roofing Co.*, 234 N.C. 273, 66 S.E.2d 821 (1951); *Clark v. Lambreth*, 235 N.C. 578, 70 S.E.2d 828 (1952); *Competitor Liaison Bureau of Nascar, Inc. v. Midkiff*, 246 N.C. 409, 98 S.E.2d 468 (1957); *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958); *Lawson v. North Carolina State Highway & Pub. Works Comm'n*, 248 N.C. 276, 103 S.E.2d 366 (1958); *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

II. LIMITATION OF THE ACTION.

Action Is Now Subject to Two-Year Statute of Limitations in § 1-53.—Up to the time of the amendments of 1951 to this section and § 1-53, it had consistently been held that the time limitation in this section was not a statute of limitations, but rather a condition precedent to maintenance of an action. The effect of the amendments was to remove from the Wrongful Death Act the time limitation and make the act subject to the statute of limitations of two years in § 1-53. *McCrater v. Stone & Webster Eng'r Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958).

Prior to the enactment of § 1-53 (4), and the 1951 amendment to this section, the institution of an action for wrongful death within one year after such death was a condition precedent to maintaining the action. All other requirements of the section were also strictly construed. The amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitations. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

And Time Is No Longer Integral Part of Right of Action.—Since the enactment of the 1951 amendment to this section, the time within which a wrongful death action may be commenced is not an integral part of the right of action or a condition precedent thereto but is an ordinary (two-year) statute of limitations under § 1-53 (4). *Stamey v. Rutherfordton Elec. Membership Corp.*, 249 N.C. 90, 105 S.E.2d 282 (1958).

Former Law. — Right of action for wrongful death is solely statutory and the former statutory requirement that the action be instituted within one year from the date of such death was a condition annexed to the right of action and not a limitation. *Colyar v. Atlantic States Motor Lines*, 231 N.C. 318, 56 S.E.2d 647 (1949).

Under this section as it stood before the 1951 amendment, the plaintiff in an action for wrongful death was not required to allege in the complaint that the action was brought within one year from the date of death, but was required to show compliance with this statutory condition by proof upon the trial. And insofar as the holding in *Wilson v. Chastain*, 230 N.C. 390, 53 S.E.2d 290 (1949) was in conflict with this decision it was modified. *Colyar v. Atlantic States Motor Lines*, 231 N.C. 318, 56 S.E.2d 647 (1949).

For other cases construing this section

prior to the 1951 amendment, see *Taylor v. Cranberry Iron & Coal Co.*, 94 N.C. 525 (1886); *Best v. Town of Kinston*, 106 N.C. 203, 10 S.E. 997 (1890); *Meekins v. Norfolk & So. R.R.*, 131 N.C. 1, 42 S.E. 333 (1902); *Trull v. Seaboard Air Line R.R.*, 151 N.C. 545, 66 S.E. 586 (1909); *Bennett v. North Carolina R.R.*, 159 N.C. 345, 74 S.E. 883 (1912); *Hatch v. Alamance Ry.*, 183 N.C. 617, 112 S.E. 529 (1922); *McGuire v. Montvale Lumber Co.*, 190 N.C. 806, 131 S.E. 274 (1925); *Hanie v. Penland*, 193 N.C. 800, 138 S.E. 165 (1927); *Brooks v. Suncrest Lumber Co.*, 194 N.C. 141, 138 S.E. 532 (1927); *Neely v. Minus*, 196 N.C. 345, 145 S.E. 771 (1928); *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857 (1930); *Davis v. Norfolk So. R.R.*, 200 N.C. 345, 157 S.E. 11 (1931); *Mathis v. Camp Mfg. Co.*, 204 N.C. 434, 168 S.E. 515 (1933); *Curlee v. Duke Power Co.*, 205 N.C. 644, 172 S.E. 329 (1934); *George v. Atlantic & Charlotte Air Line R.R.*, 210 N.C. 58, 185 S.E. 431 (1936); *Whitehead v. Branch*, 220 N.C. 507, 17 S.E.2d 637 (1941); *Webster v. City of Charlotte*, 222 N.C. 321, 22 S.E.2d 900 (1942); *Harrison v. Carter*, 226 N.C. 36, 36 S.E.2d 700 (1946); *Moore v. Atlantic Coast Line R.R.*, 153 F.2d 782 (2d Cir. 1946); *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948); *Webb v. Eggleston*, 228 N.C. 574, 46 S.E.2d 700 (1948), discussed in 27 N.C.L. Rev. 160; *Lewis v. North Carolina State Highway & Pub. Works Comm'n*, 228 N.C. 618, 46 S.E.2d 705 (1948).

Amendment Not Introducing New Cause of Action.—Where, in an action for wrongful death, the complaint discloses that the action was instituted within the statutory period, but plaintiff is thereafter permitted to amend the defective statement of his good cause of action by particularizing the acts of negligence complained of, the amendment does not introduce a new cause of action, and the cause is not barred by this section. *Davis v. Rhodes*, 231 N.C. 71, 56 S.E.2d 43 (1949).

Delay Less than Period Is Not Laches of Itself.—Mere delay of petitioner in commencing his action for damages for wrongful death, which does not amount to a bar of the statute of limitations, does not of itself constitute laches, where the delay has not worked an injury or prejudice or disadvantage to the administratrix c.t.a. of the estate, and the clerk has found no facts that petitioner's delay would work prejudice or injury to the estate of the deceased. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

III. PARTIES TO THE ACTION.

Suit Must Be Brought by Personal Representative.—The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of this section. *Hanes v. Southern Pub. Util. Co.*, 191 N.C. 13, 131 S.E. 402 (1926). See *Hood v. American Tel. & Tel. Co.*, 162 N.C. 70, 77 S.E. 1096 (1913); *White v. Holding*, 217 N.C. 329, 7 S.E.2d 825 (1940).

While any sum recovered is not a part of decedent's estate, such sum can only be recovered in the name of the personal representative, and must be distributed under laws of intestacy in this State. *Harrison v. Carter*, 226 N.C. 36, 36 S.E.2d 700 (1946), citing *Neill v. Wilson*, 146 N.C. 242, 59 S.E. 674 (1907); *Hines v. Foundation Co.*, 196 N.C. 322, 145 S.E. 612 (1928).

Under this section, the only person who can sue is the personal representative of the deceased. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951); *Mozingo v. Consolidated Constr. Co.*, 171 F. Supp. 396 (E.D. Va. 1959).

Action for wrongful death may be brought only by the executor, administrator, or collector of the decedent. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

In His Official Capacity.—The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue as administrator. *Hall v. Southern R.R.*, 146 N.C. 345, 59 S.E. 879 (1907).

The personal representative alone can maintain the action, and only in his official capacity. He sues in his own right and not en autre droit. *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948). See *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904).

Hence under this section an action cannot be maintained by a widow as such, but must be brought by the personal representative of the deceased. *Bennett v. North Carolina R.R.*, 159 N.C. 345, 74 S.E. 883 (1912); *Craig v. Suncrest Lumber Co.*, 189 N.C. 137, 126 S.E. 312 (1925).

A widow, as such, has no right of action for the death of her husband. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

Nor can a husband as such sue for the wrongful death of his wife. *Hood v. American Tel. & Tel. Co.*, 162 N.C. 70, 77 S.E. 1096 (1913). A father cannot main-

tain an action in his individual capacity for the death of his son. *Killian v. Southern R.R.*, 128 N.C. 261, 38 S.E. 873 (1901). Nor for the wrongful death of his daughter resulting from seduction. *Scarlett v. Norwood*, 115 N.C. 284, 20 S.E. 459 (1894).

Action by One Not Personal Representative Should Be Dismissed.—If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed in this State, it should be dismissed, and a separate and independent action instituted by such representative. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

And Court Has No Authority to Convert It to New Action by Admission of Party.—The court has no authority, over objection, to convert a pending action for wrongful death which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

If Joinder of Personal Representative Is Permitted, Action Only Commenced Then.—Should the personal representative be permitted to become a party to an unauthorized action for wrongful death, the action is deemed to have been commenced only from the time he became a party. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

The real party in interest in an action under this section is not the administrator, but the beneficiary under the statute for whom the recovery is sought. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947); *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958).

Necessity for Proof Where Plaintiff's Capacity Denied.—Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that she was duly qualified and acting administratrix of the deceased is denied in the answer and plaintiff offers no evidence in support of her allegation. *Carr v. Lee*, 249 N.C. 712, 107 S.E.2d 544 (1959).

False Allegation of Appointment Cannot Be Validated by Subsequent Appointment.—One who has never applied for letters of administration or who, having applied, has no reasonable grounds for believing that he had been duly appointed, cannot institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

Appointment of Administrator. — A

cause of action under this section is sufficient for the appointment of an administrator. *Vance v. Southern R.R.*, 138 N.C. 460, 50 S.E. 860 (1905).

Where a deceased has left a will naming an executor, and disposing of all his property, the right of action for his wrongful death must be by the executor named. *Hood v. American Tel. & Tel. Co.*, 162 N.C. 70, 77 S.E. 1096 (1913).

Foreign Administrator Cannot Sue.—A foreign administrator cannot bring an action under this section. Therefore when an administrator does not qualify in this State until after the commencement of the suit and the expiration of one year from the death of his intestate he cannot bring the action. *Vance v. Southern R.R.*, 138 N.C. 460, 50 S.E. 860 (1905); *Hall v. Southern R.R.*, 149 N.C. 108, 62 S.E. 899 (1908).

Since an action for wrongful death exists solely by virtue of this section, it must be maintained and prosecuted in strict accord herewith, and an administratrix appointed by the court of another state may not maintain an action for wrongful death in this State. This holding does not impinge Article IV, § 1, of, or the 14th Amendment to, the United States Constitution. *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E.2d 673 (1940).

In an action brought to recover for a wrongful death which occurred in this State, no one except an executor, administrator or collector qualified in North Carolina has a right to bring such an action in North Carolina. *King v. Cooper Motor Lines, Inc.*, 142 F. Supp. 405 (D. Md. 1956).

And His Complaint Is Demurrable. — Where an action for wrongful death is instituted in this State by an administratrix appointed by the court of another state, the defect may be taken advantage of by demurrer, since such plaintiff does not have legal capacity to sue and thus the complaint does not state facts sufficient to constitute a cause of action. *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E.2d 673 (1940).

Action by Representative of Employee Who Has Received Workmen's Compensation.—Although an administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, under this section, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death

of the intestate, and where the insurance carrier has paid the compensation later awarded, it is subrogated to the rights of the employer and may maintain the action against such third person in the name of the administratrix. *Phifer v. Berry*, 202 N.C. 388, 163 S.E. 119 (1932).

Since the North Carolina Workmen's Compensation Act expressly provides that the subrogated right of action against the third person tort-feasor in favor of the insurance carrier paying compensation for which the employer is liable must be maintained in the name of the injured employee or his personal representative, the act does not change or modify the requirement of this section that an action for wrongful death must be maintained by the administrator of the deceased, and the insurance carrier cannot maintain the action for wrongful death in its own name against the third person tort-feasor. *Whitehead v. Branch*, 220 N.C. 507, 17 S.E.2d 637 (1941). See also *Brown v. Southern R.R.*, 202 N.C. 256, 162 S.E. 613 (1932).

Action by Administrator of Child against Parents. — An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death, as this section gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action. *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931); *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955).

The administrator of an unemancipated minor child killed by the negligence of his parent has no cause of action against the parent for the wrongful death of his intestate. *Capps v. Smith*, 263 N.C. 120, 139 S.E.2d 19 (1964).

Action by Administrator of Wife against Husband.—If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Action against Estate of One Causing Wrongful Death. — Where a person is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death within one year after the wrongful death caused by him, an action will lie against the executor and administrator of the deceased defendant under the provisions of this section. *Tonkins v. Cooper*, 187 N.C. 570, 122 S.E. 294 (1924).

By the specific language of this section, when the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor and the person that would have been so liable dies, or is killed at the same time, then the action for damages for wrongful death survives the death of the tort-feasor against his executor or administrator. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Right to Have Discharge of Tort-Feasor's Administratrix Set Aside.—An administrator who institutes action for the wrongful death of his intestate within the statutory time against the estate of the deceased tort-feasor is entitled to have the order of the clerk discharging the administratrix of the deceased tort-feasor set aside by motion in the cause upon showing a policy of liability insurance in the hands of the administratrix of the deceased tort-feasor available for the payment of the claim. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Joinder of Employer with Employee.—Where the death is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of respondeat superior. *Brown v. Southern R.R.*, 202 N.C. 256, 162 S.E. 613 (1932).

Joinder of Joint Tort-Feasor as Party Defendant.—One of several defendants, in an action for wrongful death arising out of a joint tort, may have still another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, although plaintiff's right of action against such other tort-feasor, originally subsisting, has been lost by the lapse of time. *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943).

Where plaintiff sues defendant under this section, alleging that her intestate was killed by his negligence, defendant may not join as a joint tort-feasor under § 1-240 a railway company by which the plaintiff's intestate was employed in interstate commerce. *Wilson v. Massagee*, 224 N.C. 705, 32 S.E.2d 335 (1944).

The principle applied in *Wilson v. Massagee*, 224 N.C. 705, 32 S.E.2d 335 (1944), was held to be the same, and the court adhered to its decision therein, in *Bryant v. Atlantic Coast Line R.R.*, 248 N.C. 43, 102 S.E.2d 393 (1958), involving a suit under the Federal Employers' Liability Act against defendant railroad in which plaintiff was not permitted to join an additional defendant tort-feasor since there

was no common legal right in the actions against the two.

IV. DISTRIBUTION OF RECOVERY.

The North Carolina law is materially different from that of most states in that distribution is made, not to designated classes, but in accordance with the statute of distribution. *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948).

Recovery Held in Trust.—The administrator holds the amount recovered in trust for those that may be entitled thereto as distributees. *Baker v. Raleigh & Gaston R.R.*, 91 N.C. 308 (1884); *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721 (1926); In *re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958).

Existence of Beneficiaries Immaterial.—The existence of persons who would have been entitled to the recovery under former § 28-149 [now see § 29-1 et seq.] was not a condition precedent to the right to bring the action. The purpose of the section is to give the action irrespective of who may become beneficiaries of the recovery. *Warner v. Western N.C.R.R.*, 94 N.C. 250 (1886). See *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947); *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1949), holding that evidence as to the number of children left is inadmissible.

The damages when recovered are not to be simply distributed, but disposed of as provided in case of intestacy, and the complaint need not allege that the intestate left next of kin. *Warner v. Western N.C.R.R.*, 94 N.C. 250 (1886).

Distribution When There Are No Next of Kin.—In an action under this section for damages for negligently causing the death of the intestate, if there be no next of kin who are entitled to the recovery, under the statute of distributions, the recovery goes to the University. *Warner v. Western N.C.R.R.*, 94 N.C. 250 (1886).

When Rights of Distributees Fixed.—Under this section the rights of the distributees are fixed as of the time when the intestate died. *Neill v. Wilson*, 146 N.C. 242, 59 S.E. 674 (1907). See *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947).

Recovery Not Assets of Deceased's Estate.—Damages for a wrongful death are not assets of the estate available to creditors, but are to be disposed of according to the statute of distribution. *Hines v. Foundation Co.*, 196 N.C. 322, 145 S.E. 612 (1928).

The provision that the recovery is not

to be applied as assets in the payment of debts or legacies extends to creditors of the intestate and not to creditors of the distributees. *Neill v. Wilson*, 146 N.C. 242, 59 S.E. 674 (1907).

The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptance of the term. *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952); *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958).

Not Subject to Widow's Year's Support.—The damages recovered are not subject to the widow's year's support, as such support is not provided for "in this chapter" as specified by the section. *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912).

Contributory Negligence of One Beneficiary.—In an action to recover for wrongful death of a 2½-year-old child, contributory negligence on the part of its mother is a bar to so much of the recovery as would accrue to her as a beneficiary of the child's estate, but negligence of the child's mother will not be imputed to the child's father, and is no bar to the recovery of the amount which would inure to his benefit as beneficiary of the child's estate. *Pearson v. National Manufacture & Stores Corp.*, 219 N.C. 717, 14 S.E.2d 811 (1941).

Statutory Beneficiary Not Entitled to Share in Recovery for Death Caused by His Negligence.—In cases instituted to recover damages for wrongful death, no beneficiary under the statute for whom recovery is sought will be permitted to enrich himself by his own wrong. The right of a person otherwise entitled to receive the money paid for wrongful death, or to share in the distribution of such a sum paid, will be denied where the death of the decedent was caused by such person's negligence. *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958).

Intestate was killed in a collision while riding as a passenger in an automobile owned and driven by her son. Intestate's administrator and the son's insurer effected a settlement whereby the insurer paid the administrator a sum of money in consideration of the release by the administrator of all claims and demands against the son and the insurer arising out of the accident. There was no finding of fact that the son was negligent, or that he knew of the settlement, and the release stated that all parties released denied liability; however, the son, although he alleged in his answer that he was not negligent and that the accident was caused solely by the negligence of the driver of the other auto-

mobile did not allege that he had brought suit or made any claim or demand against such driver for damage to his automobile, and offered no evidence at the hearing. It was held that public policy would not permit the son to share in the amount paid in settlement by his insurer. *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958).

Distribution When Deceased Was Non-resident.—Where a person was domiciled in another state and was killed in this State, and an administrator sues in this State, the funds recovered must be distributed under the laws of this State, though a prior administration had been taken out in the state of his domicile. *Hartness v. Pharr*, 133 N.C. 566, 45 S.E. 901 (1903). See *Hall v. Southern R.R.*, 146 N.C. 345, 59 S.E. 879 (1907).

Formerly, Payment of Hospital and Medical Expenses Was Unauthorized.—There was no provision in this section for payment of hospital and medical expenses out of a recovery until the section was amended by Session Laws 1959, c. 1136. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Now Such Payment Is Limited by This Section.—This section, as amended in 1959 authorizes payment for hospital and medical expenses not exceeding \$500.00. Therefore, in a case where an action has been brought for wrongful death and the jury has awarded an amount for such death, the limitation fixed in the statute for payment of hospital and medical expenses would control. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Allocation of Funds Received in Single Settlement for Wrongful Death and for Suffering Prior to Death.—See *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Recovery under Federal Employers' Liability Act.—In an action to recover damages under the Federal Employers' Liability Act, this State statute does not apply as to the distribution of the recovery. *Horton v. Seaboard Air Line R.R.*, 175 N.C. 472, 95 S.E. 883 (1918), overruling. *In re Stone*, 173 N.C. 208, 91 S.E. 852 (1917).

V. ADMISSION OF DECLARATIONS.

Rules of Evidence Changed—Amendment Applies to Prior Cases.—The 1919 amendment to this section enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. This is a general statute changing the rule

of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will. *Williams v. Randolph & C.R.R.*, 182 N.C. 267, 108 S.E. 915 (1921). And this change is valid and constitutional. *Tatham v. Andrews Mfg. Co.*, 180 N.C. 627, 105 S.E. 423 (1920).

What Declarations Permitted. — This section permits in evidence declarations of the act of killing and circumstances immediately attendant on the act, which constitute a part of the *res gestae*, uttered when the declarant was in actual danger of death, and made in full apprehension thereof, and when the death accordingly ensued. *Tatham v. Andrews Mfg. Co.*, 180 N.C. 627, 105 S.E. 423 (1920).

As in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused, to be admissible upon the trial of an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and must be confined to the act of killing and the attendant circumstances forming a part of the *res gestae*. *Dellinger v. Elliott Bldg. Co.*, 187 N.C. 845, 123 S.E. 78 (1924).

§ 28-174. Damages recoverable for death by wrongful act. — The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death. (R. C., c. 1, s. 10; 1868-9, c. 113, s. 71; Code, s. 1499; Rev., s. 60; C. S., s. 161.)

Editor's Note. — As to admissibility of evidence relating to damages recoverable for wrongful death, see 28 N.C.L. Rev. 106.

The jury assesses the value of the life of the decedent in *solido*, which is disbursed under the statute of distributions. *Horton v. Seaboard Air Line R.R.*, 175 N.C. 472, 95 S.E. 883 (1918); *Carpenter v. Asheville Power & Light Co.*, 191 N.C. 130, 131 S.E. 400 (1926).

No "Hard and Fast Rule" Prescribed. — The Supreme Court has not prescribed any "hard and fast rule" by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment to damages in any particular way. *Poe v. Raleigh & A. Air Line R.R.*, 141 N.C. 525, 54 S.E. 406 (1906); *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E.2d 241 (1960).

The action for wrongful death exists only by virtue of this and the preceding section, and the statutory provision must govern not only the right of action but also the rule for determining the basis and extent of recovery of damages therefor.

Preliminary Facts Must Be Shown. — The dying declarations of a deceased person for whose death an action has been brought under this section are competent as evidence, provided the preliminary facts are made to appear. *Southwell v. Atlantic Coast Line R.R.*, 189 N.C. 417, 127 S.E. 361 (1925). Otherwise they are not admissible. *Holmes v. Wharton*, 194 N.C. 470, 140 S.E. 93 (1927).

Declarations Made before Occurrence of Accident. — Where the declarant was fatally injured in an automobile accident, declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. *Gassaway v. Gassaway*, 220 N.C. 694, 18 S.E.2d 120 (1942).

Testimony of Statement Held Inadmissible. — In a workmen's compensation case, testimony of a statement by an officer shortly before his death from coronary occlusion that he "had had a time all the morning" arresting three men who resisted him, was incompetent as a dying declaration, not having been brought within the terms of this section. *West v. North Carolina Dep't of Conservation & Dev.*, 229 N.C. 232, 49 S.E.2d 398 (1948).

Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952).

In North Carolina a right of action to recover damages for wrongful death is given by this section and § 28-173, and in this jurisdiction the action for wrongful death exists only by virtue of these statutes. In *re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Only Right to Compensation for Pecuniary Loss Conferred. — This section leaves no room for sentiment. It confers a right to compensation only for pecuniary loss. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Question of Damages Is for Jury. — The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantages from the continuance of the life of the deceased" is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. North Carolina R.R.*, 139 N.C. 499, 52 S.E. 642 (1905).

Recovery Not Limited to Actual Pecuniary Loss.—It has been held by the Supreme Court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900).

But exemplary or punitive damages are not recoverable in an action for wrongful death. *Martin v. Currie*, 230 N.C. 511, 53 S.E.2d 447 (1949); *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958).

This section does not provide for assessment of punitive damages nor the allowance of nominal damages in the absence of pecuniary loss. *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

No damages are to be allowed as a solatium or a punishment. *Kesler v. Smith*, 66 N.C. 154 (1872); *Bradley v. Ohio River & C.R.R.*, 122 N.C. 972, 30 S.E. 8 (1898); *Western Union Tel. Co. v. Catlett*, 177 Fed. 71 (4th Cir. 1910).

This section does not contemplate solatium for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being: How much has the plaintiff lost by the death of the person injured? *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958).

This section restricts the recovery for malpractice to compensatory damages. *Gray v. Little*, 127 N.C. 304, 37 S.E. 270 (1900).

Nominal damages, entitling plaintiff to costs, are not recoverable under this section, in the absence of pecuniary loss in which recovery could be based. *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958).

This section does not provide for the allowance of nominal damages in the absence of pecuniary loss. *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962).

The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of decedent's death. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Damages Sustained by Deceased in His Lifetime.—Where the injured person lived for 31 days, and thereafter died as a result of injuries, his personal representative could recover damages sustained by the injured person during his lifetime, and for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping. *Hoke*

v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

Recovery for Pain and Suffering and for Medical Expenses.—Recovery for pain and suffering and for hospital and medical expenses relate to a single cause of action and should be submitted upon a single issue of damages. *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 38 S.E.2d 105 (1946); *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Where a person is injured by the negligence of another, lives for a period of time, and thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate, damages sustained by the injured person during his lifetime, including hospital and medical expenses, and (2) for the benefit of the next of kin, the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Pecuniary Loss Suffered by Relative Is Measure.—In estimating damages under this section, the question is, did the relative suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. *Carter v. North Carolina R.R.*, 139 N.C. 499, 52 S.E. 642 (1905).

Under this section compensation for wrongful death is limited to "the pecuniary injury resulting from such death." This phrase has remained unchanged since the section was enacted in 1869. In view of this restrictive language, the consideration of the jury should be confined to determining the amount of money the decedent would have earned during the period the jury find he would otherwise have lived, and, then, after deducting the probable cost of his ordinary living expenses, to ascertaining the present worth of the accumulation of such net earnings as the pecuniary value of the life of the decedent to his estate. This rule, though sometimes difficult of application, applies to all alike. *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952).

Reasonable Expectation of Pecuniary Advantage.—The correct measure of the quantum of damages is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. *Kesler v. Smith*, 66 N.C. 154 (1872).

The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased must, in all cases,

guide the jury in determining the quantum of damages, to which end evidence as to the age, habits, industry, business, etc., of the deceased is indispensable. *Burton v. Wilmington & W.R.R.*, 82 N.C. 504 (1880).

Net Present Pecuniary Worth of Deceased.—The damages recoverable for the wrongful death of another negligently caused are the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900); *Purnell v. Rockingham R.R.*, 190 N.C. 573, 130 S.E. 313 (1925); *Carpenter v. Asheville Power & Light Co.*, 191 N.C. 130, 131 S.E. 400 (1926). See *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952); *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

The present value of the net pecuniary worth of a deceased is the value of his net pecuniary worth in terms of a lump sum presently paid rather than when paid from time to time during the deceased's life expectancy. *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E.2d 241 (1960).

The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when, according to his expectancy, the intestate would have died in due course of nature; but this total may be composed of many annual incomes of different amounts. The present value of that sum, whatever it may be, is what the jury should allow in the way of damages. *Poe v. Raleigh & A. Air Line R.R.*, 141 N.C. 525, 54 S.E. 406 (1906).

Probable Gross Income Less Probable Expenses.—The measure of damages in an action for wrongful death is the present worth of the pecuniary loss suffered by those entitled to the distribution of the recovery, which is to be measured by the probable gross income of the deceased during his life expectancy less the probable cost of his own living and usual or ordinary expenses. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949).

The measure of damages for wrongful death is the present value of the accumulations of income which would have been derived from the decedent's own exertions, after deducting the probable cost of living and ordinary expenses, based upon decedent's life expectancy. *Rea v. Simowitz*, 226 N.C. 379, 38 S.E.2d 194 (1946). See *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951); *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

In ascertaining damages for wrongful death the jury may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951); *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E.2d 49 (1952). See *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

Ascertainment of Necessary Living Expenses.—In an action for wrongful death, the jury, in ascertaining the probable cost of deceased's necessary living expenses during the period of his life expectancy, may take into consideration the deceased's age and manner of living. *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

Ascertainment of Life Expectancy.—In an action for wrongful death, the jury in ascertaining the life expectancy of the deceased may take into consideration the mortuary tables, as evidence, along with other evidence as to his health, constitution, and habits. *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

What Expenses to Be Deducted.—In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him should not be deducted. *Carter v. North Carolina R.R.*, 139 N.C. 499, 52 S.E. 642 (1905).

The measure of damages for the wrongful killing of a mother of children is the value of her labor or the amount of her

earnings if she had lived out her expectancy, without regard to the number of her children and the intellectual and moral training she might have given them. *Bradley v. Ohio River & C.R.R.* 122 N.C. 972, 30 S.E. 8 (1898).

The value of the life before twenty-one as well as after twenty-one years of age is recoverable. *Gurley v. Southern Power Co.*, 172 N.C. 690, 90 S.E. 943 (1916).

Wrongful Death of Child.—The measuring of damages, in the case of the wrongful death of a child is the same as in the case of an adult. The difficulty is in the application. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900). See *Gurley v. Southern Power Co.*, 172 N.C. 690, 90 S.E. 943 (1916); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Where deceased was a mentally retarded boy of eleven shown by the evidence to be one who would continue to be a dependent person rather than a person capable of earning a livelihood, no pecuniary loss was shown and an involuntary nonsuit should have been granted. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

In estimating the pecuniary value of a child to her next of kin, the jury could take into consideration all the probable or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900).

Mental Anguish and Loss of Services Not to Be Considered.—Where the plaintiff brings an action, under § 28-173, as administrator of his child, his recovery is limited to the value of the life, and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. *Byrd v. Southern Express Co.*, 139 N.C. 273, 51 S.E. 851 (1905).

Estimating Life Expectancy of Child.—In an action for the wrongful death of a child nine years of age the rule for measuring damages is that expectancy of life may be determined by the jury based upon the constitution, health and habits of the infant, and where the jury was so instructed, it was not error for the court in illustrating the rule to use the figures fifty and twenty in referring to life expectancy. *Rea v. Simowitz*, 226 N.C. 379, 38 S.E.2d 194 (1946).

Evidence of Retirement Income.—The retirement income which a deceased was receiving at the time of his death is properly shown in evidence on the question of

damages in an action for wrongful death, since such retirement income is earned by an employee as the result of his previous labors, and evidence that the deceased was earning such income is alone sufficient basis for the admeasurement of damages. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E.2d 241 (1960).

Evidence Held Competent in General.—

In an action for wrongful death, evidence relating to the age, health and life expectancy of deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had of earning money is competent. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949). See *Kesler v. Smith*, 66 N.C. 154 (1872); *Burton v. Wilmington & W.R.R.*, 82 N.C. 504 (1880); *Poe v. Raleigh & A. Air Line R.R.*, 141 N.C. 525, 54 S.E. 406 (1906); *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394 (1931).

As a basis on which to enable the jury to make their estimate of damages, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the defendant, but you seek to give a fair, reasonable pecuniary worth of the deceased to his family. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E.2d 241 (1960).

Evidence Held Inadmissible.—In an action for wrongful death it is error to permit plaintiff administratrix to testify that intestate, who was her husband, had just come out of military service, as to the length of time he had been in the service, that they had a child two years old at the time of his death, and that she lost the home place to the mortgage people after his death, and that she paid his hospital and doctors' bills and burial expenses. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951).

The admission of testimony that the deceased had a 200-acre farm, a comfortable home, and plenty for his family to eat and wear, was not error. *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394 (1931).

The inventory of the estate of the deceased showing the salary due him at the time of death and the present action for

wrongful death as the total assets of the estate is competent as an aid to the jury in arriving at a proper estimate of the pecuniary worth of the decedent to those entitled to the distribution of the recovery. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949).

Evidence Showing Attitude of Deceased towards His Family.—In an action for wrongful death the verified complaint in an action theretofore instituted by deceased against his wife for absolute divorce, alleging that he and his wife had entered into an agreement respecting custody and support of the minor children of the marriage, and setting forth the agreement, was competent upon the issue of damages to show the attitude of the deceased toward his family. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949).

Authenticated copies of court records showing that deceased was sentenced for nonsupport of his minor children, with sentence suspended on condition that he pay a stipulated sum weekly for their support, was held competent on the issue of damages, since it imported more than a single act of dereliction and revealed a serious defect of character. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949).

A complaint and order for temporary alimony which had not been served on deceased because of his death were properly excluded. *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 52 S.E.2d 717 (1949).

Evidence as to Number of Children Inadmissible.—In an action for death under this section, evidence of the number of children left by the deceased is inadmissible as irrelevant and calculated to mislead the jury. *Kesler v. Smith*, 66 N.C. 154 (1872). See *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948).

Annuity Act Not to Be Considered.—In estimating the damages under this section the court should not permit the jury to consider the provisions of § 8-47 (the Annuity Act) for the purposes of ascertaining the present value of intestate's life. *Poe v. Raleigh & A. Air Line R.R.*, 141 N.C. 525, 54 S.E. 406 (1906).

Evidence of the pecuniary state of de-

fendant is irrelevant in an action for wrongful death, and objection was properly sustained to a question asked defendant as to the amount of land he owned. *Martin v. Currie*, 230 N.C. 511, 53 S.E.2d 447 (1949).

Instructions Must Be Specific.—The instruction for the determination of the quantum of damages must be so specific as to contain an explanation of the consideration to be given to the whole evidence in fixing the worth of the life. An error due to such a defect will not be cured by the judge's reducing the amount of damages assessed. *Burton v. Wilmington & W.R.R.*, 82 N.C. 504 (1880).

Instruction as to Necessity for Showing Amount of Earnings.—Where the evidence disclosed that deceased was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability, and the court correctly instructed the jury as to the method of ascertaining the present net worth of deceased to his family, the refusal of a requested instruction that since the administrator had not shown the amount of any earning on the part of the deceased, the jury should not speculate as to what his earnings had been, is not error. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940).

Instructions as to Net Pecuniary Worth.—Failure of instructions to sufficiently explain to the jury that its award should be the present value of the net pecuniary worth over the period of life expectancy is prejudicial error. *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955).

Applied in *Graham v. Atlantic Coast Line R.R.*, 240 N.C. 338, 82 S.E.2d 346 (1954); *Burkey v. Kornegay*, 261 N.C. 513, 135 S.E.2d 204 (1964).

Cited in *Hines v. Foundation Co.*, 196 N.C. 322, 145 S.E. 612 (1928); *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933); *McClamroch v. Colonial Ice Co.*, 217 N.C. 106, 6 S.E.2d 850 (1940); *United States v. Atlantic Coast Line R.R.*, 64 F. Supp. 289 (E.D.N.C. 1946); *Gray v. Carolina & N.W. Ry.*, 243 N.C. 107, 89 S.E.2d 807 (1955); *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958); *Mozingo v. Consolidated Constr. Co.*, 171 F. Supp. 396 (E.D. Va. 1959).

§ 28-175. Actions which do not survive.—The following rights of action do not survive:

- (1) Causes of action for libel and for slander, except slander of title.
- (2) Causes of action for false imprisonment.
- (3) Causes where the relief sought could not be enjoyed, or granting it would be nugatory after death. (1868-9, c. 113, s. 64; Code, s. 1491; Rev., s. 157; 1915, c. 38; C. S., s. 162; 1965, c. 631.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—This section formerly contained an additional provision to the effect that "injuries to the person, where such injury does not cause the death of the injured party" shall not survive. But this provision was omitted by the 1915 amendment. See note to § 28-172.

Public Laws of 1915, ch. 38, which amended the survival statutes (now this section and § 28-172) by striking out "or other injuries to the person, where such injury does not cause death of the injured party" from the exceptions to the causes of action which survive, has the effect of prescribing that causes of action for wrongful injury do survive the death of the injured party. *Hoke v. Atlantic Grey-*

hound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

The 1965 amendment deleted the words "and assault and battery" formerly appearing at the end of subdivision (2).

For note on libel by will, see 33 N.C.L. Rev. 146 (1954).

In General.—Except as specified in this section, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. *Suskin v. Maryland Trust Co.*, 214 N.C. 347, 199 S.E. 276 (1938).

Applied in *Neal v. Associates Discount Corp.*, 260 N.C. 771, 133 S.E.2d 699 (1963).

Cited in *Hardison v. Gregory*, 242 N.C. 324, 88 S.E.2d 96 (1955); *Paschal v. Autry*, 256 N.C. 166, 123 S.E.2d 569 (1962).

§ 28-176. To sue or defend in representative capacity.—All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity. (1868-9, c. 113, s. 79; Code, s. 1507; Rev., s. 160; C. S., s. 164.)

Cross References.—As to joinder of beneficiary, see § 1-63. As to when heirs and devisees are necessary parties, see § 28-87.

Heirs and Next of Kin as Parties.—The heirs and next of kin have no right to be made parties to an action on an account against a personal representative, although they allege collusion between the plaintiff and the representative. *Byrd v. Byrd*, 117 N.C. 523, 23 S.E. 324 (1895).

Application to Administrator d.b.n.—The provisions of this section apply to suits brought by administrator de bonis non, as well as to original administrator, and are mandatory. There is no middle ground. *Rogers v. Gooch*, 87 N.C. 442 (1882).

There is no statutory authority for a foreign executor or administrator to come into our courts and prosecute or defend an action in his representative capacity. *Cannon v. Cannon*, 228 N.C. 211, 45 S.E.2d 34 (1947); *Brauff v. Commissioner of Revenue*, 251 N.C. 452, 111 S.E.2d 620 (1959).

§ 28-177. Service on or appearance by one binds all.—In actions against several executors, administrators or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all. (1868-9, c. 113, s. 81; Code, s. 1508; Rev., s. 161; C. S., s. 165.)

§ 28-178. When creditors may sue on claim; execution in such action.—An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall is-

This section is silent as to any distinction between a resident and a foreign personal representative. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

Action against Nonresident Motorist's Personal Representatives Is Authorized as Exception.—An action authorized by § 1-105, as amended in 1953 to allow service of process upon the executor or administrator of a nonresident motorist, is an exception to the general rule stated in *Cannon v. Cannon*, 228 N.C. 211, 45 S.E.2d 34 (1947). *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

Action to collect note payable to decedent and maturing before his death must be instituted by the representative of his estate in his representative capacity. *Cannon v. Cannon*, 228 N.C. 211, 45 S.E.2d 34 (1947).

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

sue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted. (1868-9, c. 113, s. 82; Code, s. 1509; Rev., s. 162; C. S., s. 166.)

Cross Reference.—See § 28-114.

Any Court May Entertain Suit to Establish Claim.—In construing this section, it was decided at a very early day after its enactment that any court having jurisdiction of the amount sued for could entertain the suit of the creditor so far as to establish his claim and give him judgment therefor. *Heilig v. Foard*, 64 N.C. 710 (1870); *Vaughn v. Stephenson*, 69 N.C. 212 (1873); *Shields v. Payne*, 80 N.C. 291 (1879); *Hoover v. Berryhill*, 84 N.C. 132 (1881).

Jurisdiction for Breach of Contract.—

The superior court in term has, under this section, jurisdiction of an action by a creditor against an administrator for breach of a contract made by his intestate. *Shields v. Payne*, 80 N.C. 291 (1879).

What Court May Grant Leave to Issue Execution.—

The court which, under this section, may grant leave to issue execution is the court which has jurisdiction of probate matters, and no other court. *Vaughn v. Stephenson*, 69 N.C. 212 (1873).

§ 28-179. **Service by publication on executor without bond.**—Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions. (1868-9, c. 113, s. 94; Code, s. 1523; Rev., s. 163; C. S., s. 167.)

§ 28-180. **Execution by successor in office.**—Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done. (1868-9, c. 113, s. 84; Code, s. 1513; Rev., s. 164; C. S., s. 168.)

§ 28-181. **Action to continue, though letters revoked.**—In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death. (1868-9, c. 113, s. 85; Code, s. 1514; Rev., s. 165; C. S., s. 169.)

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

ARTICLE 20.

Representative's Powers, Duties and Liabilities.

§ 28-182. **Representative may maintain appropriate suits and proceedings.**—Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent. (1868-9, c. 113, s. 73; Code, s. 1501; Rev. s. 159; C. S., s. 170.)

Cross Reference.—As to discovery of assets, see §§ 28-69 to 28-72.

Recovery of Realty by Administrator d.b.n., c.t.a.—Where an executor is entitled, under this section, to the possession

of the land, his successor, an administrator *de bonis non, cum testamento annexo*, is entitled to the same rights and remedies as his predecessor in office. *Smathers v. Moody*, 112 N.C. 791, 175 S.E. 532 (1893).

§ 28-183. Representative may purchase for estate to prevent loss.

—At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate. (1868-9, c. 113, s. 77; Code, s. 1505; Rev., s. 85; C. S., s. 171.)

Section Applies in Sale of Realty Only.

—This section authorizes the representative to bid at the sale of realty only. Hence the nonstatutory rule that a representative cannot bid at his own sale applies in sales

of personalty. *Woody v. Smith*, 65 N.C. 116 (1871).

Cited in *Pearson v. Pearson*, 227 N.C. 31, 40 S.E.2d 477 (1946); *Davis v. Jenkins*, 236 N.C. 283, 72 S.E.2d 673 (1952).

§ 28-184. Representatives hold in joint tenancy.—Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy. (1868-9, c. 113, s. 74; Code, s. 1502; Rev., s. 166; C. S., s. 172.)

§ 28-184.1. Exercise of powers of joint personal representatives by one or more than one.—(a) As used in this section, the term “personal representatives” includes executors, administrators, administrators c.t.a., administrators d.b.n., collectors, and testamentary trustees.

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

- (1) Open bank accounts and draw checks thereon;
- (2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
- (3) Employ attorneys and accountants;
- (4) List property for taxes and prepare and file State, municipal and county tax returns;
- (5) Collect claims and debts due the estate and give receipts therefor;
- (6) Pay claims against and debts of the estate;
- (7) Compromise claims in favor of or against the estate;
- (8) Have custody of property of the estate.

(d) The voting of corporate shares of stock is governed by the provisions of G.S. 55-69 (f).

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1959, c. 1160.)

Cross Reference.—As to person named as executor failing to qualify or renounce, see § 28-16.

§ 28-185. Representatives liable for devastavit.—The executors and administrators of persons who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been. (1868-9, c. 113, s. 68; Code, s. 1495; Rev., s. 167; C. S., s. 173.)

§ 28-186. Nonresident executor to appoint process agent.—A nonresident qualifying in the State as an executor shall at or before the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor. The executor shall file the appointment with the clerk in the county of his qualification. All citations, notices, and other processes served on such process agent shall be as effective as if served on the executor, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters testamentary shall be granted to an executor until the appointment of the process agent has been filed with the clerk, and the clerk shall have properly recorded and indexed said appointment. (1917, c. 198, ss. 1, 2, 3; C. S., s. 174; 1955, c. 481.)

Cross References.—As to appointment of executors, etc., see § 28-29 et seq. As to when nonresident executor may give bond after one year and then be entitled to rights, etc., of resident executor, see § 28-36. As to when no bond is required of executor of nonresident when executor has power to convey, see § 28-37.

Noncompliance as Ground for Removal.—The failure and refusal by a nonresi-

dent executrix to appoint a process agent as required by this section is sufficient ground under § 28-32 for her removal. In *re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

Applied in *Brauff v. Commissioner of Revenue*, 251 N.C. 452, 111 S.E.2d 620 (1959); *In re Marks' Estate*, 259 N.C. 332, 130 S.E.2d 678 (1963).

§ 28-187. Executor removing from State to appoint process agent.—When a resident executor removes from the State, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed. (1917, c. 198, s. 4; C. S., s. 175; 1955, c. 521.)

§ 28-188. Nonresident's failure to obey process ground for removal.—The clerk may remove any nonresident executor who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in §§ 28-186, 28-187, and appoint a resident. (1917, c. 198, s. 5; C. S., s. 176; 1955, c. 470.)

§ 28-189. Power to renew obligation; no personal liability.—Whenever a decedent is a maker, a surety, an indorser, or a guarantor of any note, bond or other obligation for the payment of money which is due at his death, or thereafter becomes due prior to the settlement of his estate, such obligation may be renewed under the following conditions:

- (1) The executor, administrator or collector of the decedent's estate may execute in his official capacity a new obligation, in the same capacity as decedent was obligated, for an amount equal to or less but not greater than the sum due on the original obligation, which shall be in lieu of the original obligation of decedent, whether made payable to the original holder or another; and the executor, administrator or collector may renew the obligation from time to time, and it shall bind the decedent's estate in the same manner and to the same extent as the original obligation; but the maturity of the obligation or any renewal thereof by the executor, administrator or collector shall not extend beyond a period of two years from the qualification of the original executor, administrator or collector, except as hereinafter provided.
- (2) If the court finds that it is for the best interest of the estate that the maturity of any such obligation be extended beyond two years from the qualification of the original executor, administrator or collector, the court in its discretion may authorize the executor, administrator or collector to renew the obligation for such additional period as the court

may deem best. This additional period shall be for not more than two years unless the time for final settlement of the estate is extended, in which case, subdivision (3), below, applies.

- (3) When the time for final settlement of the decedent's estate has been extended from year to year for a longer period by order of the clerk of the superior court, approved by the resident judge of the superior court, the obligation may likewise be further extended, but not beyond the period authorized by the court for the final settlement of the decedent's estate.

- (4) No obligation executed under this section shall bind the executor, administrator or collector personally. (1925, c. 86; 1933, cc. 161, 196, 498.)

Local Modification.—Mecklenburg, Pamlico, 1933, c. 161, s. 2.

Editor's Note.—For a descriptive sur-

vvey of the 1933 amendment to this section, see 11 N.C.L. Rev. 264. For review of this section, see 4 N.C.L. Rev. 18.

§ 28-190. Continuance of farming operations of deceased persons.—When any person shall die while engaged in farming operations, his executor or administrator shall be authorized to continue such farming operations until the end of the current calendar year, and until all crops grown during that year are harvested: Provided, that only the net income from such farming operations shall be assets of the estate, and any indebtedness incurred in connection with such farming operations shall be a preferred claim as to any heir, legatee, devisee, distributee, general or unsecured creditor of said estate. Nothing herein contained shall limit the powers of an executor under the terms of a will. (1935, c. 163.)

Quoted in *Poindexter v. First Nat'l Bank*, 244 N.C. 191, 92 S.E.2d 773 (1956).

ARTICLE 21.

Construction and Application of Chapter.

§ 28-191. Where no time specified, reasonable time allowed; extension.—If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk. (1871-2, c. 213, s. 16; Code, s. 1463; Rev., s. 169; C. S., s. 177.)

§ 28-192. Powers under will not affected.—Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will, provided creditors be not delayed thereby nor the order changed in which by law they are entitled to be paid. (R. C., c. 46, ss. 12, 13; 1868-9, c. 113, s. 23; Code, s. 1415; Rev., s. 170; C. S., s. 178.)

Cross Reference.—See §§ 28-117, 28-121 and notes thereto.

ARTICLE 22.

Estates of Missing Persons.

§§ 28-193 to 28-201: Repealed by Session Laws 1965, c. 815, s. 4.

Cross Reference. — For present provisions as to estates of missing persons, see §§ 28A-1 to 28A-22.

Chapter 28A.

Estates of Missing Persons.

Sec.	Sec.
28A-1. Death not presumed from seven years' absence; exposure to peril to be considered.	28A-13. Distribution of property of absentee.
28A-2. Action for receiver; contents of complaint; parties.	28A-14. Additional limitations on accounting, distribution or making claim by absentee.
28A-3. Procedure on complaint.	28A-15. When claim of absentee barred.
28A-4. Notice to interested persons.	28A-16. Laws of administration of estates applicable.
28A-5. Service of notices.	28A-17. Appointment of public administrator as receiver for estate of less than one thousand dollars.
28A-6. Procedure after notice.	28A-18. Payment of insurance policies.
28A-7. Property transferred to permanent receiver by order of judge; filing of inventory; recordation of order of transfer.	28A-19. Absentee insurance fund.
28A-8. Powers and duties of permanent receiver.	28A-20. Provisions applicable to person held incommunicado in foreign country.
28A-9. Search for absentee.	28A-21. When agents' acts binding on estate of absentee.
28A-10. Claims against absentee.	28A-22. Provisions of chapter severable.
28A-11. Final finding and decree.	
28A-12. Termination of receivership.	

§ 28A-1. Death not presumed from seven years' absence; exposure to peril to be considered.—(a) Death Not to Be Presumed from Mere Absence.—In any action under this chapter, where the death of a person and the date thereof, or either, is in issue the fact that he has been absent from his place of residence, unheard of for seven years, or for any other period, creates no presumption requiring the judge or the jury to find that he is now deceased. The issue shall be decided by the judge or jury as one of fact upon the evidence.

(b) Exposure to Specific Peril to Be Considered.—If during such absence the person has been exposed to a specific peril of death, this fact shall be considered by the judge; or if there be a jury, shall be sufficient evidence to be submitted to the jury. (1965, c. 815, s. 1.)

§ 28A-2. Action for receiver; contents of complaint; parties.—(a) Action for Receiver to Be Instituted in the Superior Court.—If any person having an interest in any property in this State disappears and is absent from his place of residence and after diligent inquiry his whereabouts remains unknown to those persons most likely to know the same, for a period of thirty days or more, or is a person in the military service of the United States who has been officially reported as missing in action, anyone who would be entitled to administer the estate of such absentee if he were deceased, or any interested person, may commence a civil action and file a duly verified complaint in the superior court of either the county of such absentee's domicile, or the county where any of his property is situated.

(b) Contents of the Complaint.—The complaint shall contain the following:

- (1) The name, age, occupation, and last known residence or address of such absentee;
- (2) The date and circumstances of his disappearance;
- (3) So far as known, a schedule of all his property within this State, including property in which he has an interest as tenant by the entirety, and other property in which he is co-owner with or without the right of survivorship;
- (4) The names and addresses of the persons who would have an interest in the estate of such absentee if he were deceased;

- (5) The names and addresses of all persons known to the complainant to claim an interest in the absentee's property; and
- (6) A prayer, that ancillary to the principal action, a receiver be appointed by virtue of the provisions of this chapter to take custody and control of such property of the absentee and to preserve and manage the same pending final disposition of the action as provided in G.S. 28A-11.

(c) Parties to the Action.—The absentee, all persons who would have an interest in the estate of such absentee if he were deceased, all persons known to claim an interest in the absentee's property, and all known insurers of the life of the absentee shall be made parties to the action. A guardian ad litem shall be appointed for the absentee, and shall file an answer in his behalf. (1965, c. 815, s. 1.)

§ 28A-3. Procedure on complaint.—Upon the filing of the complaint referred to in G.S. 28A-2, the judge may for cause shown appoint a temporary receiver to take charge of the property of the absentee to conserve it pending hearing on the complaint. Such temporary receiver shall qualify by giving bond in an amount and with surety approved by the judge and shall exercise only the powers specified by the judge. Within thirty days after the date of his appointment, he shall file an inventory of the property taken in charge. If a permanent receiver is appointed, the temporary receiver shall transfer and deliver to the permanent receiver all property in his custody and control, less such only as may be necessary to cover his expenses and compensation as allowed by the judge, and shall file his final account, and upon its approval be discharged. If the prayer for a permanent receiver is denied, the temporary receiver shall transfer and deliver to those entitled thereto all property in his custody and control less such only as may be necessary to cover his expenses and compensation as allowed by the judge, and shall file his final account, and upon its approval be discharged. If the prayer for a permanent receiver is denied the expenses and compensation of the temporary receiver may in the discretion of the judge be taxed as costs of the action to be paid by the complainant, but if the judge finds that the complaint was brought in good faith and upon reasonable grounds, he may charge such costs against the property of the absentee. (1965, c. 815, s. 1.)

§ 28A-4. Notice to interested persons.—Upon the filing of the inventory by the temporary receiver, the judge shall issue a notice reciting the substance of the complaint and the appointment and action of the temporary receiver. This notice shall be addressed to such absentee, to all persons who would have an interest in the estate of such absentee if he were deceased, to all persons alleged in the complaint to claim an interest in the absentee's property, and to all whom it may concern. It shall direct them to file in the court within a time fixed by the judge a written statement of the nature and extent of the interest claimed in the property, and to appear at a time and place named and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this chapter. The return day of the notice shall be not less than thirty nor more than sixty days after its date unless otherwise ordered by the judge. (1965, c. 815, s. 1.)

§ 28A-5. Service of notices.—All notices required under this chapter shall be served on all parties to the action and on all other persons entitled to such notice in the manner now prescribed by G.S. 1-585 through G.S. 1-592, and in addition thereto the absentee shall be served by publication once in each of four successive weeks in one or more newspapers in the county where the proceeding is pending, and one copy shall be posted in a conspicuous place upon each parcel of land shown in the temporary receiver's inventory, and one copy shall be sent by registered or certified mail with return receipt requested to the last known address of such absentee. The judge may in his discretion cause other and further notice to be given within or without the county. (1965, c. 815, s. 1.)

§ 28A-6. **Procedure after notice.**—The absentee or any person entitled to notice as provided in G.S. 28A-4 may appear and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this chapter. The judge may, after the hearing, either dismiss the complaint and order that the property in the custody and control of the temporary receiver be returned to the persons entitled thereto or he may make a finding that the absentee disappeared as of a stated date and appoint a permanent receiver of the absentee's property. (1965, c. 815, s. 1.)

§ 28A-7. **Property transferred to permanent receiver by order of judge; filing of inventory; recordation of order of transfer.**—Upon the permanent receiver giving bond as required by G.S. 28A-16 and its approval by the judge, the judge shall order the temporary receiver to transfer and deliver to the permanent receiver custody and control of the absentee's property, and the permanent receiver shall file with the court an inventory of the property received by him. A copy of this order as it affects any real property shall be issued by the judge and delivered to the permanent receiver who shall cause the same to be recorded in the office of the register of deeds of each county wherein such real property is situated. (1965, c. 815, s. 1.)

§ 28A-8. **Powers and duties of permanent receiver.**—The permanent receiver shall under the direction of the judge administer the absentee's property as an equity receivership with the following powers:

- (1) To take custody and control of all property of the absentee wherever situated,
- (2) To collect all debts due to the absentee and to pay all debts owed by him,
- (3) To bring and defend suits,
- (4) To pay insurance premiums,
- (5) With the approval of the judge in each instance, to continue to operate and manage any business enterprise, farm or farming operations, and to make necessary contracts with reference thereto,
- (6) With the approval of the judge in each instance, to renew notes and other obligations, obtain loans on life insurance policies, and pledge or mortgage property for loans necessary in carrying on or liquidating the affairs of such absentee,
- (7) With the approval of the judge in each instance, to partition property owned by the absentee and another as joint tenants or tenants in common, with or without the right of survivorship; provided, in the case of property owned by the absentee and spouse as tenants by the entirety, such property may be partitioned only if the absentee's spouse consents in writing to the partitioning, and, in the event of partitioning, one half of the property or proceeds shall belong to the spouse and one half shall belong to the receiver as property of the absentee,
- (8) With the approval of the judge in each instance to sell, lease, invest and reinvest any or all property, its income, or its proceeds,
- (9) To pay over or apply the proceeds of loans and sales of such portion, or all of the property or the income thereof as may be necessary for the maintenance and support of the absentee's dependents; and if the income from the property of the absentee is not sufficient to pay all his debts and to provide for the maintenance and support of his dependents, the permanent receiver may apply to the judge for an order to sell or mortgage so much of the real or personal property as may be necessary therefor; each such sale or mortgage shall be reported to the judge, and if approved and confirmed by the judge, the receiver shall execute the required conveyances or mortgages of such property

to the purchaser or lender upon his complying with the terms of sale or mortgage.

The judge may, in his discretion, by written order modify, add to or subtract from the statutory powers granted in this section. (1965, c. 815, s. 1.)

§ 28A-9. Search for absentee.—The judge shall by order direct the receiver to make a search for the absentee. The order shall specify the manner in which the search is to be conducted in order to insure that, in the light of the circumstances of the particular case, a diligent and reasonable effort be made to locate the absentee. The order may prescribe any methods of search deemed advisable by the judge, but must require, as a minimum, the following:

- (1) Inquiry of persons at the absentee's home, his last known residence, the place where he was last known to have been, and other places where information would likely be obtained or where the absentee would likely have gone;
- (2) Inquiry of relatives, friends and associates of the absentee, or other persons who should be most likely to hear from or of him;
- (3) Insertion of a notice in one or more appropriate papers, periodicals or other news media, requesting information from any person having knowledge of the absentee's whereabouts; and
- (4) Notification of local, state and national offices which should be most likely to know or learn of the absentee's whereabouts. (1965, c. 815, s. 1.)

§ 28A-10. Claims against absentee.—Immediately upon the appointment of a permanent receiver under this chapter, the permanent receiver shall publish a notice addressed to all persons having claims against the absentee informing them of the action taken and requiring them to file their claims under oath with the permanent receiver. If any claimant fails to file his sworn claim within six months from the date of the first publication of such notice, the receiver may plead this fact in bar of his claim. Such notice shall be published in the same manner as that now prescribed by statute (G.S. 28-47) for claims against the estate of a decedent. Any party in interest may contest the validity of any claim before the judge, on due notice given to the permanent receiver and the person whose claim is contested. (1965, c. 815, s. 1.)

§ 28A-11. Final finding and decree.—(a) At any time, during the receivership proceedings, upon application to the judge by any party in interest and presentation of satisfactory evidence of the absentee's death, the judge may make a final finding and decree that the absentee is dead; in which event the decree and transcript of all of the receivership proceedings shall be certified to the clerk of the superior court for any administration as may be required by law upon the estate of a decedent, and the judge shall proceed no further except for the purposes hereinafter set forth in G.S. 28A-12, subdivisions (1) and (4); or

(b) At any time during the receivership proceedings, upon application to the judge by any party in interest and presentation of satisfactory evidence of the absentee's existence and whereabouts, except as provided in G.S. 28A-20, the judge may by decree revoke his finding that he is an absentee, and the judge shall proceed no further except for the purposes hereinafter set forth in G.S. 28A-12, subdivisions (2) and (4); or

(c) After the lapse of five years from the date of the finding of disappearance provided for in G.S. 28A-6, if the absentee has not appeared and no finding and decree have been made in accordance with the provisions of either subsections (a) or (b) above, and subject to the provisions of G.S. 28A-14, the judge may proceed to take further evidence and thereafter make a final finding of such absence and enter a decree declaring that all interest of the absentee in his property, including property in which he has an interest as tenant by the entirety

and other property in which he is co-owner with or without the right of survivorship, subject to the provisions of § 28A-8 (7), has ceased and devolved upon others by reason of his failure to appear and make claim. (1965, c. 815, s. 1.)

§ 28A-12. Termination of receivership.—Upon the entry of any final finding and decree as provided in G.S. 28A-11, the judge shall proceed to wind up the receivership and terminate the proceedings:

- (1) In the case of a decree under G.S. 28A-11, subsection (a), that the absentee is dead:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then deducting for the insurance fund provided in G.S. 28A-19 a sum equal to five percent (5%) of the total value of the property remaining for distribution upon settlement of the absentee's estate, including amounts paid to the estate from policies of insurance on the absentee's life, and
 - c. By then certifying the proceedings to the clerk of the superior court subject to an order by the judge administering the receivership, or
- (2) In the case of a decree under G.S. 28A-11, subsection (b), revoking the finding that the missing person is an absentee:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then returning his remaining property to him and rendering an accounting for that property not returned; or
- (3) In the case of a decree under G.S. 28A-11, subsection (c), declaring that all interest of the absentee in his property has ceased:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then satisfying all outstanding taxes, other debts and charges, and
 - c. By then deducting for the insurance fund provided in G.S. 28A-19 a sum equal to five percent (5%) of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life, and
 - d. By transferring or distributing the remaining property as provided in G.S. 28A-13; and
- (4) In all three cases by requiring the receiver's account, and upon its approval, discharging him and his bondsmen and entering a final decree terminating the receivership. (1965, c. 815, s. 1.)

§ 28A-13. Distribution of property of absentee.—The property remaining for distribution in accordance with the provisions of G.S. 28A-12, subdivision (3) d shall be transferred or distributed by the receiver in accordance with the judge's decree to those persons who would be entitled thereto under the applicable laws of intestate succession as though the absentee died intestate on the day five years after the date of his disappearance as determined by the judge in his final finding and decree; or, if the absentee leaves a document which, had he died, might have been admissible to probate as his will, the judge administering the receivership shall cause citations to issue to all persons entitled to notice upon the probate of wills in solemn form and determine whether the will would have been admitted to probate, and, if it shall be so determined, the transfer and distribution shall be according to the provisions of the document as of the date of the decree under G.S. 28A-12, subdivision (3) d, subject, however, to the right of the spouse of such absentee, or others, to claim whatever property

they would have been entitled by law to claim in derogation of the terms of the will as if the absentee had actually died testate on the date five years after the date of his disappearance as determined by the judge in his final finding and decree. (1965, c. 815, s. 1.)

§ 28A-14. Additional limitations on accounting, distribution or making claim by absentee.—If, at the time of the hearing in G.S. 28A-6 wherein a permanent receiver is appointed by the judge after a finding of disappearance as of a stated date, the date of disappearance so found is more than four years prior to the date of such hearing, the time limited for accounting for or fixed for transferring or distributing the property or its proceeds, or for barring actions by or on behalf of the absentee relative thereto, shall be not less than two years after the date of the appointment of the permanent receiver instead of the five years provided in G.S. 28A-11 (c).

Provided, however, that the time limited for accounting for or fixed for transferring and distributing any additional property or its proceeds within the State coming into the custody and control of the permanent receiver during such two-year period, or for barring actions by or on behalf of the absentee relative thereto, shall be not more than one year after the expiration of said two-year period. (1965, c. 815, s. 1.)

§ 28A-15. When claim of absentee barred.—No action shall be brought by an absentee to recover any portion of the property which is the subject of this proceeding after a final finding and decree as provided for in G.S. 28A-11 (a) or G.S. 28A-11 (c). (1965, c. 815, s. 1.)

§ 28A-16. Laws of administration of estates applicable.—Except as otherwise provided in this chapter, the laws of this State applicable to administration of decedents' estates as to the amount and type of bond, inventories, reports, priority of creditors, compensation and court costs shall govern receivers appointed under this chapter. (1965, c. 815, s. 1.)

§ 28A-17. Appointment of public administrator as receiver for estate of less than one thousand dollars.—Whenever a receiver is to be appointed under this chapter, and it is found by the judge that the fair value of the estate involved is less than one thousand dollars (\$1,000.00), the judge shall appoint the public administrator as such receiver, if there be one for the county. In case such public administrator is appointed, he shall act as receiver under his official bond as public administrator which shall be liable for any default, and no other bond shall be required. (1965, c. 815, s. 1.)

§ 28A-18. Payment of insurance policies.—(a) At the time of the distribution under G.S. 28A-13 the judge may direct the payment of any sums as they become due on any policies of insurance upon the life of the absentee, to the proper parties as their interest may appear.

(b) If the insurer refuses payment, the judge, upon the filing of appropriate supplemental pleadings in the pending action, shall determine all issues arising upon the pleadings, provided that all issues of fact shall be tried by a jury, unless trial by jury is waived.

(c) Where the required survival of a beneficiary is not established the provisions of this chapter shall apply as if the proceeds of the insurance were a part of the estate of the absentee, unless the absentee retained no interest in the policy.

(d) If in any proceeding under subsection (b) it is determined that the absentee is not dead and the policy provides for a surrender value, the receiver or an otherwise entitled beneficiary acting through the receiver, may demand the payment of the surrender value or obtain a policy loan. The receiver's receipt for such payment of surrender value shall be a release to the insurer of all claims under the

policy. The receiver shall pay over to such beneficiary any money so received, first reserving only an amount allowed by the judge as costs of the proceedings under this section and that amount required by G.S. 28A-12 (3) b. (1965, c. 815, s. 1.)

§ 28A-19. Absentee insurance fund.—(a) In each case of termination of the receivership, as provided in G.S. 28A-12, subdivisions (1) and (3), the judge shall set aside the sum therein named for the Absentee Insurance Fund and direct its payment by the receiver to the Treasurer of the State, who shall be liable therefor upon his official bond as for other monies received by him in his official capacity.

(b) The Treasurer shall retain, invest and reinvest all funds thus paid in a separate account entitled the "Absentee Insurance Fund," and add thereto as received the interest or other earnings.

(c) If at any time thereafter, a person declared an absentee whose estate has been distributed under a final finding and decree made as provided in G.S. 28A-13 shall personally appear before the Treasurer and make claim for reimbursement from such fund, the superior court may in an action commenced in the Superior Court of Wake County by such person against the Treasurer, enter a judgment ordering payment to the claimant of such part of the accumulated fund from all sources as in its opinion is found to be fair, adequate and reasonable under the circumstances, taking into account the disposition made of his property, the reasons for his absence, and any other relevant matters.

(d) An action for compensation from the Absentee Insurance Fund shall be begun within three years from the time of the absentee's return. In cases of infancy or other disability recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action.

(e) The Treasurer of the State shall from time to time prescribe the rate to be charged for the "Absentee Insurance Fund" under G.S. 28A-12, subdivisions (1) and (3) on the basis of actuarial experience. (1965, c. 815, s. 1.)

§ 28A-20. Provisions applicable to person held incommunicado in foreign country.—As to a person who is known to be held incommunicado in a foreign country, G.S. 28A-1 through G.S. 28A-8 and G.S. 28A-10 may be applied as though such person were an absentee within the meaning of this chapter, and if his whereabouts becomes unknown, the other provisions of this chapter may be applied by such amendments to the pending proceeding as may be required. (1965, c. 815, s. 1.)

§ 28A-21. When agents' acts binding on estate of absentee.—Acts of an agent of an absentee, carried out in good faith, prior to the appointment of a receiver under this chapter, shall be binding on the estate of such absentee if said acts were within the scope of the agent's real or apparent authority. (1965, c. 815, s. 1.)

§ 28A-22. Provisions of chapter severable.—If any provisions of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. (1965, c. 815, s. 1.)

Chapter 29.

Intestate Succession.

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ARTICLE 1.

General Provisions.

§ 29-1. **Short title.**—This chapter shall be known and may be cited as the Intestate Succession Act. (1959, c. 879, s. 1.)

Editor's Note. — Session Laws 1959, c. 879, s. 1, inserted this new chapter numbered 29 and entitled "Intestate Succession" to replace, as of July 1, 1960, former chapter 29 entitled "Descents." By the same act § 28-149, with regard to order of distribution, was repealed, effective July 1, 1960, and other related statutory provisions were repealed or amended to conform with the new Intestate Succession Law. Section 15 of the 1959 act provides: "This act shall become effective July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

Some of the cases cited in the notes to the sections of this chapter construe similar provisions of the former chapter.

Section 4.1 of Session Laws 1963, c. 1209, provides that from and after the certification of the amendment to § 6 of Article X of the Constitution which was proposed by c. 1209, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife. The approval of the amendment by vote of the people was certified by the Governor on February 6, 1964.

For article entitled "North Carolina's

New Intestate Succession Act," see 39 N.C.L. Rev. 1 (1960). For comment on 1959 changes in intestate succession statutes, see 40 N.C.L. Rev. 297 (1962).

Proof of the death of a person raises a presumption that such person died intestate. *Collins v. R. L. Coleman & Co.*, 262 N.C. 478, 137 S.E.2d 803 (1964).

Descents are regulated by statute in this State. *Edwards v. Yearby*, 168 N.C. 663, 85 S.E. 19 (1915); *University of N.C. v. Markham*, 174 N.C. 338, 93 S.E. 845 (1917).

§ 29-2. **Definitions.**—As used in this chapter, unless the context otherwise requires, the term:

- (1) "Advancement" means an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift; except that no gift to a spouse shall be considered an advancement unless so designated by the intestate donor in a writing signed by the donor at the time of the gift.
- (2) "Estate" means all the property of a decedent, including but not limited to:
 - a. An estate for the life of another; and
 - b. All future interests in property not terminable by the death of the owner thereof, including all reversions, remainders, executory interests, rights of entry and possibilities of reverter, subject, however, to all limitations and conditions imposed upon such future interests.
- (3) "Heir" means any person entitled to take real or personal property upon intestacy under the provisions of this chapter.
- (4) "Lineal descendants" of a person means all children of such person and successive generations of children of such children.
- (5) "Net estate" means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate.
- (6) "Share," when used to describe the share of a net estate or property which any person is entitled to take, includes both the fractional share of the personal property and the undivided fractional interest in the real property, which the person is entitled to take. (1959, c. 879, s. 1; 1961, c. 958, s. 1.)

Estate Tail Distinguishable from Life Estate with Remainder.—Inasmuch as an estate tail is an estate of inheritance which descends to particular heirs, it is distinguishable from a life estate with remainder. *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963).

The distinction between a vested and a contingent remainder is the capacity to take upon the termination of the preceding estate. *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963).

Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963).

Legacies Not Excluded in Determining

The English canons of descent remained in force in North Carolina until 1784. Because certain provisions seemed repugnant to republican principles, the legislature was led to make the changes which distinguish this section from the English act. *Clement v. Cauble*, 55 N.C. 82 (1854).

Cited in *Chisholm v. Hall*, 255 N.C. 374, 121 S.E.2d 726 (1961); *Chappell v. Chappell*, 260 N.C. 737, 133 S.E.2d 666 (1963); *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Net Estate.—The phrase "all lawful claims against the estate," as used in subdivision (5), does not include either specific legacies or general legacies for specific amounts. If it did, the net estate in many instances would be so deleted by their payment that it would be insufficient to provide the widow with the same share of her husband's real and personal property as if he died intestate. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

As Legacies or Distributive Shares Are Not "Lawful Claims."—In the use of the phrase "lawful claims against the estate" in subdivision (5), the legislature was not referring to claims of beneficiaries created either by the will or the statute of de-

scents and distributions. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

Residue of Net Estate after Distribution to Dissenting Widow.—When the dissenting widow is entitled to one half of the deceased spouse's net estate as defined in subdivision (5) of this section, § 30-3 (c) says that the residue of the testator's net estate for distribution to other devisees and legatees is as defined in this section. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

Definition of "Share" Applies to Share of Net Estate.—The definition contained in subdivision (6) is intended to apply when "share" is used "to describe the share of a net estate or property," e.g., a share under § 29-14, which "includes . . . the undivided fractional interest in the real property." *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Cited in *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962).

§ 29-3. Certain distinctions as to intestate succession abolished.—In the determination of those persons who take upon intestate succession there is no distinction:

- (1) Between real and personal property, or
- (2) Between ancestral and nonancestral property, or
- (3) Between relations of the whole blood and those of the half blood. (1959, c. 879, s. 1.)

Distinctions Abolished Only for Purposes of Determining Succession.—This section abolishes the distinction between real and personal property only in the

determination of those persons who take upon intestate succession. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

§ 29-4. Curtesy and dower abolished.—The estates of curtesy and dower are hereby abolished. (1959, c. 879, s. 1.)

Cited in *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962).

§ 29-5. Computation of next of kin.—Degrees of kinship shall be computed as provided in G.S. 104A-1. (1959, c. 879, s. 1.)

§ 29-6. Lineal succession unlimited.—There shall be no limitation on the right of succession by lineal descendants of an intestate. (1959, c. 879, s. 1.)

§ 29-7. Collateral succession limited.—There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating. (1959, c. 879, s. 1.)

§ 29-8. Partial intestacy.—If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will shall descend and be distributed as intestate property. (1959, c. 879, s. 1.)

§ 29-9. Inheritance by unborn infant.—Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him. (1959, c. 879, s. 1.)

Child Born after Ten Months.—If a child is born more than ten lunar months or 280 days after the death of the intestate, the presumption is that the child was not en ventre sa mere when the intestate died, but this presumption may be rebutted by evidence tending to show that he was in

fact the father of the child. *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959), decided under former Rule 7 of old § 29-1. See also *Britton v. Miller*, 63 N.C. 268 (1869); *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907).

§ 29-10. Renunciation.—(a) An heir may renounce the succession to his share of the estate of an intestate, and such renunciation shall be retroactive to

the date of the death of the intestate. The renunciation shall be by a signed and acknowledged writing, executed by the heir in person, or by his duly authorized attorney, guardian, or next friend when approved by the clerk of the superior court and the resident judge of the superior court, and shall be delivered to the clerk of the superior court of the county in which the administrator or collector qualifies.

(b) Such renunciation must be filed within four months after the death of the intestate if letters of administration are not issued within that period, or if letters of administration are issued during that period, then within two months after the date of such issuance, or if litigation that affects the share of the heir in the estate is pending at the expiration of such period for filing the renunciation, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(c) In case of such renunciation the property shall descend in accordance with the applicable provisions of this chapter as though the person renouncing had died immediately prior to the intestate; provided that in no event shall the persons who inherit by representation in the place of the renouncer receive from the renouncement a greater share of the estate than the renouncer would have received.

(d) If no renunciation is made in the manner and within the time provided for in subsections (a) and (b) hereof, the heir shall be conclusively deemed to have waived his or her right to renounce.

(e) Any mortgage, deed of trust, or other encumbrance, or any conveyance or contract to convey any property or interest in the estate of an intestate made by an heir during the period allowed for renunciation, or any such transaction by a person relating to his expectancy to inherit, shall constitute a waiver of his right of renunciation as provided in subsection (a) hereof. Provided such waiver shall be effective as against the personal representative only from the time written notice thereof is delivered by any interested party to the clerk of the superior court of the county in which renunciation must be filed.

(f) Every renunciation and notice of waiver of renunciation as provided for in subsections (a) and (e) hereof shall be filed with the clerk of superior court and cross-indexed by the clerk in a record entitled "Renunciation" to be kept by him pursuant to G.S. 2-42 (33).

(g) If a decedent dies intestate as to a portion of his estate, this section shall apply to that portion. (1959, c. 879, s. 1; 1961, c. 958, s. 2.)

Renunciation by Administrator.—Where a son died intestate, and his father was the administrator of his estate, and the father and his wife were the sole heirs and beneficiaries of their son's estate, renunciation was permissible within the intent and purpose of this section. The renunciation, however, would not adversely affect any rights or defenses asserted to defeat any claim on behalf of the estate. In re Estate of Glenn, 258 N.C. 351, 128 S.E.2d 408 (1962).

§ 29-11. Aliens.—Unless otherwise provided by law, it shall be no bar to intestate succession by any person, that he, or any person through whom he traces his inheritance, is or has been an alien. (1959, c. 879, s. 1.)

§ 29-12. Escheats. — If there is no person entitled to take under G.S. 29-14 or G.S. 29-15, or if in case of an illegitimate intestate, there is no one entitled to take under G.S. 29-21 or G.S. 29-22 the net estate shall escheat as provided in G.S. 116-21. (1959, c. 879, s. 1; 1961, c. 83.)

ARTICLE 2.

Shares of Persons Who Take Upon Intestacy.

§ 29-13. Descent and distribution upon intestacy.—All the estate of a person dying intestate shall descend and be distributed, subject to the payment

of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this chapter. (1959, c. 879, s. 1.)

Quoted in *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

§ 29-14. Share of surviving spouse.—The share of the surviving spouse shall be as follows:

- (1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one half of the net estate, including one half of the personal property and a one-half undivided interest in the real property; or
- (2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one third of the net estate, including one third of the personal property and a one-third undivided interest in the real property; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars (\$10,000.00) in value plus one half of the remainder of the personal property; or
- (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate. (1959, c. 879, s. 1.)

This section defines the share of the surviving spouse of an intestate. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

Definition of "Share" in § 29-2 (6) Applies.—The definition contained in § 29-2 (6) is intended to apply when "share" is used "to describe the share of a net estate or property," e.g., a share under this section which thus "includes . . . the undivided fractional interest in the real property." *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Surviving Wife and Child Each Take Undivided One Half of Lands.—Upon the death of an intestate, title to his lands immediately vests in his wife and child under this section, each taking a one-half undivided interest in fee. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Applied in *Smith v. Perdue*, 258 N.C. 686, 129 S.E.2d 293 (1963); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Cited in *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963); *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964).

§ 29-15. Shares of others than surviving spouse.—Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

- (1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G.S. 29-16; or
- (2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G.S. 29-16; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share; or
- (4) If the intestate is not survived by such children or lineal descendants

or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G.S. 29-16; or

- (5) If there is no one entitled to take under the preceding subdivisions of this section or under G.S. 29-14,
- a. The paternal grandparents shall take one half of the net estate in equal shares, or, if either is dead, the survivor shall take the entire one half of the net estate, and if neither paternal grandparent survives, then the paternal uncles and aunts of the intestate and the lineal descendants of deceased paternal uncles and aunts shall take said one half as provided in G.S. 29-16; and
 - b. The maternal grandparents shall take the other one half in equal shares, or if either is dead, the survivor shall take the entire one half of the net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take one half as provided in G.S. 29-16; but
 - c. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the paternal side, then those of the maternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole; or
 - d. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the maternal side, then those on the paternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole. (1959, c. 879, s. 1.)

ARTICLE 3.

Distribution Among Classes.

§ 29-16. **Distribution among classes.**—(a) Children and Their Lineal Descendants.—If the intestate is survived by lineal descendants, their respective shares in the property which they are entitled to take under G.S. 29-15 of this chapter shall be determined in the following manner:

- (1) Children.—To determine the share of each surviving child, divide the property by the number of surviving children plus the number of deceased children who have left lineal descendants surviving the intestate.
- (2) Grandchildren.—To determine the share of each surviving grandchild by a deceased child of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving grandchildren plus the number of deceased grandchildren who have left lineal descendants surviving the intestate.
- (3) Great-Grandchildren.—To determine the share of each surviving great-grandchild by a deceased grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-grandchildren plus the number of deceased great-grandchildren who have left lineal descendants surviving the intestate.
- (4) Great-Great-Grandchildren.—To determine the share of each surviving great-great-grandchild by a deceased great-grandchild of the intestate in the property not taken under the preceding subdivisions of this

subsection, divide that property by the number of such surviving great-great-grandchildren plus the number of deceased great-great-grandchildren who have left lineal descendants surviving the intestate.

- (5) Other Lineal Descendants of Children.—Divide, according to the formula established in the preceding subdivisions of this subsection, any property not taken under such preceding subdivisions, among the lineal descendants of the children of the intestate not already participating.

(b) Brothers and Sisters and Their Lineal Descendants.—If the intestate is survived by brothers and sisters or the lineal descendants of deceased brothers and sisters, their respective shares in the property which they are entitled to take under G.S. 29-15 of this chapter shall be determined in the following manner:

- (1) Brothers and Sisters.—To determine the share of each surviving brother and sister, divide the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.
- (2) Nephews and Nieces.—To determine the share of each surviving nephew or niece by a deceased brother or sister of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.
- (3) Grandnephews and Grandnieces.—To determine the share of each surviving grandnephew or grandniece by a deceased nephew or niece of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving grandnephews and grandnieces plus the number of deceased grandnephews and grandnieces who have left children surviving the intestate.
- (4) Great-Grandnephews and Great-Grandnieces.—Divide equally among the great-grandnephews and great-grandnieces of the intestate any property not taken under the preceding subdivisions of this subsection.
- (5) Grandparents and Others.—If there is no one within the fifth degree of kinship to the intestate entitled to take the property under the preceding subdivisions of this subsection, then the intestate's property shall go to those entitled to take under G.S. 29-15 (5).

(c) Uncles and Aunts and Their Lineal Descendants.—If the intestate is survived by uncles and aunts or the lineal descendants of deceased uncles and aunts, their respective shares in the property which they are entitled to take under G.S. 29-15 shall be determined in the following manner:

- (1) Uncles and Aunts.—To determine the share of each surviving uncle and aunt, divide the property by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate.
- (2) Children of Uncles and Aunts.—To determine the share of each surviving child of a deceased uncle or aunt of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of surviving children of deceased uncles and aunts plus the number of deceased children of deceased uncles and aunts who have left children surviving the intestate.
- (3) Grandchildren of Uncles and Aunts.—Divide equally among the grand-

children of uncles and aunts of the intestate any property not taken under the preceding subdivisions of this subsection. (1959, c. 879, s. 1.)

Not Function of Administrator to Partition Real Estate. — It is the duty of the administrator to make distribution of the surplus of his intestate's personal property among those entitled thereto, but it is not

his function to partition the real estate of his decedent among the heirs. *King v. Neese*, 233 N.C. 132, 63 S.E. 123 (1951), decided under former § 28-149.

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.—(a) A child, adopted in accordance with chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.

(b) An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs, except as provided in subsection (e) of this section.

(c) The adoptive parents and the heirs of the adoptive parents are entitled by succession to any property, by, through and from an adopted child the same as if the adopted child were the natural legitimate child of the adoptive parents.

(d) The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child, except as provided in subsection (e) of this section.

(e) If a natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession. (1959, c. 879, s. 1.)

Editor's Note.—For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

The right of an adopted child to inherit vests as of the death of her adoptive parent, and therefore where the parent died prior to the effective date of an act creating a new rule of descent and of distribution the act is not applicable. *Wilson v. Anderson*, 232 N.C. 521, 61 S.E.2d 447 (1950).

Former Rule 14 of old § 29-1 and § 28-149 (10), as enacted by Session Laws 1947, c. 879, had prospective effect only, and therefore a child adopted in 1919, under the law prescribing that such child should be entitled to inherit only from the adopting parent, was not entitled to inherit either realty or personalty from the brother of her deceased father by adoption, even though the brother died subsequent to the effective date of the 1947 act. *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

Under the provisions of Session Laws 1955, c. 813, s. 6, an adopted child was entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered

prior to the passage of the statute, the legislature having the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act. *Bennett v. Cain*, 248 N.C. 428, 103 S.E.2d 510 (1958).

The legislature has provided that an adopted child from the date of its adoption shall have the same property rights as a natural born child from the date of its birth. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961), decided under former § 28-149, old § 29-1 and § 48-23.

Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child, was swept away by the repealing clause in chapter 813, Session Laws of 1955. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961).

An adopted child shall be entitled to inherit property by, through, and from his adoptive parents as if he were born the legitimate child of the adoptive parents. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

Section Has No Bearing Upon Whether Adopted Child Takes under Will. — The

statutes relating to the right of adopted children to take as distributees and heirs have no bearing upon whether an adopted child takes under a will, except insofar as they establish and define the parent and child relationship between the adoptive

parents and the adopted child. *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953), decided under former § 28-149 and old § 29-1.

Antilapse Statute Applies to Adopted Child of Legatee.—See note to § 48-23.

ARTICLE 5.

Legitimated Children.

§ 29-18. **Succession by, through and from legitimated children.**—A child born an illegitimate who shall have been legitimated in accordance with G.S. 49-10 or G.S. 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock. (1959, c. 879, s. 1.)

Right to Inherit by, through and from Parents.—A legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

Right to Inherit from Collaterals.—The legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had had it been born in lawful wedlock. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

ARTICLE 6.

Illegitimate Children.

§ 29-19. **Succession by illegitimate children.**—For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him. (1959, c. 879, s. 1.)

No Inheritance from Father.—Under the intestacy laws, an illegitimate child cannot inherit from his father or his father's relatives. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Former Law.—See *Flintham v. Holder*, 16 N.C. 345 (1829); *Fairly v. Priest*, 56 N.C. 383 (1857); *McBryde v. Patterson*, 78 N.C. 412 (1878); *Bettis v. Avery*, 140 N.C. 184, 52 S.E. 584 (1905); *Ashe v. Camp Mfg. Co.*, 154 N.C. 241, 70 S.E. 295 (1911);

Brown v. Brown, 168 N.C. 4, 84 S.E. 25 (1915); *Wilson v. Wilson*, 189 N.C. 85, 126 S.E. 181 (1925); *Bryant v. Bryant*, 190 N.C. 372, 130 S.E. 21 (1925); *Battle v. Shore*, 197 N.C. 449, 149 S.E. 590 (1929); *Paul v. Willoughby*, 204 N.C. 595, 169 S.E. 226 (1933); *Brown v. Holland*, 221 N.C. 135, 19 S.E.2d 255 (1942); *Board of Educ. v. Johnston*, 224 N.C. 86, 29 S.E.2d 126 (1944).

§ 29-20. **Descent and distribution upon intestacy of illegitimate children.**—All the estate of a person dying illegitimate and intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against his estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this article. (1959, c. 879, s. 1.)

§ 29-21. **Share of surviving spouse.**—The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G.S. 29-14 for the surviving spouse of a legitimate person except:

- (1) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his or her mother, a one-half undivided interest in the real property and

the first ten thousand dollars (\$10,000.00) in value plus one half of the remainder of the personal property; or

- (2) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or his mother, the surviving spouse shall take all of the net estate. (1959, c. 879, s. 1.)

§ 29-22. Shares of others than the surviving spouse.—Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate, if there is no surviving spouse, as follows:

- (1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G.S. 29-16; or
- (2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G.S. 29-16; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother, she shall take the entire net estate or share; or
- (4) If the intestate is not survived by such children or lineal descendants or by a surviving mother, the other children of the mother of the intestate, whether legitimate or illegitimate, and the lineal descendants of any such children who are deceased, shall take as provided in G.S. 29-16; or
- (5) If there is no one entitled to take under the preceding subdivisions of this section or under G.S. 29-21, the maternal grandparents shall divide the entire net estate or if either is dead the survivor shall take the entire net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take as provided in G.S. 29-16. (1959, c. 879, s. 1.)

ARTICLE 7.

Advancements.

§ 29-23. In general.—If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share, shall be taken into account in computing the estate to be distributed. (1959, c. 879, s. 1.)

A child must account for advancements in order to share by inheritance or by distribution in the real estate and personal property owned by the parent at death, and therefore it must be ascertained that the parent left property before the question of advancements can arise. *Atkinson v. Bennett*, 242 N.C. 456, 88 S.E.2d 76 (1955), decided under former Rule 2 of old § 29-1.

Decisions under Former Law as to Advancements.—See *Stallings v. Stallings*, 16 N.C. 298 (1829); *Brown v. Brown*, 37 N.C. 309 (1842); *Lamb v. Carroll*, 28 N.C. 4

(1845); *Meadows v. Meadows*, 33 N.C. 148 (1850); *Headen v. Headen*, 42 N.C. 159 (1850); *Daves v. Haywood*, 54 N.C. 253 (1854); *Skinner v. Wynne*, 55 N.C. 41 (1854); *Shiver v. Brock*, 55 N.C. 137 (1855); *Ward v. Riddick*, 57 N.C. 22 (1858); *Jenkins v. Mitchell*, 57 N.C. 207 (1858); *Dixon v. Coward*, 57 N.C. 354 (1859); *Hollister v. Attmore*, 58 N.C. 373 (1860); *Bradsher v. Cannady*, 76 N.C. 445 (1877); *Melvin v. Bullard*, 82 N.C. 34 (1880); *Harper v. Harper*, 92 N.C. 300 (1885); *Eller v. Lillard*, 107 N.C. 486, 12 S.E. 462 (1890); *Kiger v. Terry*, 119 N.C.

456, 26 S.E. 38 (1896); *Ex parte Griffin*, 142 N.C. 116, 54 S.E. 1007 (1906); *Thompson v. Smith*, 160 N.C. 256, 75 S.E. 1010 (1912); *Nobles v. Davenport*, 183 N.C. 207, 111 S.E. 180 (1922); *Southern Distrib. Co. v. Carraway*, 189 N.C. 420, 127 S.E. 427 (1925); *Paschal v. Paschal*, 197 N.C. 40,

147 S.E. 680 (1929); *Prevette v. Prevette*, 203 N.C. 89, 164 S.E. 623 (1932); *Wolfe v. Galloway*, 211 N.C. 361, 190 S.E. 213 (1937); *Parker v. Eason*, 213 N.C. 115, 195 S.E. 360 (1938); *Harrelson v. Gooden*, 229 N.C. 654, 50 S.E.2d 901 (1948).

§ 29-24. **Presumption of gift.**—A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement. (1959, c. 879, s. 1.)

Right to Change Advancement into Gift.—While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, there is no apparent reason why a parent cannot by deed change into a gift that which was at the time of delivery intended as an advancement. *Atkinson v. Bennett*, 242 N.C. 456, 88 S.E.2d 76 (1955), decided under former Rule 2 of old § 29-1.

Where more than a year after an alleged

advancement, the parent executes a deed conveying all of her property in equal division between two of the children, without providing for advancements previously made, the asserted advancement to one of them should not be taken into account in the division of the property conveyed by the deed. *Atkinson v. Bennett*, 242 N.C. 456, 88 S.E.2d 76 (1955), decided under former Rule 2 of old § 29-1.

§ 29-25. **Effect of advancement.**—If the amount of the advancement equals or exceeds the intestate share of the advance, he shall be excluded from any further portion in the distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount of the advancement is less than his share, he shall be entitled to such additional amount as will give him his full share of the intestate donor's estate. (1959, c. 879, s. 1.)

Purpose.—The proviso to former Rule 2 of old § 29-1 was enacted to establish a perfect equality in the division of the intestate's whole estate, real and personal, amongst an intestate's children, excepting

only, that no property given by a parent to a child is in any case to be taken away. *King v. Neese*, 233 N.C. 132, 63 S.E.2d 123 (1951). See *Atkinson v. Bennett*, 242 N.C. 456, 88 S.E.2d 76 (1955).

§ 29-26. **Valuation.**—The value of the property given as an advancement shall be determined as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. However, if the value of the property, so advanced, is stated by the intestate donor in a writing signed by him and designating the gift as an advancement, such value shall be deemed the value of the advancement. (1959, c. 879, s. 1.)

§ 29-27. **Death of advancee before intestate donor.**—If the advancee dies before the intestate donor leaving a lineal heir or heirs who take by intestate succession from the intestate donor, the advancement shall be taken into account in the same manner as if it had been made directly to such heir or heirs, but the value shall be determined as of the time the original advancee came into possession or enjoyment, or when the heir or heirs came into possession or enjoyment or at the time of the death of the intestate donor, whichever first occurs. (1959, c. 879, s. 1.; 1961, c. 958, s. 3.)

§ 29-28. **Inventory.**—If any person who has, in the lifetime of an intestate donor, received a part of the donor's property, refuses, upon order of the clerk of superior court of the county in which the administrator or collector qualifies, to give an inventory on oath, setting forth therein to the best of his knowledge and belief the particulars of the transfer of such property, he shall be considered to have received his full share of the donor's estate, and shall not be entitled to receive any further part or share. (1959, c. 879, s. 1.)

§ 29-29. **Release by advancee.**—If the advancee acknowledges to the intestate donor by a signed writing that he has been advanced his full share of

the intestate donor's estate, both he and those claiming through him shall be excluded from any further participation in the intestate donor's estate. (1959, c. 879, s. 1.)

ARTICLE 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.—(a) In lieu of the share provided in G.S. 29-14 or 29-21, the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

- (1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
- (2) Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or
- (3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
- (4) Is otherwise not legally entitled to the election provided in this section.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

(c) The election provided for in subsection (a) shall be made by the filing of a notice thereof with the clerk of the superior court of the county in which the administration of the estate is pending, or, if no administration is pending, then with the clerk of the superior court of any county in which the administration of the estate could be commenced. Such election shall be made:

- (1) At any time within one month after the expiration of the time fixed for the filing of a dissent, or
- (2) In case of intestacy, then within twelve months after the death of the deceased spouse if letters of administration are not issued within that period, or
- (3) If letters of administration are issued within twelve months after the date of the death of the deceased spouse, then within one month after the expiration of the time limited for filing claims against the estate, or
- (4) If litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

The notice of election shall:

- (1) Be directed to the clerk with whom filed;
- (2) State that the surviving spouse making the same elects to take under this section rather than under the provisions of G.S. 29-14 or 29-21, as applicable;
- (3) Set forth the names of all heirs, devisees, legatees, personal representatives and all other persons in possession of or claiming an estate or an interest in the property described in subsection (a); and
- (4) Request the allotment of the life estate provided for in subsection (a).

The notice of election may be in person, or by attorney authorized in a writing

executed and duly acknowledged by the surviving spouse and attested by at least one witness. If the surviving spouse is a minor or an incompetent, the notice of election may be executed and filed by a general guardian or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the notice of election may be executed and filed by a next friend appointed by the clerk. The notice of election, whether in person or by attorney, shall be filed as a record of the court, and a summons together with a copy of the notice shall be served upon each of the interested persons named in the notice of election.

(d) In case of election to take a life estate in lieu of an intestate share, as provided in either G.S. 29-14, G.S. 29-21, or G.S. 30-3 (a), the clerk of superior court, with whom the notice of election has been filed, shall summon and appoint a jury of three disinterested persons who being first duly sworn shall promptly allot and set apart to the surviving spouse the life estate provided for in subsection (a) and make a final report of such action to the clerk.

(e) The final report shall be filed by the jury not more than sixty days after the summoning and appointment thereof, shall be signed by all jurors, and shall describe by metes and bounds the real estate in which the surviving spouse shall have been allotted and set aside a life estate. It shall be filed as a record of court and a certified copy thereof shall be filed and recorded in the office of the register of deeds of each county in which any part of the real property of the deceased spouse, affected by the allotment, is located.

(f) In the election and procedure to have the life estate allotted and set apart provided for in this section, the rules of procedure relating to partition proceedings shall apply except insofar as the same would be inconsistent with the provisions of this section.

(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:

- (1) By a mortgage or deed of trust in which the surviving spouse has waived his or her rights by joining with the other spouse in the making thereof; or
- (2) By a purchase money mortgage or deed of trust, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the marriage; or
- (3) By a mortgage or deed of trust made prior to the marriage; or
- (4) By a mortgage or deed of trust constituting a lien on the property at the time of its acquisition by the deceased spouse either before or during the marriage.

(h) If no election is made in the manner and within the time provided for in subsection (c) the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased spouse by virtue of this section shall terminate. (1959, c. 879, s. 1; 1961, c. 958, ss. 4-8; 1965, c. 848.)

Editor's Note. — The 1965 amendment rewrote the exception at the end of subsection (a).

Section Preserves Benefits of Dower and Curtesy.—Dower, as such, has been abolished in North Carolina, but this section preserves to a surviving spouse the benefits of the former rights of dower and curtesy. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Law Is Concerned with Rights under

This Section.—Dower was a favorite of the law and was an elongation of the husband's estate, and the widow held in priority with the heirs and those claiming under them. The courts are no less concerned with the rights of a surviving spouse under this section. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Surviving Spouse Is Given Election So as Not to Be Rendered Penniless. — The reason for granting the surviving spouse an

election or choice is to prevent such spouse from being rendered penniless and turned out of doors by reason of a small net estate or an insolvent estate. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

The life estate, which the surviving spouse elects, is not subject to the payment of the ordinary debts due from the estate of the deceased spouse. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Thus, Spouse Would Elect Life Estate Where Estate Is Insolvent. — A surviving spouse would certainly elect to take a life estate where it would require a sale of all of the property of deceased's estate to pay the debts. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Different Time Limits Are Fixed to Give Surviving Spouse Opportunity to Decide. — The reason different time limits are fixed for making the election, under the different circumstances, as set out in subsection (c), subdivisions (1), (2), (3) and (4), is to give the surviving spouse ample opportunity to make a decision as to which choice is most beneficial. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

"Share" under Subsection (c) (4) Means Any Share Spouse Is Entitled to. — As used in subsection (c) (4), "share" means such share in the estate (not necessarily the net estate or property) as the surviving spouse shall be entitled to take by any provision of this chapter. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Any Litigation Affecting Spouse's Choice Affects Such Share. — Any litigation which may substantially and materially affect the choice the surviving spouse is entitled to make "affects the share of the surviving spouse in the estate" under subsection (c) (4). *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Such as Suit on Disputed Claim Large Enough to Render Estate Insolvent. — If there is a disputed claim which, if allowed, would render the estate insolvent or nearly so, and which, if disallowed, would leave a large net estate, the outcome of the suit on the claim would affect the share of the surviving spouse and might well determine the matter of election, though the subject of the litigation is a mere debt and not the title to land. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Or Suit to Set Aside Deed from Son to Surviving Spouse of His Interest in Estate. — Where, before the time limit for making an election, as provided in subsection (c) (3), had expired, a son instituted litigation to set aside a deed to his mother of his in-

terest in his deceased father's lands, on the ground that she had defrauded him, the outcome of the litigation would affect her choice or election, i.e., her share of the estate. The pendency of the litigation extended her time for making the election. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Subsection (c) (4) Authorizes Fixing of Time for Election Where Such Litigation Is Pending. — Subsection (c) (4) contemplates that the outcome of the litigation may well determine whether the surviving spouse will elect to take a life estate. Therefore, it authorizes the surviving spouse, if such litigation is pending, to request of the clerk a written order allowing a reasonable time within which the notice of election and the proceedings pursuant thereto may be filed and instituted. Upon such request, it becomes the duty of the clerk forthwith to make a written order fixing a time within which an election may be filed in accordance with subsection (c). *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Time Allowed Should Be Reasonable Time after Litigation Ends. — The time allowed under subsection (c) (4) should be such time after the termination of the pending litigation as to the clerk, in the exercise of his sound discretion, seems reasonable under the circumstances. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

And Twenty Days Is Not Unreasonable. — Twenty days allowed under subsection (c) (4) by the clerk for filing notice of election and issuing of summons is not unreasonable. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

The order fixing the time limit under subsection (c) (4) must be made forthwith upon the ex parte request of the surviving spouse. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Such Order Is Only Ministerial. — The written order under subsection (c) (4) is only ministerial, it merely fixes the time limit, and it is not an adjudication of any issues or questions of law which may be raised in the proceeding between the surviving spouse and other interested parties. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Rights of Parties Are Not Determined Until Later. — The rights of the parties are determined after notice of election has been filed pursuant to the order fixing the time limit, summons served and the pleadings are in. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Procedure Is in Accordance with Rules

Relating to Partition.—Proceedings determining the rights of the parties and allotting the life estate are in accordance with the rules of procedure relating to partition of lands as far as practicable. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Applied in *Lucas v. Felder*, 261 N.C. 169, 134 S.E.2d 154 (1964).

Cited in *Smith v. Smith*, 265 N.C. 34, 143 S.E.2d 311 (1965); *Samet v. United States*, 242 F. Supp. 214 (M.D.N.C. 1965).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

Sec.

- 30-1. Right of dissent.
- 30-2. Time and manner of dissent.
- 30-3. Effect of dissent.

Article 2.

Dower.

30-4 to 30-10. [Repealed.]

Article 3.

Allotment of Dower.

30-11 to 30-14. [Repealed.]

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

- 30-15. When spouse entitled to allowance.
- 30-16. Duty of personal representative or justice to assign allowance.
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Part 2. Assigned by Justice of the Peace.

Sec.

- 30-19. Value of property ascertained.
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- 30-21. Report of commissioners.
- 30-22. Fees of commissioners.
- 30-23. Right of appeal.
- 30-24. Hearing on appeal.
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Part 3. Assigned in Superior Court.

- 30-27. Surviving spouse or child may apply to superior court.
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- 30-29. What complaint must show.
- 30-30. Judgment and order for commissioners.
- 30-31. Duty of commissioners; amount of allowance.
- 30-32. Exceptions to the report.
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ARTICLE 1.

Dissent from Will.

§ 30-1. **Right of dissent.**—(a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator:

- (1) Is less than the intestate share of such spouse, or
- (2) Is less than one half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent.

(b) For the purpose of subsection (a) of this section and by way of illustration and not of limitation, the following shall, subject to the exception hereinafter set forth, be included in the computation of the value of the property or interests in property passing to the surviving spouse as a result of the death of the testator:

- (1) The value of a legal or equitable life estate for the life of the surviving spouse;
- (2) The value of the proceeds of an annuity for the life of the surviving spouse;
- (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
- (4) The value of any property passing by survivorship, including real property owned by the decedent and surviving spouse as tenants by the entirety;
- (5) The value of the principal of a trust under the terms of which the surviv-

ing spouse holds a general power of appointment over the principal of the trust estate;

except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.

(c) For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator shall be determined and valued as of the date of his death, which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized shall be final for determining the right of dissent and shall be used exclusively for this purpose. (1959, c. 880, s. 1; 1961, c. 959, s. 1; 1965, c. 849, s. 1.)

Editor's Note. — Session Laws 1959, c. 880, s. 1, provides: "Chapter 30 of the General Statutes, entitled 'Widows,' is hereby redesignated 'Surviving Spouses,' and article 1 thereof is hereby rewritten."

Session Laws 1959, c. 880, s. 3 provides: "This act shall become effective on July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

Section 4.1 of Session Laws 1963, c. 1209, provides that from and after the certification of the amendment to § 6 of Art. X of the Constitution which was proposed by c. 1209, wherever "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife. The approval of the amendment by vote of the people was certified by the Governor on February 6, 1964.

The 1965 amendment reenacted this section without change. Section 2 of the amendatory act provides: "This reenactment of G.S. 30-1, G.S. 30-2 and G.S. 30-3 shall not be construed as a legislative determination that, with respect to the right of a husband to dissent from his wife's will, these sections were invalid between the date of certification of the amendments to Art. X, § 6 and the date of ratification of this act. This intention is manifested by the following language of s. 4.1 of c. 1209 of the Session Laws of 1963: 'From and after the date of certification of the amendments set out in s. 1 of this act, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate succession, it shall apply alike to both husband and wife.'"

For note on constitutionality of hus-

band's right to dissent from wife's will, see 41 N.C.L. Rev. 311 (1963).

For case law survey on devolution of property, see 41 N.C.L. Rev. 432 (1963).

See also 11 N.C.L. Rev. 274 and 23 N.C.L. Rev. 380, for discussion of law prior to amendments.

Article Was Unconstitutional Insofar as It Authorized Dissent by Husband.—The provisions of this section and §§ 30-2 and 30-3, insofar as they gave a husband a right in certain cases to dissent from his deceased wife's will, and to take a specified share of his deceased wife's real and personal property, violated the former provisions of Const., Art. X, § 6, since they diminished a married woman's estate disposed of by her will, and restricted and abridged her constitutional power to dispose of her property by will as if she were unmarried. *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963), decided prior to the 1964 amendment to N.C. Const., Art. X, § 6.

Decision of Unconstitutionality Not Ground for Cancelling Agreement Based on Section.—An agreement between the widower and the beneficiaries in regard to the settlement of an estate and the deed and the consent judgment effectuating the agreement were made in reliance upon this section giving the husband the right to dissent from the will of his wife, there was no ground for the cancellation of the consent judgment and deed sequent to the declaration by the court of the unconstitutionality of this section. *Roberson v. Penland*, 260 N.C. 502, 133 S.E.2d 206 (1963).

This section confers no right of dower

or year's support; these rights exist independently. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963). As to abolition of dower, see § 29-4.

Testator Presumed to Have Known of Widow's Right to Dissent.—In making a will a husband is presumed to have knowledge of and to have taken into consideration the statutory right of his widow to dissent from the will. *Keesler v. North Carolina Nat'l Bank*, 256 N.C. 12, 122 S.E.2d 807 (1961).

Dissent Equivalent to Death.—Dissent of widow, so far as remaindermen are concerned, is equivalent to her death. *Keesler v. North Carolina Nat'l Bank*, 256 N.C. 12, 122 S.E.2d 807 (1961).

Widow Has Six Months to Dissent.—This section allows a widow six months from the probate of the will of her husband within which to dissent. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

Time Is to Enable Her to Reach Intelligent Conclusion.—Time is allowed by this section to enable the widow to make an examination into the value of the estate, the debts and liabilities, and for her to come to an intelligent conclusion as to the course she should pursue under all the circumstances that surround her. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

If She Offers Will and Is Appointed Executrix, She Cannot Resign and Dissent Unless Disqualified.—A widow who offers a will for probate and qualifies as executrix thereunder, and enters upon the duties of her office, or knowingly takes property thereunder, may not afterwards be allowed to resign and dissent from said will, unless

it appears that such widow was at the time mentally and physically disqualified from attending to the business in hand or having any intelligent concept of what she was about. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

But Surviving Spouse Need Not Resign While Right Being Determined.—The personal representative need not resign from that position during the time the right to dissent is being determined. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

And Failure to Resign Is Not Waiver of Right to Dissent.—The failure of the surviving spouse to resign as personal representative during the time the right to dissent is determined under the provisions of this section, cannot constitute a waiver of the right to dissent. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

The right to dissent is limited to those cases in which provisions under the will, when added to the value of property passing outside the will as a result of the testator's death, (1) are less than the intestate share, or (2) are less than one half the net estate if neither lineal descendant nor parent survives. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

Method Is Provided for Determining Different Benefits.—Subsection (c) provides a method by which to determine the value of benefits under the will and the benefits in case of intestacy. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

§ 30-2. Time and manner of dissent.—(a) Any person entitled under the provisions of G.S. 30-1 to dissent from the will of his or her deceased spouse, may do so by filing such dissent with the clerk of the superior court of the county in which the will is probated, at any time within six months after the issuance of letters testamentary or of administration with the will annexed, or if litigation that affects the share of the surviving spouse is pending at the expiration of the time allowed for filing the dissent, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(b) The dissent shall be in writing signed and acknowledged by the surviving spouse or his or her duly authorized attorney; provided, however, if the surviving spouse is a minor or an incompetent, the dissent may be executed and filed by the general guardian, or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the dissent may be executed and filed by a next friend appointed by the clerk of the superior court of the county in which the will is probated.

(c) The dissent, whether in person or by attorney, shall be filed as a record of the court.

(d) If no dissent is filed in the manner and within the time provided for in subsections (a), (b) and (c) of this section the surviving spouse shall be deemed to

have waived his or her right to dissent. (1868-9, c. 93, s. 37; Code, s. 2108; Rev., s. 3080; C. S., s. 4096; 1959, c. 880, s. 1; 1961, c. 959, s. 2; 1965, c. 849, s. 1.)

Cross References. — See note to § 30-1. As to intestate succession, see § 29-1 et. seq.

Editor's Note. — The 1965 amendment reenacted this section without change.

Some of the cases in the following note were decided under § 30-1 as it stood before the passage of the 1959 act which rewrote this article.

For note on dissent by incompetent widow through her guardian, see 35 N.C.L. Rev. 520 (1957).

Article Was Unconstitutional as Applied to Dissent By Husband. — See note to § 30-1.

This section is a statute of limitation, not an enabling statute. The period provided a widow to dissent from her husband's will is not a condition precedent to that right, but merely limits the time in which she may resort to the courts to enforce it. *Whitted v. Wade*, 247 N.C. 81, 100 S.E.2d 263 (1957).

This section is a statute of limitations. It extinguishes no right but limits the time in which a widow may enforce the right the law gives her to participate in her husband's estate. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

See also *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963) and *Hinton v. Hinton*, 61 N.C. 410 (1868).

Failure to dissent within the time specified does not extinguish the right, it simply bars the action therefor. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

Dissent Not a Condition Precedent to Right to Dower. — Dissent within six months is not a condition precedent to the right of a widow, whose husband dies testate, to dower. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963). As to abolition of dower, see § 29-4.

Widow Must Comply with Section Although Will Gives Her Nothing. — Although a will gives a widow nothing, she is nevertheless required to comply with § 30-2. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

Although an insane widow received nothing in the will of her husband, the failure of her guardian to dissent for her within six months of his qualification barred her right of dissent at the end of that period. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

An insane widow is not barred by the statute of limitations in this section, but may bring the action through a guardian as provided in this section within three years after the disability is removed pursuant to § 1-17. *Whitted v. Wade*, 247 N.C. 81, 100 S.E.2d 263 (1957), so holding though the guardian was not appointed until more than six months after the husband's will was proved.

Statute Runs against Insane Widow from Appointment of Guardian. — The statute of limitation provided in this section begins to run against an insane widow's right to dissent from the date a guardian is appointed. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

Widow May Dissent without Assigning Reason.—The right of a widow to dissent from the will is given by law, and she may exercise such right within the time fixed by statute without assigning any reason therefor. *Union Nat'l Bank v. Easterby*, 236 N.C. 599, 73 S.E.2d 541 (1952).

Dissent Based on Separate Agreement with Remaindermen.—The fact that the widow's unconditional dissent from the will and election to take her statutory rights is based upon separate agreement with the vested remaindermen that they pay her a specified sum, does not affect the validity of the dissent, the dissent being valid unless she is induced to dissent in ignorance of her rights to her prejudice. *Union Nat'l Bank v. Easterby*, 236 N.C. 599, 73 S.E.2d 541 (1952).

Duty of Clerk to Record Dissent. — While the statute merely requires the filing of the dissent, it is the duty of the clerk to record the dissent when filed. *Philbrick v. Young*, 255 N.C. 737, 122 S.E.2d 725 (1961).

Effect of Recording. — This recording creates the presumption that the instrument was the act of the widow done in the time and manner required by law. *Philbrick v. Young*, 255 N.C. 737, 122 S.E.2d 725 (1961).

Former Law.—See *Cheshire v. McCoy*, 52 N.C. 376 (1860); *Jones v. Gerock*, 59 N.C. 190 (1861); *Ramsour v. Ramsour*, 63 N.C. 231 (1869); *Yorkly v. Stinson*, 97 N.C. 236, 1 S.E. 452 (1887); *Horton v. Lee*, 99 N.C. 227, 5 S.E. 404 (1888); *Hollomon v. Hollomon*, 125 N.C. 29, 34 S.E. 99 (1899); *Richardson v. Justice*, 125 N.C. 409, 34 S.E. 441 (1899); *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465 (1903); *Lee v. Giles*, 161 N.C. 541, 77 S.E. 852 (1913);

Atlantic Trust & Banking Co. v. Stone, 176 N.C. 270, 97 S.E. 8 (1918); *In re Smith's Estate*, 226 N.C. 169, 37 S.E.2d 127 (1946); *Coble v. Coble*, 227 N.C. 547, 42 S.E.2d 898 (1947).

Quoted in *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

Cited in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1952).

§ 30-3. Effect of dissent.—(a) Upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2 (3), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

(b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

(c) If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata unless the will otherwise provides. (R. C., c. 118, s. 12; 1868-9, c. 93, s. 38; Code, s. 2109; Rev., s. 3081; C. S., s. 4097; 1959, c. 880, s. 1; 1961, c. 959, s. 3; 1965, c. 849, s. 1.)

Cross References.—See note to § 30-1. As to intestate succession, see § 29-1 et seq.

Editor's Note.—The 1965 amendment reenacted this section without change.

Most of the cases in the following note were decided under § 30-2 as it stood before the passage of the 1959 act which rewrote this article.

In General.—A widow having dissented from her husband's will is entitled to exactly the same share in his estate she would have received if he had died intestate. So far as her property rights in her husband's estate are concerned there is no will. In all other respects the will remains and the executors are controlled by its terms. *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953), commented on in 31 N.C.L. Rev. 491 (1953).

Article Was Unconstitutional as Applied to Dissent by Husband.—See note to § 30-1.

The effect of a widow's dissent is spelled out in subsections (a) and (b). *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

Dissent Accelerates the Vesting of the Property.—Widow's dissent from will held to terminate her life estate thereunder and accelerate the vesting of remainder. *Union Nat'l Bank v. Easterby*, 236 N.C. 599, 73 S.E.2d 541 (1952).

Dissenting Widow May Not Assert Any

Benefits under Will.—The widow's dissent from her husband's will is a rejection of it as far as her rights are concerned, and having elected to treat it as a nullity, she may not assert any benefits thereunder, even in regard to direction in the will for the payment of estate taxes. *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953), commented on in 31 N.C.L. Rev. 491 (1953).

Where a will directed that "all estate, inheritance or succession taxes of every kind which may be assessed against my estate or against any beneficiary thereunder in connection with my estate, shall be paid by my executors as debts of my estate, out of the general assets thereof, without diminishing any specific devise or bequest contained herein by reason hereof," testator's widow who dissented from the will could not bring herself within the classification of devisee or legatee under the will or become entitled to any right or benefit therein prescribed. *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953), commented on in 31 N.C.L. Rev. 491 (1953).

Property from Which General Legacies Come Is Asset Subject to Distribution to Widow.—When the property from which general legacies must come provides income, it is a general asset of the estate subject to the payment of debts and disposition under the terms of the will and, where a widow dissents, is to be propor-

tionately distributed to her under the applicable statute. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

Meaning of Residue of Net Estate.—See note to § 29-2.

When Dissenting Widow Takes Share Free of Federal Estate Tax.—The only instance where a surviving wife is allowed to take her distributive share free and clear of the federal estate tax occurs when her husband dies testate, leaves no lineal descendants or parents surviving him, and she dissents from his will. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963); *Adams v. Adams*, 261 N.C. 342, 134 S.E.2d 633 (1964).

A childless widow who dissents from the will of her husband who is survived also by one or more lineal descendants by a

former marriage, takes her statutory share of the estate computed after the deduction of the federal estate taxes. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

The words "as if he had died intestate" were construed prior to the 1959 amendment in *State ex rel. Corporation Comm'n v. Dunn*, 174 N.C. 679, 94 S.E. 481 (1917).

Former Law.—See *Hinton v. Hinton*, 68 N.C. 100 (1873); *Arrington v. Dorten*, 77 N.C. 367 (1877); *Trustees of Baptist Female Univ. v. Borden*, 132 N.C. 476, 44 S.E. 47 (1903); *State ex rel. Corporation Comm'n v. Dunn*, 174 N.C. 679, 94 S.E. 481 (1917).

Cited in *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E.2d 651 (1951); *Gomer v. Askew*, 242 N.C. 547, 89 S.E.2d 117 (1955).

ARTICLE 2.

Dower.

§§ 30-4 to 30-8: Repealed by Session Laws 1959, c. 879, s. 14.

Cross Reference.—As to abolition of the estate of dower, see § 29-4.

§ 30-9: Repealed by Session Laws 1965, c. 853.

Cross Reference.—For present provisions as to conveyance without joinder of incompetent spouse, see § 39-7.

§ 30-10: Repealed by Session Laws 1959, c. 879, s. 14.

Editor's Note.—The act repealing this section inserted the new chapter 29 entitled "Intestate Succession."

ARTICLE 3.

Allotment of Dower.

§§ 30-11 to 30-14: Repealed by Session Laws 1959, c. 879, s. 14.

Editor's Note.—The act repealing these sections inserted the new chapter 29 entitled "Intestate Succession."

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. **When spouse entitled to allowance.**—Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of one thousand dollars (\$1,000.00) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c.

499, s. 2; Rev., s. 3091; C. S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1.)

Cross References. — As to property subject to allowance, see § 30-18 and note. As to effect of wife's adultery, see § 52-20. As to allowance to children, see § 30-17.

Editor's Note.—For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 376 (1953).

Purely Statutory Right.—The right of a widow to a year's support is purely statutory. *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912). See *Drewry v. Raleigh Sav. Bank & Trust Co.*, 173 N.C. 644, 92 S.E. 593 (1917); *Jones v. Callahan*, 242 N.C. 566, 89 S.E.2d 111 (1955); *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

If the wife dies intestate, the husband has the same right as a widow. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

Under this section as rewritten, for the first time in our law a husband may be entitled to a year's allowance. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

Priority over Creditors.—The widow is given her right to a year's support against all general creditors, but no better title to the property assigned her than her husband had. She is entitled to her year's allowance in preference to the special lien acquired by an execution bearing teste prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner and plight in which her husband held it. *Williams v. Jones*, 95 N.C. 504 (1886). Her priority extends over the funeral expenses and costs of administration. *Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896).

Mortgage Registered after Husband's Death.—Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support, it was held that the widow took the property subject to the mortgage lien. *Williams v. Jones*, 95 N.C. 504 (1886); *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957).

Where widow fails to dissent from will, and brings an action after six months from the probate for a year's allowance, such action is not maintainable. *Perkins v. Brinkley*, 133 N.C. 86, 45 S.E. 465 (1903); *Jones v. Callahan*, 242 N.C. 566, 89 S.E.2d 111 (1955).

Under this section as phrased prior to the 1961 revision, the time element in §

30-2 was a statute of limitations with respect to the rights of both dissent and year's support. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

A widow who has dissented from her husband's will takes her year's allowance in addition to her statutory share in his estate. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

The phrase "and shall, in cases of testacy, be charged against the share of the surviving spouse," refers only to the share of a widow who takes in accordance with the will and has not dissented from it. *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963).

When Husband Died a Citizen of Another State.—It has been held that the widow of a man who dies a citizen of another state is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the laws of his domicile. *Simpson v. Cureton*, 97 N.C. 113, 2 S.E. 668 (1887). See *Medley v. Dunlap*, 90 N.C. 527 (1884).

But in *Jones v. Layne*, 144 N.C. 600, 57 S.E. 372 (1907), it is held that a widow, whose husband died domiciled in another state, is entitled to her year's support in this State in which there is a fund due her husband, if the widow is a bona fide resident in the State. The reason given for this ruling is that the fiction of personal property being considered as belonging to the domicile of the owner applies only to the distribution of the assets of the one deceased, and has no application to payment of debts, legacies, costs of administration, etc. See *Moye v. May*, 43 N.C. 131 (1851). Further support may be found in the object of the statute giving to the widow her year's support. See *Kimball v. Deming*, 27 N.C. 418 (1845); *In re Hayes*, 112 N.C. 76, 16 S.E. 904 (1893).

Adultery Prior to Enactment of Section Not a Bar.—A widow is not barred of her right to a year's support under this section by reason of adultery committed prior to the passage of the statute. *Cook v. Sexton*, 79 N.C. 305 (1878).

Antenuptial Contract as a Bar. — A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. *Perkins v. Brinkley*, 133 N.C. 80, 45 S.E. 465 (1903).

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off to the widow her year's support, provided for her in the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was

estopped by the award and cannot maintain a proceeding under this section. *Flippin v. Flippin*, 117 N.C. 376, 23 S.E. 321 (1895).

Applied in *In re Stewart*, 140 N.C. 28, 52 S.E. 255 (1905).

Cited in *Gomer v. Askew*, 242 N.C. 547, 89 S.E.2d 117 (1955).

§ 30-16. Duty of personal representative or justice to assign allowance.—It shall be the duty of every administrator, collector, or executor of a will, on application in writing, signed by the surviving spouse, at any time within one year after the death of the deceased spouse, to assign to the surviving spouse the year's allowance as provided in this article.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a justice of the peace, as provided in § 30-20, for ten days after the surviving spouse has filed the aforesaid application, or if the surviving spouse is the personal representative, the surviving spouse may make application to the justice, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative.

Where any personal property of the deceased spouse shall be located outside the township or county where the deceased spouse resided at the time of his death, the personal representative or the surviving spouse may apply to any justice of the peace of any township or county where such personal property is located, and it shall be the duty of such justice to assign the year's allowance as if the deceased spouse had resided and died in that township. (1868-9, c. 93, s. 12, 1870-1, c. 263; Code, ss. 2120, 2122; 1889, cc. 496, 531; 1891, c. 13; Rev., ss. 3096, 3098; C. S., ss. 4113, 4115; 1961, c. 749, s. 2.)

Widow's Allowance Is Terminable.—The administrator is only under a duty to assign the year's allowance upon written application of the widow, signed by her, and within one year from the decedent's death and if these requirements are not met, there is no duty to assign the allowance; therefore, it is terminable. *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

Therefore Not Part of Marital Deduction for Estate Tax Purposes. — The

widow's year's allowance being terminable is not part of the marital deduction for estate tax purposes. *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

Next Friend as Representative of Minor Widow.—In dissenting from her husband's will and applying for a year's allowance, the widow, being a minor without guardian, may be represented by a next friend, duly appointed. *Hollomon v. Hollomon*, 125 N.C. 29, 34 S.E. 99 (1899).

§ 30-17. When children entitled to an allowance.—Whenever any parent dies leaving any child under the age of eighteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of eighteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of three hundred dollars (\$300.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within ten days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a justice of the peace, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said

child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3.)

Editor's Note.—For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 376 (1953).

The background and effect of this section are summarized in part as follows in 17 N.C.L. Rev. 357: Since 1796 statutes have been in force in North Carolina providing for the allotment of a portion of the property of a deceased person for the support of his widow and family for one year after his death. See *In re Stewart*, 140 N.C. 28, 52 S.E. 255 (1905). By these statutes the widow, in addition to her dower and distributive share of her husband's estate, has been given a year's allowance out of his personal property; the year's allowance has included not only a certain sum for her own maintenance, but also an additional sum for each child of hers or her husband's under fifteen years of age. The entire amount of this allowance was at one time held to be personal to the widow—her own property to be used at her pleasure. *Simpson v. Cureton*, 97 N.C. 112, 2 S.E. 668 (1887). As a consequence, if the husband died leaving no widow, or if the widow died before her year's allowance was assigned to her, no allowance could be set aside for the surviving children as such. *Kimball v. Deming*, 27 N.C. 418 (1845). To

remedy this situation, Public Laws 1889, c. 496, provided that in case there was no widow, or if she died before the allowance had been set aside, an allotment still could be made for the benefit of the members of the family surviving under the age of fifteen years. The 1939 amendment rewrote this statute so as to dissociate completely the year's allowance for a child from the concept of its inclusion in the widow's allotment, and to give him an independent legal status for the purpose of receiving a year's allowance.

This section, by its terms, its history, and when considered with the other provisions of this article, has reference only to the estate of an intestate or at most to an estate where the widow dissents from the will. *Jones v. Callahan*, 242 N.C. 566, 89 S.E.2d 111 (1955).

As to purpose of this and foregoing sections, see *Kimball v. Deming*, 27 N.C. 418 (1845), approved in *In re Hayes*, 112 N.C. 76, 16 S.E. 904 (1893).

Applied in *Drewry v. Raleigh Sav. Bank & Trust Co.*, 173 N.C. 664, 92 S.E. 593 (1917).

Cited in *Gomer v. Askew*, 242 N.C. 547, 89 S.E.2d 117 (1955).

§ 30-18. From what property allowance assigned.—Such allowance shall be made in money or other personal property of the estate of the deceased spouse. (1868-9, c. 93, s. 9; Code, s. 2117; Rev., s. 3095; C. S., s. 4112; 1925, c. 92; 1961, c. 749, s. 4.)

Former Law.—For cases construing section prior to the 1961 amendment, see *Van Norden v. Prim*, 3 N.C. 149 (1801); *Hunter v. Husted*, 45 N.C. 97 (1852); *Irvin v.*

Hughes, 82 N.C. 210 (1880); *Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896); *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912).

Part 2. Assigned by Justice of the Peace.

§ 30-19. Value of property ascertained. — The value of the personal property assigned to the surviving spouse and children shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will probated. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C. S., s. 4114; 1961, c. 749, s. 5.)

§ 30-20. Procedure for assignment.—Upon the application of the surviving spouse, or whenever it shall appear that a child is entitled to an allowance as provided by § 30-17, the personal representative of the deceased shall

apply to a justice of the peace of the township in which the deceased resided, or some other township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially as commissioners shall, with him, ascertain the person or persons entitled to an allowance according to the provisions of this article, and determine the money or other personal property of the estate, and pay over to or assign to the surviving spouse and to the children, if any, so much thereof as they shall be entitled to as provided in this article. Any deficiencies shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient to satisfy such allowance, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C. S., s. 4115; 1961, c. 749, s. 6.)

Assignment Not Precluding Increase of Allowance. — The assignment of a year's provision under this section does not serve

to preclude the widow's right to an increase thereof under § 30-26 et seq. *Mann v. Mann*, 173 N.C. 20, 91 S.E. 355 (1917).

§ 30-21. Report of commissioners.—The commissioners shall make and sign three lists of the money or other personal property assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the surviving spouse, one of these lists shall be delivered to him. Where the allowance is to a child, one of these lists shall be delivered to the surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said surviving parent; or to the child if said child is not living with the surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the justice, within twenty days after the assignment, to the superior court of the county in which administration was granted or the will probated, and the clerk shall file and record the same, together with any judgment entered pursuant to § 30-20. (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C. S., s. 4116; 1961, c. 749, s. 7.)

Filing of List of Articles Mandatory.—The filing and recording of the list of articles [now money or other personal property] allotted to the widow, as her year's support, as required by this section, is essential to its validity, and to the vesting in her of the property or debt allotted to the widow. *Kiff v. Kiff*, 95 N.C. 72 (1886).

Reasonable Certainty Required. — The

allotment to the widow must be made with such reasonable certainty, in regard to the thing allotted, as to indicate what property was intended by the commissioners, otherwise the allotment will be void. Under this principle the item, "labor for 3½ years, \$173," was held void. *Kiff v. Kiff*, 95 N.C. 72 (1886).

§ 30-22. Fees of commissioners.—Any person appointed by any justice of the peace to allot or set apart to any surviving spouse or child a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar (\$1.00) a day or fraction of a day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18; C. S., s. 3900; 1961, c. 749, s. 8.)

§ 30-23. Right of appeal.—The personal representative, or the surviving spouse, or child by his guardian or next friend, or any creditor, legatee or heir of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (1868-9, c. 93, s. 16; Code, s. 2124; 1897, c. 442; Rev., s. 3100; C. S., s. 4117; 1961, c. 749, s. 9.)

Findings Supported by Evidence Not Reviewed.—The findings of the judge in the special proceedings for the allotment of the year's support will not be reviewed

on appeal where there is evidence to support such findings. *Drewry v. Raleigh Sav. Bank & Trust Co.*, 173 N.C. 664, 92 S.E. 593 (1917).

§ 30-24. Hearing on appeal.—At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners. (1868-9, c. 93, s. 17; Code, s. 2125; Rev., s. 3101; C. S., s. 4118.)

§ 30-25. Personal representative entitled to credit.—Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him. (1868-9, c. 93, s. 18; Code, s. 2126; Rev., s. 3102; C. S., s. 4119.)

§ 30-26. When above allowance is in full.—If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars (\$2,000.00), the allowances for the year's support of the surviving spouse and the children shall not, in any case, exceed the value prescribed in G.S. 30-15 and 30-17; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C. S., s. 4120; 1961, c. 749, s. 10.)

Assignment Not Barring Increased Allowance.—The assignment of an allowance to a widow under § 30-20 is not a bar to a subsequent petition for an increased allowance. The very language of the statute

plainly indicates that the widow may have a further allowance in addition to the first, if the estate exceeds \$2,000. *Mann v. Mann*, 173 N.C. 20, 91 S.E. 355 (1917).

Part 3. Assigned in Superior Court.

§ 30-27. Surviving spouse or child may apply to superior court.—It shall not, however, be obligatory on a surviving spouse or child to have the support assigned as above prescribed. Without application to the personal representative, the surviving spouse, or the child through his guardian or next friend, may at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted or the will probated to have a year's support assigned. (1868-9, c. 93, s. 20; Code, s. 2128; Rev., s. 3104; C. S., s. 4121; 1961, c. 749, s. 11.)

Approval of Allowance Less than Maximum under § 30-31.—Where the superior court found a sum which a widow has agreed to accept to be reasonable and proper, though less than her maximum allowance would have been if calculated under § 30-31, this section gives the court the jurisdiction to make the allowance agreed upon. *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E.2d 651 (1951).

Irrelevant Allegations in Answer.—Upon petition for allotment of a widow's year's allowance, allegations in the answer to the

effect that the widow did not need an allotment for her support, that deceased's will evidenced a desire that the widow should receive no part of the estate, and that defendants were the aged and infirm parents of deceased dependent upon the estate left them by the will, are irrelevant to the issues and could not be shown in evidence, and were properly stricken upon motion, since even the reading of the pleadings would be highly prejudicial to petitioner. *Edwards v. Edwards*, 230 N.C. 176, 52 S.E.2d 281 (1949).

§ 30-28. Nature of proceeding; parties.—The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties. (1868-9, c. 93, s. 21; Code, s. 2129; Rev., s. 3105; C. S., s. 4122.)

§ 30-29. **What complaint must show.** — In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not an allowance has been made to plaintiff and the nature and value thereof. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C. S., s. 4123; 1961, c. 749, s. 12.)

§ 30-30. **Judgment and order for commissioners.**—If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two persons qualified to act as jurors, who shall determine the money or other personal property of the estate and assign to the plaintiff a sufficiency thereof for plaintiff's support for one year from the decedent's death. Any deficiency shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient for such support, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1868-9, c. 93, s. 23; Code, s. 2131; Rev., s. 3107; C. S., s. 4124; 1961, c. 749, s. 13.)

§ 30-31. **Duty of commissioners; amount of allowance.** — The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the plaintiff a value sufficient for the support of plaintiff according to the estate and condition of the decedent and without regard to the limitations set forth in this chapter; but the value allowed shall be fixed with due consideration for other persons entitled to allowances for year's support from the decedent's estate; and the total value of all allowances shall not in any case exceed the one half of the average annual net income of the deceased for three years next preceding his death. This report shall be returned by the justice to the court. (1868-9, c. 93, s. 24; Code, s. 2132; Rev., s. 3108; C. S., s. 4125.)

Cross Reference.—As to jurisdiction of superior court to approve allowance less than maximum allowed under this section, see note to § 30-27.

Meaning of Annual Net Income. — The provision of this section that the allowance shall not exceed "the one half of the [average] annual net income of the deceased for three years next preceding his death" means the one half of one year's net income, determined by the average annual income for the three years next preceding the decease, and not one half of the sum total of the annual net income for the

three-year period. *Holland v. Henson*, 189 N.C. 742, 128 S.E. 145 (1925).

Allowance Sustained Where Discretion Not Abused.—Where the estate of the deceased husband is large and in good condition, and he received a net annual income for three years prior to his death of over \$38,500, an allowance of \$12,500 for a year's support to his widow with minor son, less the value of the household furniture, is not an abuse of the superior court's discretion which the Supreme Court will review. *Drewry v. Raleigh Sav. Bank & Trust Co.*, 173 N.C. 664, 92 S.E. 593 (1917).

§ 30-32. **Exceptions to the report.**—The personal representative, or any creditor, distributee or legatee of the deceased, within ten days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (1868-9, c. 93, s. 25; Code, s. 2133; Rev., s. 3109; C. S., s. 4126; 1947, c. 484, s. 1.)

§ 30-33. **Confirmation of report; execution.**—If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases. (1868-9, c. 93, s. 26; Code, s. 2134; Rev., s. 3110; C. S., s. 4127.)

Chapter 31. Wills.

Article 1.

Execution of Will.

Sec.

- 31-1. Who may make will.
- 31-2. [Repealed.]
- 31-3. [Rewritten and renumbered.]
- 31-3.1. Will invalid unless statutory requirements complied with.
- 31-3.2. Kinds of wills.
- 31-3.3. Attested written will.
- 31-3.4. Holographic will.
- 31-3.5. Nuncupative will.
- 31-3.6. Seal not required.
- 31-4. Execution of power of appointment by will.

Article 2.

Revocation of Will.

- 31-5. [Rewritten and renumbered.]
- 31-5.1. Revocation of written will.
- 31-5.2. Revocation of nuncupative will.
- 31-5.3. Revocation by marriage; exceptions.
- 31-5.4. Revocation by divorce.
- 31-5.5. After-born or after-adopted child; effect on will.
- 31-5.6. No revocation by subsequent conveyance.
- 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.
- 31-5.8. Revival of revoked will.
- 31-6. [Renumbered.]
- 31-7. [Repealed.]
- 31-8. [Renumbered.]

Article 3.

Witnesses to Will.

- 31-8.1. Who may witness.
- 31-9. Executor competent witness.
- 31-10. Beneficiary competent witness; when interest rendered void.
- 31-10.1. Corporate trustee not disqualified by witnessing of will by stockholder.

Article 4.

Depository for Wills.

- 31-11. Depositories in offices of clerks of superior court where living persons may file wills.

Article 5.

Probate of Will.

- 31-12. Executor may apply for probate; jurisdiction when clerk interested party.

Sec.

- 31-13. Executor failing, beneficiary may apply.
- 31-14. Clerk to notify legatees and devisees of probate of wills.
- 31-15. Clerk may compel production of will.
- 31-16. What shown on application for probate.
- 31-17. Proof and examination in writing.
- 31-18. [Rewritten and renumbered.]
- 31-18.1. Manner of probate of attested written will.
- 31-18.2. Manner of probate of holographic will.
- 31-18.3. Manner of probate of nuncupative will.
- 31-18.4. Probate of wills of members of the armed forces.
- 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.
- 31-20. Wills filed in clerk's office.
- 31-21. Validation of wills heretofore certified and recorded.
- 31-22. Certified copy of will proved in another state or country.
- 31-23. Probate of will made out of the State; probate when witnesses out of State.
- 31-24. Probate when witnesses are non-resident; examination before notary public.
- 31-25. Probate when witnesses in another county.
- 31-26. [Renumbered.]
- 31-27. Certified copy of will of nonresident recorded.
- 31-28. Probates validated where proof taken by commissioner or another clerk.
- 31-29. Probates in another state before 1860 validated.
- 31-30. Validation of wills recorded without probate by subscribing witnesses.
- 31-31. Validation of wills admitted on oath of one subscribing witness.
- 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.
- 31-31.2. Validation of wills when recorded without order of probate or registration upon oath and examination of subscribing witness or witnesses.

Article 6.**Caveat to Will.**

Sec.

- 31-32. When and by whom caveat filed.
 31-33. Bond given and cause transferred to trial docket.
 31-34. Prosecution bond required in actions to contest wills.
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 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

Article 7.**Construction of Will.**

- 31-38. Devise presumed to be in fee.
 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.

Sec.

- 31-40. What property passes by will.
 31-41. Will relates to death of testator.
 31-42. Failure of devises and legacies by lapse or otherwise.
 31-42.1, 31-42.2. [Repealed.]
 31-43. General gift by will an execution of power of appointment.
 31-44. [Repealed.]
 31-45. [Rewritten and renumbered.]
 31-46. Validity of will; which laws govern.

Article 8.**Devise or Bequest to Trustee of an Existing Trust.**

- 31-47. Devise or bequest to trustee of an existing trust.

ARTICLE 1.*Execution of Will.*

§ 31-1. **Who may make will.**—Any person of sound mind, and 21 years of age or over, or married and of sound mind and 18 years of age or over, may make a will. (1811, c. 280; R. C., c. 119, s. 2; Code, s. 2137; Rev., s. 3111; C. S., s. 4128; 1953, c. 1098, s. 1; 1965, c. 303.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section, which formerly related only to the incapacity of infants. The amendatory act, which changed this and other sections relating to wills, in § 16 provides: "This act does not have the effect of rendering invalid any will executed or probated prior to July 1, 1953."

Section 4.1 of Session Laws 1963, c. 1209, provides that from and after the certification of the amendment to § 6 of Art. X of the Constitution which was proposed by c. 1209, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife. The approval of the amendment by vote of the people was certified by the Governor on February 6, 1964.

The 1965 amendment substituted "or married and of sound mind and 18 years of age or over" for "including a married woman."

For comment on the 1953 amendments to this chapter, see 31 N.C.L. Rev. 444 (1953). For article on medication as a threat to testamentary capacity, see 35 N.C.L. Rev. 380 (1957).

For case law survey on wills and administration, see 41 N.C.L. Rev. 530 (1963).

For article on drafting and probate of wills, see 23 N.C.L. Rev. 306.

Burden of Proving Mental Capacity.— "Wherever one alleges that the maker of a will did not have sufficient mental capacity to make it, then the burden is upon such person to satisfy the jury by the greater weight of the evidence of the truth of his contention and to overcome the presumption of sanity after the formal execution has been established." In re Pridgen's Will, 249 N.C. 509, 107 S.E.2d 160 (1959).

Instruction as to Mental Capacity. — When the court in its charge stated the rule to measure mental capacity in this language: "It is your duty in passing on the mental capacity of M. W. Pridgen to determine with reference to the will in controversy whether when he signed same he had such mental capacity as enabled him to understand the provisions contained in the paper, the extent of the same, and to know that he was giving the property therein bequeathed or devised to the person named therein and that he desired her to have it as written in the paper, to know his relatives and to know and realize that it was his free will and desire that his relatives should not have any property of his other than in the manner devised, or that devised," it was in

substance if not verbatim the rule as stated in numerous decisions by the Supreme Court. In *re Pridgen's Will*, 249 N.C. 509, 107 S.E.2d 160 (1959).

Under earlier prior law it was held that an infant between twenty-one and eighteen could dispose of personal estate by will.

§ 31-2: Repealed by Session Laws 1953, c. 1098, s. 1.

Editor's Note.—The repealing act became effective July 1, 1953. See note to § 31-1.

§ 31-3: Rewritten and renumbered as §§ 31-3.1 to 31-3.6 by Session Laws 1953, c. 1098, s. 2.

§ 31-3.1. **Will invalid unless statutory requirements complied with.**—No will is valid unless it complies with the requirements prescribed therefor by this article. (1953, c. 1098, s. 2.)

Editor's Note.—Former § 31-3 was rewritten by Session Laws 1953, c. 1098, s. 2, effective July 1, 1953, to appear as §§ 31-3.1 to 31-3.6. See note to § 31-1.

Some of the cases cited in the notes to this and the following five sections construe former § 31-3.

Compliance with Statutory Requirements.—See *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956). See also *Little v. Lockman*, 49 N.C. 495 (1857); *Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915); *Wescott v. First & Citizens Nat'l Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946); In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).

Necessity of Animus Testandi.—The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written animus testandi. It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it. In *re Perry*, 193 N.C. 397, 137 S.E. 145 (1927).

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made animus testandi, and where the other formalities have been observed, a "pack" of letters containing a note in his favor, with the indorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack," will not operate either as a valid holograph will or codicil. In *re Perry*, 193 N.C. 397, 137 S.E. 145 (1927).

Where the animus testandi appears as doubtful the question is for the jury. In

Williams' Legatees v. Heirs at Law, 44 N.C. 271 (1853).

Applied, as to will executed in another state under prior law, in *In re Reynolds*, 206 N.C. 276, 173 S.E. 789 (1934).

Cited in *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962).

re Will of Harrison, 183 N.C. 457, 111 S.E. 867 (1922).

Otherwise Where Animus Testandi Conclusively Presumed.—Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the animus testandi is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders. In *re Rowland's Will*, 206 N.C. 456, 174 S.E. 284 (1934).

Writing Drafted from Dictations after Testator's Death.—A paper-writing drafted by an attorney from a stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. *Kennedy v. Douglas*, 151 N.C. 336, 66 S.E. 216 (1909).

An agreement to adopt a minor and make her his heir, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, indicates that the instrument is not intended as a will. *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938).

References as to Certain Questions.—See 2 N.C.L. Rev. 107, for article on (1) what is sufficient subscription; (2) what are valuable papers; (3) what is meant by depositing with someone for safekeeping; (4) animus testandi.

As to devisability of possibility of reverter before condition broken, see *Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902).

§ **31-3.2. Kinds of wills.**—(a) Personal property may be bequeathed and real property may be devised by

(1) An attested written will which complies with the requirements of G.S. 31-3.3, or

(2) A holographic will which complies with the requirements of G.S. 31-3.4.

(b) Personal property may also be bequeathed by a nuncupative will which complies with the requirements of G.S. 31-3.5. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

§ **31-3.3. Attested written will.**—(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.

(b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.

(c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.

(d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other. (1953, c. 1098, s. 2.)

Cross References.—See note to § 31-3.1. As to manner of probate of attested written will, see § 31-18.1.

Editor's Note.—Some of the cases cited in the note to this section construe former § 31-3.

In General.—In order to prove the formal execution of a will by subscribing witnesses, as required by this section, it must appear that the will was signed by the testator or some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses and when the testator does not sign the will in the presence of the witnesses, the signature should be acknowledged by him. In re Will of Franks, 231 N.C. 252, 56 S.E.2d 668 (1949). See In re Morrow's Will, 234 N.C. 365, 67 S.E.2d 279 (1951).

In order to be a valid written will with witnesses, the same should be signed by the testator or some other person in his presence and by his direction, or the signature should be acknowledged by the testator, and subscribed in his presence by at least two witnesses. Watson v. Hinson, 162 N.C. 72, 77 S.E. 1089 (1913). As to witnesses to will, see §§ 31-8.1 to 31-10.

A codicil must be executed with the same formality as the will. Paul v. Davenport, 217 N.C. 154, 7 S.E.2d 352 (1940).

Distinction between Signing and Subscribing.—The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity in reference to the first class, that it is not necessary for the name to appear on any particular part of the

instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. Peace v. Edwards, 170 N.C. 64, 86 S.E. 807 (1915); In re Williams' Will, 234 N.C. 228, 66 S.E.2d 902 (1951), commented on in 30 N.C.L. Rev. 201 (1952).

The North Carolina statutes have never required a testator to subscribe his signature to his will. Yount v. Yount, 258 N.C. 236, 128 S.E.2d 613 (1962).

Name of Testator May Be Signed by Another.—That the name of the testator may be signed to the paper-writing by some other person in his presence and by his direction is expressly authorized by the statute. In re Williams' Will, 234 N.C. 228, 66 S.E.2d 902 (1951), commented on in 30 N.C.L. Rev. 201 (1952).

Where a will is written on two or more separate sheets, the statute does not require that they be physically attached or that the signature of the testator appear on each sheet. It is sufficient if the signature of the testator appears in any part of the will. In re Roberts' Will, 251 N.C. 708, 112 S.E.2d 505 (1960); In re Sessions' Will, 254 N.C. 369, 119 S.E.2d 193 (1961).

Signing in Presence of Witnesses Not Necessary.—It is not necessary that testator sign his will in the presence of the attesting witnesses, but if he does not do so he must acknowledge his signature either by acts or conduct. In re Will of Franks, 231 N.C. 252, 56 S.E.2d 668 (1949).

It is not required that testator sign the

will in the presence of the attesting witnesses. In *re* Will of Etheridge, 229 N.C. 280, 49 S.E.2d 480 (1948).

This section does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such. *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913); In *re* Fuller's Will, 189 N.C. 509, 127 S.E. 549 (1925).

But Attestation in Presence of Testator Is Essential.—It is essential that the will be subscribed in the presence of the testator by at least two witnesses. In *re* Thomas, 111 N.C. 409, 16 S.E. 226 (1892).

If the subscribing witnesses signed a will in a room adjacent to the room in which testator was lying in bed, but the testator was in a position where he did see or could have seen them subscribe their names, the attestation was in compliance with law. In *re* Pridgen's Will, 249 N.C. 509, 107 S.E.2d 160 (1959).

When a witness who had properly signed as such, no other witness signing, had the will copied upon different paper in the absence of the testator, signed the copy, left it at the home of the testator with the original, who afterwards procured the due attestation and signature of the other witness on the copy, both of which were found among the papers of the testator after his death, but the original was destroyed, the copy is not valid as a will, and evidence that the first draft was identical with the copy is incompetent, the first witness having signed before the testator, and not in his presence, there being no physical connection between the original and copy, and not upon the same paper as that of the signature of the testator. In *re* Baldwin, 146 N.C. 25, 59 S.E. 163 (1907).

Evidence tending to show that one of the subscribing witnesses signed the will as such in the presence of testatrix and the other subscribing witness warrants the jury in finding that the witness' subscription met the requirements of this section, notwithstanding that the witness wavered somewhat in her testimony. In *re* Redding's Will, 216 N.C. 497, 5 S.E.2d 544 (1939).

Witnesses Need Not Sign in Presence of Each Other.—See In *re* Will of Franks, 231 N.C. 252, 56 S.E.2d 668 (1949). See also *Watson v. Hinson*, 162 N.C. 72, 77

S.E. 1089 (1913); In *re* Will of Johnson, 182 N.C. 522, 109 S.E. 373 (1921).

Witnesses are not required to sign in the presence of each other; only in the presence of the testator. In *re* Long's Will, 257 N.C. 598, 126 S.E.2d 313 (1962).

Where the judge told the jury that if the signatures of the witnesses "were subscribed thereto at the request of the testator and in his presence and in the presence of each other" they would answer the issue of execution of the will "Yes," this was error, and a new trial was required even though all the evidence tended to show that the witnesses did sign in the presence of each other. In *re* Long's Will, 257 N.C. 598, 126 S.E.2d 313 (1962).

Signature Made for Testatrix in Her Presence.—An instruction that it was not required that the will should be manually signed by the alleged testatrix if her name was signed thereto by someone in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will, was held correct. In *re* Will of Johnson, 182 N.C. 522, 109 S.E. 373 (1921).

Testimony Showing Formal Execution of Will.—Testimony of one subscribing witness to the effect that he signed the instrument at the request of testator simultaneously with the testator, and testimony of the other that when he signed same it had already been signed by testator, together with testimony that testator stated to the witnesses that the instrument was his will and requested them to sign same, was held sufficient to show formal execution of the will and to support the charge of the court hereon. In *re* Will of Franks, 231 N.C. 252, 56 S.E.2d 668 (1949).

Relation in Point of Time of Signing and Attestation.—Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that if the signature of the latter precede the signing by the testator the will is void. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. In *re* Baldwin, 146 N.C. 25, 59 S.E. 163 (1907).

Where a witness subscribes his name to an instrument during the afternoon, and the purported testatrix signs the instru-

ment the following night, but not in the presence of the witness, the signing of the instrument by the parties cannot be construed as one and the same transaction, and the instrument is not validly witnessed and attested by him, and, upon proof that the instrument was properly subscribed by one other witness, a peremptory instruction in favor of caveators is without error for want of proof that the instrument was subscribed by two witnesses. *In re McDonald's Will*, 219 N.C. 209, 13 S.E.2d 239 (1941).

The attestation by witnesses must be on the sheet of paper containing the testator's signature, or else upon some paper physically connected with that sheet. *In re Baldwin*, 146 N.C. 25, 59 S.E. 163 (1907).

Necessity of Date—Signature Required.—The testator's signature to the will is required though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator. *Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915), construing former § 31-3.

Where Only One of Inconsistent Wills Dated.—Where the decedent has left sev-

eral paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had indorsed under his signature, thereon, the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy. *Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915), construing former § 31-3.

Question for Jury.—It is for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient to submit the question to the jury. *In re Kelly's Will*, 206 N.C. 551, 174 S.E. 453 (1934).

Applied in *In re Crawford's Will*, 246 N.C. 322, 98 S.E.2d 29 (1957); *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Cited in *Matter of Covington's Will*, 252 N.C. 546, 114 S.E.2d 257 (1960); *In re Will of Gilkey*, 256 N.C. 415, 124 S.E.2d 155 (1962).

§ 31-3.4. Holographic will.—(a) A holographic will is a will

- (1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and
- (2) Subscribed by the testator, or with his name written in or on the will in his own handwriting, and
- (3) Found after the testator's death among his valuable papers or effects, or in a safe deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

(b) No attesting witness to a holographic will is required. (1953, c. 1098, s. 2; 1955, c. 73, s. 1.)

Cross References.—See note to § 31-3.1. As to manner of probate of holographic will, see § 31-18.2.

Editor's Note.—For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 597 (1955). For case law survey on holographic wills, see 41 N.C.L. Rev. 535 (1963).

Many of the cases cited in the note to this section construe former § 31-3.

Legislative History of Section.—See In

re Will of Gilkey, 256 N.C. 415, 124 S.E.2d 155 (1962).

It is not required that a holographic will be dated or the place of its execution stated therein. *Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952).

A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive

words sufficient to dispose of the estate, is valid as a holograph will under this section and § 31-18, subdivision (2) [now § 31-18.2], and it is not necessary that the writing be dated or show the place of execution. In re Parson's Will, 207 N.C. 584, 178 S.E. 78 (1935), citing In re Will of Lowrance, 199 N.C. 782, 155 S.E. 876 (1930).

It is necessary that the testator's name be inserted in his own handwriting in some part of the instrument. *Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952).

Name in Body of Will Sufficient Signature.—It is well settled that if the name of the testator appears in his handwriting in the body of the will this is a signing within the meaning of the statute [former § 31-3]. *Hall v. Misenheimer*, 137 N.C. 183, 49 S.E. 104, 107 Am. St. Rep. 474 (1904); *Richards v. W. M. Ritter Lumber Co.*, 158 N.C. 54, 73 S.E. 485 (1911); *Boger v. Cedar Cove Lumber Co.*, 165 N.C. 557, 81 S.E. 784, Ann. Cas. 1917D, 116 (1914); *Burriss v. Starr*, 165 N.C. 657, 81 S.E. 929, Ann. Cas. 1914D, 71 (1914); *Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915).

Under this section [former § 31-3], a paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will. In re Rowland, 202 N.C. 373, 162 S.E. 897 (1932).

Same—Example.—"I, John Jones, do make and publish this my last will and testament" is good if John Jones wrote the quoted words even though he did nothing further in the way of signing or attesting the instrument concerned. 2 N.C.L. Rev. 107.

Engraved Monogram of Testatrix Not Construed as Signature.—An engraved monogram of a testatrix, appearing on the instrument offered for probate in solemn form as a holographic will, may not be considered as a part thereof. The monogram is not in her handwriting and may not be construed to be her signature. *Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952).

Words Not in Handwriting of Testator.—Every word of a holographic will must be in the handwriting of testator, and while words printed on the paper will not invalidate the instrument but will be treated as surplusage if such printed words are not essential to the written words, printed words or letters may not be used to supply any essential part of the instrument.

Pounds v. Litaker, 235 N.C. 746, 71 S.E.2d 39 (1952).

When all the words appearing on a paper in the handwriting of the deceased person are sufficient to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be her last will and testament. In re Will of Lowrance, 199 N.C. 782, 155 S.E. 876 (1930); In re Parson's Will, 207 N.C. 584, 178 S.E. 78 (1935), wherein the unessential words had been printed on the paper before the testator used it.

Signature Need Not Be Witnessed.—It is not necessary that the testator's signature be witnessed if the requirements for a holographic will are established. In re Will of Gilkey, 256 N.C. 415, 124 S.E.2d 155 (1962).

Attestation Does Not Invalidate Holographic Will.—The fact of there being a signature of one subscribing witness to a will of land does not prevent it from being proved as a holograph will; and it is no objection to the probate of a script as a holograph will that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. *Hill v. Bell*, 61 N.C. 122 (1867).

Note Held to Be Codicil.—A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as § 31-18 [now § 31-18.2] requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. In re Will of Thompson, 196 N.C. 271, 145 S.E. 393 (1928).

Letter as Will.—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying "Brother Richard, take good care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house . . . I hope in a few days I will come back," etc., indicates the writer's present inten-

tion to dispose of his property, and is provable as his holograph will. *Wise v. Short*, 181 N.C. 320, 107 S.E. 124 (1921).

Letters written by a member of the armed forces which are not offered or proven in the manner or form prescribed are ineffectual as a testamentary disposition of property. *Wescott v. First & Citizens Nat'l Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946).

Purpose of Requirement that Paper Be Found among Valuable Papers.—The requirement of this section that the writing be found after death among testator's valuable papers was to show the author's evaluation of the document, important because lodged with important documents, to become effective upon death because left there by the author, thereby establishing the necessary animus testandi. In *re Will of Gilkey*, 256 N.C. 415, 124 S.E.2d 155 (1962).

What Constitutes Valuable Papers. — Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value. Much depends upon the condition and business and habits of the decedent in respect to keeping his valuable papers. *Winstead v. Bowman*, 68 N.C. 170 (1873).

The requirements of this section that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and [now "or"] effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient. In *re Will of Groce*, 196 N.C. 373, 145 S.E. 689 (1928). See also, *Hughes v. Smith*, 64 N.C. 493 (1870); In *re Williams' Will*, 215 N.C. 259, 1 S.E.2d 857 (1939).

If a document had been placed among the author's valuable papers without his knowledge and consent, it would have no validity as a will even though found among the papers after the author's death. In *re Will of Gilkey*, 256 N.C. 415, 124 S.E.2d 155 (1962).

In Drawer of Bookcase with Deeds, etc. — Where the proof showed that the script propounded as a holograph will was found in a small drawer of a bookcase, in the room which the alleged testator occupied at his death, with his deeds and other papers, it was held to be such a finding "among the valuable papers of the dece-

dent" as will, in connection with the other evidence required by the statute in respect to handwriting, authorize its probate. *Cornelius v. Brawley*, 109 N.C. 542, 14 S.E. 78 (1891).

A paper-writing found after testator's death in the pockets of the clothes he was wearing, with large sums of money and other papers of value was held to be effective as his will. In *re Will of Groce*, 196 N.C. 373, 145 S.E. 689 (1928).

Need Not Be Found among Most Valuable Papers. — The phrase, "among the valuable papers and [now 'or'] effects," etc., used in this section [former § 31-3] does not necessarily and without exception mean among the most valuable papers, etc. So the fact that decedent kept valuable papers in a tin box in a bank which were intrinsically more valuable than papers kept in a trunk where the will was found would not prevent the latter from being a depository within the meaning of the section. *Winstead v. Bowman*, 68 N.C. 170 (1873).

Deposit among Useless Papers and Rubbish.—In *Little v. Lockman*, 49 N.C. 495 (1857), the script propounded was found in the drawer of a bureau, among some useless papers and rubbish, and there were valuable papers and effects kept in another drawer of the same bureau. Under such circumstances the court properly held that the script was not found in such a place of deposit as was contemplated by the statute [former § 31-3]. *Hughes v. Smith*, 64 N.C. 493 (1870).

Evidence of Finding among Valuables. — That a holograph script was seen among the valuable papers and effects of the decedent eight months before his death is no evidence that it was found there at or after his death. *Adams v. Clark*, 53 N.C. 56 (1860).

Evidence that the will of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers and papers she desired to keep for their sentimental value, and that it was transferred after her death, together with the other papers, to her trunk where they were found, was held sufficient, under the circumstances of the case. In *re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924).

Jury to Determine Intention in Depositing with Valuables. — It was entirely proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper-writing was deposited by the deceased

among his valuable papers with the intention that it should be his will. *Simms v. Simms*, 27 N.C. 684 (1845); *Hill v. Bell*, 61 N.C. 122 (1867).

What Constitutes Depositing with Someone for Safekeeping.—In *Alston v. Davis*, 118 N.C. 202, 24 S.E. 15 (1896), a brother in Texas wrote to his sister in North Carolina that if he got sick or died in Texas he wanted her to have his farm. He simply mailed her the letter. Subsequently he died in Texas and his sister undertook to probate the letter as a holographic will in this State. The question arose whether it had been deposited "with someone for safekeeping"; the court held that this constituted depositing with someone for safekeeping and that the will should be probated. In view of the fact that a testamentary disposition must be accompanied with *animus testandi*, the decision seems to be clearly unsound, inasmuch as the letter in question discloses no such intention. This conclusion is supported by later de-

cisions of the court which in express terms refuses to follow the doctrine of *Alston v. Davis*. See *Spencer v. Spencer*, 163 N.C. 83, 79 S.E. 291 (1913). It is believed that if the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it as a will, the letter would be admitted to probate as such. See *In re Ledford's Will*, 176 N.C. 610, 97 S.E. 482 (1918); 12 N.C.L. Rev. 199.

Deposit in a Trunk Left with a Friend for Safekeeping.—The placing of a holographic will in a trunk, left for safekeeping with a friend, and having it in the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the point of deposit. *Hill v. Bell*, 61 N.C. 122 (1867).

Applied, as to former § 31-3, in *In re Gatling's Will*, 234 N.C. 561, 68 S.E.2d 301 (1951); *In re Bartlett's Will*, 235 N.C. 489, 70 S.E.2d 482 (1952); *In re Crawford's Will*, 246 N.C. 322, 98 S.E.2d 29 (1957).

§ 31-3.5. **Nuncupative will.**—A nuncupative will is a will

- (1) Made orally by a person who is in his last sickness or in imminent peril of death and who does not survive such sickness or imminent peril, and
- (2) Declared to be his will before two competent witnesses simultaneously present at the making thereof and specially requested by him to bear witness thereto. (1953, c. 1098, s. 2.)

Cross References.—See note to § 31-3.1. As to revocation of nuncupative will, see § 31-5.2. As to manner of probate of nuncupative will, see § 31-18.3 and note there-to.

Nuncupative Wills Not Precluded by Former § 31-3.—See *Kennedy v. Douglas*, 151 N.C. 336, 66 S.E. 216 (1909).

§ 31-3.6. **Seal not required.**—A seal is not necessary to the validity of a will. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

§ 31-4. **Execution of power of appointment by will.**—No appointment, made by will in the exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. (1844, c. 88, s. 9; R. C., c. 119, s. 4; Code, s. 2139; Rev., s. 3114; C. S., s. 4132.)

Cross Reference.—See § 31-43 and note.

ARTICLE 2.

Revocation of Will.

§ 31-5: Rewritten and renumbered as § 31-5.1 by Session Laws 1953, c. 1098, s. 3.

§ 31-5.1. Revocation of written will.—A written will, or any part thereof, may be revoked only

- (1) By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills, or
- (2) By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his direction. (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; 1953, c. 1098, s. 3.)

Editor's Note. — Former § 31-5 was rewritten by Session Laws 1953, c. 1098, s. 3, effective July 1, 1953, to appear as this section. See note to § 31-1.

Many of the cases cited in the note to this section construe former § 31-5.

One lacking testamentary capacity is not competent to revoke a prior will. The same degree of mental capacity is necessary to revoke a will as to make one. In re Shute's Will, 251 N.C. 697, 111 S.E.2d 851 (1960).

Revocation by Codicil Not Containing Express Words of Revocation. — In the absence of express words of revocation, it is a rule of construction that for a codicil to revoke any part of a will its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that the testator had changed his intentions. Yount v. Yount, 258 N.C. 236, 128 S.E.2d 613 (1962).

Material Alteration Necessary. — In order for there to be a revocation of a will, in whole or in part, under the provisions of this section [former § 31-5] there must not only exist the intent of the testator to cancel, but there must be the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N.C. 714, 120 S.E. 479 (1923).

Same—Primary Controlling Clause Unaltered, Effect. — Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section [former § 31-5]; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was

dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. In re Love's Will, 186 N.C. 714, 120 S.E. 479 (1923).

Presumption as to Second Will.—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of a prior date. In re Wolfe's Will, 185 N.C. 563, 117 S.E. 804 (1923), holding that where testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters, the two wills were not inconsistent and the latter did not revoke the former.

Presumption of Revocation Where Will Cannot Be Found.—It being shown that a will was once in existence and last heard of in possession of the testator, but could not be found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it. Scoggins v. Turner, 98 N.C. 135, 3 S.E. 719 (1887).

Such presumption is not conclusive, but it imposes upon the person asserting the will the burden of proving that it was not so destroyed, or that the testator was not of sound mind at the time of such presumed destruction. Scoggins v. Turner, 98 N.C. 135, 3 S.E. 719 (1887).

Revocation of Holographic Will. — It seems clear that a holographic will may be revoked just as an attested will may, i.e., (1) by burning, tearing, canceling or obliterating or (2) by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with. No witnesses are necessary on the holographic revocation. See 14 L.R.A. (n.s.) 968 (1908) and 112 Am. St. Rep. 822, 2 N.C.L. Rev. 110.

Instruction Held Without Error. — See

In re Gatling's Will, 234 N.C. 561, 68 S.E.2d 301 (1951).

Evidence of the preparation of a later dispositive instrument, without evidence that it was ever executed according to the formalities necessary to make it a valid will and without evidence that it contained any words of revocation or provisions contrary to a prior will, duly executed, is insufficient evidence of revocation of the will to justify the submission of the question of revocation to the jury. In re Crawford's Will, 246 N.C. 322, 98 S.E.2d 29 (1957).

To establish the revocation of a will by a subsequent writing it is necessary to prove the revocation in the manner required to establish the validity of the paper-writing originally offered for probate. In re Marks' Will, 259 N.C. 326, 130 S.E.2d 673 (1963).

Revocatory Paper Must Be a Testamentary Paper.—Where the writing offered as operating a revocation of the will of the testator contains none of the elements of a testamentary paper, it cannot be helped by evidence aliunde, and hence has no revocatory effect. Davis v. King, 89 N.C. 441 (1883).

Effect of Disposal of Articles Already Bequeathed.—A bequest of personal property in a trunk which contained the holographic will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testa-

trix. In re Foy, 193 N.C. 494, 137 S.E. 427 (1927).

Interlineations and Annotations Held Insufficient to Show Revocation.—Where testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed, and marks through certain words of the will, and it appears that such alterations are insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the notations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annotations are insufficient to show a revocation of the will, intent to revoke being essential to revocation by defacement or obliteration of the will by testator under this section. In re Will of Roediger, 209 N.C. 470, 184 S.E. 74 (1936).

Revocation by Parol Prior to Former § 31-5.—See Giles v. Giles, 1 N.C. 377 (1801), decided prior to the enactment of former § 31-5, where it is held that a will of real estate in writing may be revoked by parol if the words of revocation denote a present intention to revoke.

Revival by Parol Declaration.—A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. Giles v. Giles, 1 N.C. 377 (1801).

§ 31-5.2. Revocation of nuncupative will.—A nuncupative will or any part thereof may be revoked

- (1) By a subsequent nuncupative will, or
- (2) By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills. (1953, c. 1098, s. 4.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.3. Revocation by marriage; exceptions.—A will is revoked by the subsequent marriage of the maker, except as follows:

- (1) A will made prior to the marriage of the maker which contains an express statement to the effect that it is made in contemplation of marriage to a person named therein is not revoked by the maker's marriage to such person.
- (2) A will made in the exercise of a power of appointment, or so much thereof as is made in the exercise of a power of appointment, if the real or personal estate thereby appointed would not, in default of such appointment, pass to the maker's heirs or next of kin, is not revoked by the maker's subsequent marriage. (1844, c. 88, s. 10; R. C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116; C. S., s. 4134; 1947, c. 110; 1953, c. 1098, s. 5.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, renumbered former § 31-6 to appear as this section.

The object of this section is set out as plainly as language can do it. It provides that a person's subsequent marriage ipso facto, with certain exceptions, revokes all prior wills made by such person. It does not provide for any partial revocation. In re Tenner's Will, 248 N.C. 72, 102 S.E.2d 391 (1958).

Marriage Revokes Will in Toto. — In those instances not coming within the exceptions enumerated in this section, the marriage of the testator after the execution of the will revokes it in toto and not only to the extent necessary to permit the widow to share in the estate. In re Tenner's Will, 248 N.C. 72, 102 S.E.2d 391 (1958).

Republication by Parol Is Not Effective.—Where the will of a married woman was revoked by another marriage contracted after the will was made, her verbal declaration, during the last coverture, that said paper-writing was her last will and testament, without any further execution thereof in accordance with the statute, did not constitute a reexecution and republication of it. Means v. Ury, 141 N.C. 248, 53 S.E. 850 (1906).

A holograph will revoked by testator's marriage can only be revived by a written

instrument setting forth his intention, and duly attested by two witnesses, or by a writing by the testator himself, found among his valuable papers, or handed to one for safekeeping. Sawyer v. Sawyer, 52 N.C. 133 (1859).

Republication by Codicil.—A will which has been revoked by the marriage of the testator is revived and republished by a codicil properly executed subsequent to the marriage which refers to the prior will and expresses an intention of the testator that the will should be effective except as altered by the codicil. In re Coffield's Will, 216 N.C. 285, 4 S.E.2d 870 (1939).

Evidence of Undue Influence. — This section revokes, with certain exceptions, any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. In re Will of Bradford, 183 N.C. 4, 110 S.E. 586 (1922).

Applied in Potter v. Clark, 229 N.C. 350, 49 S.E.2d 636 (1948); Sinclair v. Travis, 231 N.C. 345, 57 S.E.2d 394 (1950).

Cited in In re Will of Watson, 213 N.C. 309, 195 S.E. 772 (1938); McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

§ 31-5.4. Revocation by divorce.—Dissolution of marriage by absolute divorce after making a will does not revoke the will of any testator but it revokes all provisions in the will in favor of the testator's spouse so divorced, including, but not by way of limitation, the appointment of such spouse as executor or executrix. (1953, c. 1098, s. 6.)

Editor's Note. — The act inserting this section became effective July 1, 1953. See note to § 31-1.

"Divorce" Is Used in General and Comprehensive Sense.—In enacting this section the General Assembly used the word "di-

vorce" in its general and comprehensive sense, that is, as denoting a judgment or decree by which a marriage is dissolved or annulled, rather than in its limited and technical sense. Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

§ 31-5.5. After-born or after-adopted child; effect on will.—(a) A will shall not be revoked by the birth of a child to or adoption of a child by the testator after the execution of the will, but any such after-born or after-adopted child shall be entitled to such share in testator's estate as it would be entitled to if the testator had died intestate unless:

- (1) The testator made some provision in the will for the child, whether adequate or not, or
- (2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child.

(b) The provisions of G.S. 28-153 to 28-158 inclusive shall be construed as applicable to both an after-born child and an after-adopted child. (1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C. S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote former § 31-45 to appear as this section. See note to § 31-1.

For comment on sufficiency of life insurance as provision for after-born child, see 29 N.C.L. Rev. 218. For note on the inheritance rights of an after-adopted child, see 30 N.C.L. Rev. 276 (1952). For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

Some of the cases cited in the note to this section construe former § 31-45.

For rules under common law and civil law, see *Christian v. Carter*, 193 N.C. 537, 137 S.E. 596 (1927).

After-Born Child Takes Share Unless Provided for or Intentionally Excluded.—A child born after a will is executed takes as in case of intestacy, unless (1) provision is made for it in the will, or (2) it appears from the will itself that the testator's failure to make provision was intentional. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963).

Will Is Only Source of Intent to Exclude.—The court is limited to the will as the source from which intent to exclude must appear. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963).

Intent to Exclude Is Not Shown by Will Ignoring All Children.—Where after-born children, in fact all children, are ignored in a will, the court cannot say the will discloses an intent to exclude after-born children. It is limited to the will as the source from which intent to exclude must appear. Since such intent does not appear from the will, the after-born children of the testator take as in case of their father's intestacy. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963).

After-Born Child of Intestate Shares in Estate.—This statutory provision clearly assumes and contemplates that an after-born child of an intestate shares in the estate, both real and personal, of such intestate. *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

A posthumous child was provided for under her father's will, though no direct, specific provision was made, where by the residuary clause the will made substantial provision for a class to which the posthumous child was a member. *Sheppard v. Kennedy*, 242 N.C. 529, 88 S.E.2d 760 (1955).

Child Born after Execution of Will but before Execution of Codicil.—A codicil operates as a republication of the original will and makes it speak as of the date of the execution of the codicil insofar as it is not altered or revoked by the codicil, and therefore a child born after the execu-

tion of the will, but before the execution of the codicil, is not entitled to such share in the estate as though testator had died intestate, it being apparent that testator intentionally did not make specific provision for such child. *Young v. Williams*, 253 N.C. 281, 116 S.E.2d 778 (1960).

No Intention to Direct Parent to Make Provision for Child.—Former § 31-45 was construed as not intending to control a parent as to the provision he should make for his child, but was to apply when by inadvertence or mistake the after-born child had not been provided for. Unless the omission was intentional, or provision was made for the child, either under the will or some settlement or provision ultra, the after-born child took his share, and the statute applied whether there were one or more children. *Flanner v. Flanner*, 160 N.C. 126, 75 S.E. 936 (1912).

Adequacy of Provision for After-Born Child.—While the courts will not inquire into the adequacy of provision made for a child born after the execution of the will within the purport of this section such provision must be of reasonable substance and value in praesenti. *Williamson v. Williamson*, 232 N.C. 54, 59 S.E.2d 214 (1950).

"Making Provision" under Former § 31-45.—See *Meares v. Meares*, 26 N.C. 192 (1843); *King v. Davis*, 91 N.C. 142 (1884); *Thomason v. Julian*, 133 N.C. 309, 45 S.E. 636 (1903). See also *Rawls v. Durham Realty & Ins. Co.*, 189 N.C. 368, 127 S.E. 254 (1925); *Nicholson v. Nicholson*, 190 N.C. 122, 129 S.E. 148 (1925).

Procurement of Insurance.—Testator had two children, one born before and one after the execution of his will. No testamentary provision was made for either child, but testator, after the birth of the second child, procured a policy of life and accident insurance on his life, making both the children beneficiaries therein. It was held that the procurement of the policy was not such a provision for the after-born child as to prevent such child from participating in his father's property as heir and distributee. *Williamson v. Williamson*, 232 N.C. 54, 59 S.E.2d 214 (1950).

Knowledge of Testator as to Child En ventre Sa Mere Immaterial.—The beneficent provisions of this section [former § 31-45] are not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter. It is the subsequent birth, not the father's knowledge, which effects the

partial revocation. *Christian v. Carter*, 193 N.C. 537, 137 S.E. 596 (1927).

Entire Will Is Not Revoked.—While after-born children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under this section [former § 31-45], it does not amount to revocation of the entire will. *Fawcett v. Fawcett*, 191 N.C. 679, 132 S.E. 796 (1926).

Applicability of Former § 31-45 to Adopted Children or Illegitimate Children.—See *King v. Davis*, 91 N.C. 142 (1884); *Fawcett v. Fawcett*, 191 N.C. 679, 132 S.E. 796 (1926); *Sorrell v. Sorrell*, 193 N.C. 439, 137 S.E. 306 (1927). See also 12 N.C.L. Rev. 402.

Applied in *Johnson v. Johnson*, 256 N.C. 485, 124 S.E.2d 172 (1962); *Scott v. Jackson*, 257 N.C. 658, 127 S.E.2d 234 (1962).

§ 31-5.6. No revocation by subsequent conveyance.—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (1844, c. 88, s. 2; R. C., c. 119, s. 25; Code, s. 2179; Rev., s. 3118; C. S., s. 4136; 1953, c. 1098, s. 8.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, renumbered former § 31-8 to appear as this section.

Conveyance, etc., Not to Affect Provisions of Will.—No conveyance or act done after the execution of a will, unless it amounts to a revocation, will affect its provisions. *Wood v. Cherry*, 73 N.C. 110 (1875).

Construction.—Former § 31-8 was construed in *Wood v. Cherry*, 73 N.C. 110 (1875), cited in *Pittman v. Pittman*, 107 N.C. 159, 12 S.E. 61 (1890); *Cobb v. Edwards*, 117 N.C. 244, 23 S.E. 241 (1895); *Herring v. Sutton*, 129 N.C. 107, 39 S.E.

772 (1901); *Sykes v. Boone*, 132 N.C. 199, 43 S.E. 645 (1903); *Avery v. Stewart*, 136 N.C. 426, 48 S.E. 775 (1904); *Chappell v. White*, 146 N.C. 571, 60 S.E. 635 (1908).

Parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another: *Chappell v. White*, 146 N.C. 571, 60 S.E. 635 (1908).

Former § 31-8 was enacted in view of the decision in *Cook v. Redman*, 37 N.C. 623 (1843), in which such a trust was upheld. *Chappell v. White*, 146 N.C. 571, 60 S.E. 635 (1908).

§ 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.—No will can be revoked in whole or in part by any act of the testator or by a change in his circumstances or condition except as provided by G.S. 31-5.1 through 31-5.6 inclusive. (1953, c. 1098, s. 9.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.8. Revival of revoked will.—No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-6: Renumbered as § 31-5.3 by Session Laws 1953, c. 1098, s. 5.

§ 31-7: Repealed by Session Laws 1953, c. 1098, s. 9.

Editor's Note.—The repealing act became effective July 1, 1953. See note to § 31-1.

§ 31-8: Renumbered as § 31-5.6 by Session Laws 1953, c. 1098, s. 8.

ARTICLE 3.

Witnesses to Will.

§ 31-8.1. Who may witness.—Any person competent to be a witness generally in this State may act as a witness to a will. (1953, c. 1098, s. 15.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-9. Executor competent witness.—No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. (R. C., c. 119, s. 9; Code, s. 2146; Rev., s. 3119; C. S., s. 4137.)

Purpose of Section. — This section was intended to give the benefit of an executor's testimony to every person who should be interested, either in the establishment, or defeat of a paper-writing propounded as a will. *Pannell v. Scoggin*, 53 N.C. 408 (1861).

Executor or Administrator C.T.A. Competent Witness.—An executor or administrator cum testamento annexo, who is also a subscribing witness to a will, is competent to testify to the execution thereof; and the same rule applies to one who was competent at the time of the making of the will, but subsequently acquired an interest therein. *Vester v. Collins*, 101 N.C. 114, 7 S.E. 687 (1888).

Same—Rule Prior to Section.—An executor, before the enactment of this section, could not be a witness in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. *Gunter v. Gunter*, 48 N.C. 441 (1856).

May Be Examined for Both Parties. — Under this section one named as executor in a receipt, propounded as a will, though named as plaintiff in an issue *devisavit vel non*, may be examined as a witness for the caveator as well as for the propounder. *Pannell v. Scoggin*, 53 N.C. 408 (1861).

§ 31-10. Beneficiary competent witness; when interest rendered void.—(a) A witness to an attested written or a nuncupative will, to whom or to whose spouse a beneficial interest in property, or a power of appointment with respect thereto, is given by the will, is nevertheless a competent witness to the will and is competent to prove the execution or validity thereof. However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and any one claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void.

(b) A beneficiary under a holographic will may testify to such competent, relevant and material facts as tend to establish such holographic will as a valid will without rendering void the benefits to be received by him thereunder. (R. C., c. 119, s. 10; Code, s. 2147; Rev., s. 3120; C. S., s. 4138; 1953, c. 1098, s. 11; 1955, c. 73, s. 2.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote this section. See note to § 31-1.

The 1955 amendment, effective July 1, 1955, designated the former statute as subsection (a) and added subsection (b).

Legacy Void under This Section Included in Residuary Legacy.—See note to § 31-42.

Devise, etc., to Attesting Witness Only Void.—This section avoids only the devise or bequest to the attesting witness and to his and her wife or husband and privies, and leaves the other dispositions made of

the testator's property in unimpaired force and operation. *Vester v. Collins*, 101 N.C. 114, 7 S.E. 687 (1888).

Application of Section to Holographic Wills Prior to 1955 Amendment. — See *Hampton v. Hardin*, 88 N.C. 592 (1883); *In re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924).

Object in Avoiding Witnesses' Interest.—It was to remove all improper influences and secure impartiality, in such as are called to attest the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all

temptations to swerve from the truth are taken away. *Hampton v. Hardin*, 88 N.C. 592 (1883).

Interest of One Who Signs, but Not as Witness, Not Avoided.—One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. *Boone v. Lewis*, 103 N.C. 40, 9 S.E. 644 (1889).

Devisee May Testify to Finding Script among Valuable Papers.—The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valuable papers of the deceased. *Cornelius v. Brawley*, 109 N.C. 542, 14 S.E. 78 (1891).

Competency of Witness Is Question of Law.—If a witness to a will is interested

as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy and it is error in the judge to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the court, to be raised when he offers to testify, and to be determined by the court. *McLean v. Elliott*, 72 N.C. 70 (1875).

Section 8-51 does not apply to wills, which are governed by this section. *Cox v. Beaufort County Lumber Co.*, 124 N.C. 78, 32 S.E. 381 (1899).

Applied in *Barrett v. Williams*, 215 N.C. 131, 1 S.E.2d 366 (1939); *In re Crawford's Will*, 246 N.C. 322, 98 S.E.2d 29 (1957); *Brown v. Byrd*, 252 N.C. 454, 113 S.E.2d 804 (1960).

§ 31-10.1. Corporate trustee not disqualified by witnessing of will by stockholder.—A corporation named as a trustee in a will is not disqualified to act as trustee by reason of the fact that a person owning stock in the corporation signed the will as a witness. (1949, c. 44.)

ARTICLE 4.

Depository for Wills.

§ 31-11. Depositories in offices of clerks of superior court where living persons may file wills.—The clerk of the superior court in each county of North Carolina shall be required to keep a receptacle or depository in which any person who desires to do so may file his or her will for safekeeping; and the clerk shall make a charge of fifty cents for the filing of such will, and shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator: Provided, that the contents of said will shall not be made public or open to the inspection of anyone other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. (1937, c. 435, s. 1.)

Local Modification. — Guilford: 1937, c. 435, s. 2.

Editor's Note.—This section represents a rather progressive step in the law of wills. If taken advantage of by testators, it may prevent the loss or fraudulent destruction of many validly executed wills, and may tend to prevent the offer of forged wills for probate and contests of wills upon the grounds of fraud, undue influence, and mental incapacity. Similar statutes have been enacted in several states in this country. 15 N.C.L. Rev. 353.

Testator Entitled to Inspect Will.—In a proceeding by petitioner to inquire into the mental state of respondent, his aged uncle, and to have a trustee appointed

for him, the petitioner testified in substance that he was only interested in the welfare of respondent. It was held that respondent was entitled to examine his own will which had been deposited in a sealed envelope with the court clerk for the purpose of showing that petitioner was the principal devisee under the will. *In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).

Without Written Request. — Provision of this section requiring written request of testator for permission to withdraw will from depository or receptacle does not apply to his request for inspection of will. *In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate; jurisdiction when clerk interested party.—Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or deviser or prior to the time of approval of the final account of a duly appointed administrator of the estate of the deceased, whichever time is earlier. If such will is fraudulently suppressed, stolen or destroyed, or has been lost, and an action or proceeding shall be commenced within two years from the death of the testator or deviser to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise. If the clerk of the superior court having jurisdiction to probate any will be a subscribing witness thereto or a devisee or legatee therein, or if said clerk shall have any pecuniary interest in the property disposed of by said will, then the clerk of the superior court of any adjoining county shall have jurisdiction to probate said will, and upon petition filed before him by anyone interested in any way in said will, he shall proceed to have said will produced before him, and the said will shall thereupon be probated, recorded, and filed as provided by this chapter, and a duly certified copy of the said will, together with the probate of the same, and the said petition, under the hand and seal of the said clerk, shall be filed and recorded in the book of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee therein, or who had a pecuniary interest in the property disposed of by said will and the clerk in said last mentioned county is hereby authorized to issue letters to personal representatives, who may qualify and administer the estate in said will as if originally probated in said county, and the title to all property, both real and personal, conveyed and devised in said will shall be as good and effectual as if the said will had been originally probated and recorded in said last mentioned county. (C. C. P., s. 439; Code, s. 2151; Rev., s. 3122; 1919, c. 15; C. S., s. 4139; 1921, c. 99; 1923, c. 14; 1953, c. 920, s. 2.)

Cross References. — As to jurisdiction of clerk, see §§ 29-1, 28-2. As to disqualification of clerk, see §§ 2-17 through 2-21. As to conveyances within two years of death of decedent where there is no will, see § 28-83. As to rights of innocent purchasers when will withheld from probate, see § 31-39.

Editor's Note.—The provision as to the probate of wills where the clerk is a subscribing witness was added by the 1921 amendment, and the similar provision where such clerk is a devisee or legatee, or has a pecuniary interest in the property disposed of by the will, was added by the 1923 amendment.

"The obvious purpose of the two amending statutes was to provide a simple and speedy method of obtaining the probate of a will, when the clerk was disqualified, and this has been done; but how far it was intended to change the former practice, if at all, in case of interest, is

not clearly shown." 1 N.C.L. Rev. 314, citing *Scranton & N.C. Land & Lumber Co. v. Jennett*, 128 N.C. 3, 37 S.E. 954 (1901).

The 1953 amendment rewrote the second sentence of this section. Section 4 of the amendatory act provided that it should not apply to the estate of any decedent dying prior to April 23, 1953.

For note on "Two Methods of Probate in Solemn Form in North Carolina," see 30 N.C.L. Rev. 470 (1952). For note as to procedure for probate upon death of survivor of testators of joint will, see 35 N.C.L. Rev. 345 (1957).

This section and § 31-15 require the probate of a will, by implication at least. *Wells v. Odum*, 207 N.C. 226, 176 S.E. 563 (1934).

The word "probate" when used in reference to a document purporting to be a will means the judicial process by which a court of competent jurisdiction in a duly

constituted proceeding tests the validity of the instrument before the court, and ascertains whether or not it is the last will of the deceased. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

It is the duty of a person named as executor to apply to the court having jurisdiction to have the writing probated. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Jurisdiction of Clerk.—This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950); *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

Title Descends to Heirs Subject to Being Divested.—The title of the land descends to the heirs of the testator, subject to being divested in favor of the devisee, when the will is duly admitted to probate. *Floyd v. Herring*, 64 N.C. 409 (1870).

Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being ex parte, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally. *In re Rowland*, 202 N.C. 373, 162 S.E. 897 (1932). See *In re*

Will of Etheridge, 231 N.C. 502, 57 S.E.2d 768 (1950).

The probate of a will in common form without citation to those in interest "to see the proceedings," is an ex parte proceeding and not binding on caveators upon the issue of devisavit vel non raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitute reversible error. *Wells v. Odum*, 205 N.C. 110, 170 S.E. 145 (1933). See also *In re Will of Etheridge*, 231 N.C. 502, 57 S.E.2d 768 (1950).

Appointment Is Reviewable. — The power, conferred by this section, to appoint administrators is reviewable by the judge of the superior court of the county. *In re Estate of Wright*, 200 N.C. 620, 158 S.E. 192 (1931).

Limitation on Probate under Former Law.—See *McCormick v. Jernigan*, 110 N.C. 406, 14 S.E. 971 (1892); *Steadman v. Steadman*, 143 N.C. 345, 55 S.E. 784 (1906).

Cited in *In re Will of Wood*, 240 N.C. 134, 81 S.E.2d 127 (1954); *In re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

§ 31-13. Executor failing, beneficiary may apply.—If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days' notice thereof to the executor. (C. C. P., s. 440; Code, s. 2152; Rev., s. 3123; C. S., s. 4140.)

Cross Reference.—As to who may apply for letters of administration in case of intestacy, see § 28-6 et seq.

Notice to Executor in Probating a Codicil.—Where an executor has probated and qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. *Spencer v. Spencer*, 163 N.C. 83, 79 S.E. 291 (1913).

Presenting for Probate Merely to Secure Adjudication of Invalidity. — This section permits a person interested in the estate of a supposed testator to present an alleged will for probate merely for the purpose of obtaining an adjudication of its invalidity. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950).

This section empowers any person inter-

ested in the estate of a decedent to make application to have a script purporting to be the will of such decedent "proved," i.e., tested in respect to its validity as a testamentary instrument. It is obvious that the clause "any . . . person interested in the estate" includes a person who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid as a testamentary document. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950).

Stated in *In re Pendergrass' Will*, 251 N.C. 737, 112 S.E.2d 562 (1960).

Cited in *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957); *In re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

§ 31-14. Clerk to notify legatees and devisees of probate of wills.—The clerks of the superior court of the State are hereby required and directed to notify by mail, all legatees and devisees whose addresses are known, designated in wills filed for probate in their respective counties. All expense incident to such

notification shall be deemed a proper charge in the administration of the respective estates. (1933, c. 133.)

While this requirement appears to be mandatory, it does not seem to be prerequisite to the probate of the will itself. Nor does it assume the status and importance of a citation to devisees and legatees as in

the case of the probate of a will in solemn form. Apparently the purpose of the statute is to expedite the settlement of the estate of a person who has died testate. 11 N.C.L. Rev. 263.

§ 31-15. Clerk may compel production of will. — Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the State, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt. (C. C. P., s. 442; Code, s. 2154; Rev., s. 3124; C. S., s. 4141.)

Cross References.—See note to § 31-12. As to larceny, concealment, or destruction of wills, see § 14-77.

In General.—A petition before the clerk of the superior court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is a proceeding under this section to compel the production of a will. *Williams v. Bailey*, 177 N.C. 37, 97 S.E. 721 (1919).

It is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. *In re Pendergrass' Will*, 251 N.C. 737, 112 S.E.2d 562 (1960).

Enforcement of Right to Dispose of Property.—The legislature, when it granted the right to dispose of property at death, provided for the enforcement of that right under this section. *Matter of Covington's Will*, 252 N.C. 546, 114 S.E.2d 257 (1960).

Failure of Petitioners to Pursue Proceedings—Discharge of Respondents. — Where the respondents in proceedings to compel the production of a will appear before the clerk at the time set for the hearing, and in writing under oath fully deny the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial docket, and the rule against the respondents should be discharged at the petitioner's cost. *Williams v. Bailey*, 177 N.C. 37, 97 S.E. 721 (1919).

Issue of Wrong Venue No Excuse. — Where the clerk of the court of G. county issued a notice to the respondent, who had the will of the deceased in his possession,

to exhibit the same for probate, it was the duty of the respondent to obey the summons, and he could have raised in his answer the question of whether the will should be probated in G. or L. county. *In re Scarborough's Will*, 139 N.C. 423, 51 S.E. 931 (1905).

Impossibility to Comply with Order as Excuse. — An order of the clerk of the court of G. county which adjudges the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent cannot comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent. *In re Scarborough's Will*, 139 N.C. 423, 51 S.E. 931 (1905).

Allowance of Reasonable Expenses. — Where the law imposes a duty upon a person, or group of persons, with respect to probating and establishing the validity of a will, in the performance of such duty, in good faith, reasonable expenses thereby incurred should be allowed and paid out of the fund or property which is the subject of the litigation. *Wells v. Odum*, 207 N.C. 226, 176 S.E. 563 (1934).

Attachment for Contempt — Scope of Proceedings.—In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and cannot be passed upon. *In re Scarborough's Will*, 139 N.C. 423, 51 S.E. 931 (1905).

Motion to Dismiss Proceedings.—Where a rule issued under this section in proceedings to compel the production of a will should be discharged, a motion by the re-

spondents to dismiss the proceedings will be treated as a motion to discharge them. *Williams v. Bailey*, 177 N.C. 37, 97 S.E. 721 (1919).

§ 31-16. What shown on application for probate.—On application to the clerk of the superior court, he must ascertain by affidavit of the applicant—

- (1) That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.
- (2) The value and nature of the testator's property, as near as can be ascertained.
- (3) The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of the parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known.

Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate. (C. C. P., s. 441; Code, s. 2153; Rev., s. 3125; C. S., s. 4142.)

Applied in In re Will of Hine, 28 N.C. 405, 45 S.E.2d 526 (1947).

§ 31-17. Proof and examination in writing. — Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office. (C. C. P., s. 437; Code, s. 2149; Rev., s. 3126; C. S., s. 4143.)

Compliance with this section is essential to a valid probate. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Presumption of Valid Probate and Rec- ordation.—The requirements of this section did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. *Poplin v. Hatley*, 170 N.C. 163, 86 S.E. 1028 (1915).

Same—Vacating Probate in Collateral Proceedings.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones*, 78 N.C. 402 (1878); *McClure v. Spivey*, 123 N.C. 678, 31 S.E. 857 (1898).

Testimony of Witnesses Must Be Embodied in Clerk's Certificate.—It is the duty of the clerk taking probate of a will to embody the substance of the testimony

of witnesses in his certificate of probate to be recorded with the will. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Former Practice. — Formerly the court of pleas and quarter sessions had jurisdiction of the probate of wills, and there was at that time no provision in the statute requiring the taking of the proofs in writing or for recording the probate. The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the minutes of the adjudication, and the clerk, acting upon the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases. *Poplin v. Hatley*, 170 N.C. 163, 86 S.E. 1028 (1915).

Foreign Records Conforming to Section Sufficient. — Where a nonresident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of this section, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. *Roscoe v. John L. Roper*

Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899).

Applied in *In re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

§ 31-18: Rewritten and renumbered as §§ 31-18.1 to 31-18.3 by Session Laws 1953, c. 1098, s. 12.

§ 31-18.1. **Manner of probate of attested written will.**—(a) An attested written will, executed as provided by G.S. 31-3.3, may be probated in the following manner:

- (1) Upon the testimony of at least two of the attesting witnesses; or
- (2) If the testimony of only one attesting witness is available, then
 - a. Upon the testimony of such witness, and
 - b. Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and
 - c. Upon proof of the handwriting of the testator, unless he signed by his mark, and
 - d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will.
- (3) If the testimony of none of the attesting witnesses is available, then
 - a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and
 - b. Upon compliance with paragraphs c and d of subsection (a) (2) of this section.

(b) Due execution of a will may be established, where the evidence required by subsection (a) is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

(c) The testimony of a witness is unavailable within the meaning of this section when the witness is dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify. (1953, c. 1098, s. 12.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote former § 31-18 to appear as §§ 31-18.1 to 31-18.3. See note to § 31-1.

For note as to procedure in probating will when witnesses are dead, see 35 N.C.L. Rev. 341 (1957).

Many of the cases cited in the note to this section construe former § 31-18.

Compliance with Statutory Requirements.—In order that a paper-writing, designed as a testamentary disposition of property, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948). See *Wescott v. First & Citizens Nat'l Bank*, 227 N.C. 39, 40 S.E.2d 461 (1946). See also *Morris v. Morris*, 246 N.C. 30, 95 S.E.2d 110 (1956).

Proof Required When Only One Witness Available.—An attested will may be probated on the testimony of two of the attesting witnesses, but if the testimony of only one attesting witness is available, then upon the testimony of such witness with proof of the handwriting of at least

one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and proof of the handwriting of the testator, unless he signed by his mark, and proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will. In *re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

The statute [former § 31-18] seems to require that, when the will purports to be signed by the testator himself and only one of the subscribing witnesses is alive and competent, some evidence should be introduced as to the handwriting of the testator or the genuineness of the signature. *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913).

It is not required [by former § 31-18], in order to have a valid probate, that the surviving witness should testify that he saw the other witness subscribe his name to the instrument. *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913).

Proof De Novo on Issue of Devisavit Vel Non.—The authorities seem to hold that in the trial of an issue of *devisavit*

vel non, on caveat duly entered, the proof as to the formal execution of the will shall be made de novo. *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089 (1913), citing *In re Hedgepeth's Will*, 150 N.C. 245, 63 S.E. 1025 (1909).

Evidence Must Show Subscribing in Presence of Testator.—Under § 31-3 [now § 31-3.3] and this section [former § 31-18], it is essential, not only that the document shall be subscribed in the presence of the testator by at least two witnesses, but that the evidence upon which the will is admitted to probate must show that fact. In

re Thomas, 111 N.C. 409, 16 S.E. 226 (1892).

Applied in *In re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

Quoted in *Cartwright v. Jones*, 215 N.C. 108, 1 S.E.2d 359 (1939).

Cited in *In re Will of Thompson*, 196 N.C. 271, 145 S.E. 393 (1928); *In re Will of Shemwell*, 197 N.C. 332, 148 S.E. 469 (1929); *In re Will of Stewart*, 198 N.C. 577, 152 S.E. 685 (1930); *In re Will of Lowrance*, 199 N.C. 782, 155 S.E. 876 (1930); *McMillan v. Robeson*, 225 N.C. 754, 36 S.E.2d 235 (1945).

§ 31-18.2. Manner of probate of holographic will.—A holographic will may be probated only in the following manner:

- (1) Upon the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be; and
- (2) Upon the testimony of one witness who may, but need not be, one of the witnesses referred to in subdivision (1) of this section to a statement of facts showing that the will was found after the testator's death as required by G.S. 31-3.4. (1953, c. 1098, s. 12.)

Cross References.—As to requirements for valid holographic will, see § 31-3.4. See note § 31-18.1.

Engraved Monogram Not Signature to Holographic Will.—See note to § 31-3.4.

Effect of Provisions of § 8-51.—Where the validity of a holograph will depends upon its having been left with the beneficiary for safekeeping, his testimony thereof, after the death of the testator, is a transaction or communication of which he may not testify under § 8-51. *McEwan v. Brown*, 176 N.C. 249, 97 S.E. 20 (1918), overruling *Hampton v. Hardin*, 88 N.C. 592 (1883).

Handwriting Goes to Jury on Testimony of Three Witnesses.—Testimony of three witnesses that the paper-writing propounded as the holograph will of decedent

was in his handwriting takes the case to the jury as to this requirement, notwithstanding conflicting testimony of caveator. *In re Williams' Will*, 215 N.C. 259, 1 S.E.2d 857 (1939).

Destroyed Will.—In an action to probate a destroyed holographic will, the proponent must show that the instrument in the handwriting of the deceased and signed by him once existed and was destroyed under circumstances that would defeat an inference of revocation. Upon failure of such proof, there is a failure of the proof of the res and a nonsuit is proper. *Hewett v. Murray*, 218 N.C. 569, 11 S.E.2d 867 (1940).

Applied in *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

§ 31-18.3. Manner of probate of nuncupative will. — (a) No nuncupative will may be probated later than six months from the time it was made unless it was reduced to writing within ten days after it was made.

(b) Before a nuncupative will may be probated

- (1) Written notice must be given to the surviving spouse, if any, and to the next of kin, by the clerk of the court in which it is to be probated, notifying them that the will has been offered for probate and that they may, if they desire, oppose the probate thereof, or
- (2) When the surviving spouse or next of kin are not known or when for any other reason such notice cannot be given, a notice to the same effect must be published not less than once a week for four consecutive weeks in some newspaper published in the county where the will is offered for probate, or if no newspaper is published in the county, then in some newspaper having general circulation therein.

(c) A nuncupative will may be probated only in the following manner:

- (1) Upon the testimony of at least two competent witnesses who establish the terms of such will and who state that they were simultaneously present at the making thereof, that the testator declared he was then making his will, and that they were then and there specially requested by him to bear witness thereto; and
- (2) Upon the testimony of one competent witness, who may but need not be one of the witnesses referred to in subdivision (1) of this subsection, that the will was made in the testator's last illness or while he was in imminent peril of death, and that he did not survive such sickness or imminent peril, but it is not necessary that all such facts be proved by the testimony of the same witness. (1953, c. 1098, s. 12.)

Cross References.—As to requirements for valid nuncupative will, see § 31-3.5. See note to § 31-18.1.

Editor's Note.—The cases cited in the note to this section construe the provisions of former § 31-18 which related to nuncupative wills.

Similarity to English Statute of Frauds.—Statutory provisions in relation to nuncupative wills have existed in this State since 1784, and they originally were substantially the same as those in the English Statute of Frauds, 29 Car. II, ch. 3, §§ 19, 20. These provisions have always been strictly construed and enforced by the courts, both in this State and in England. *Smith v. Smith*, 63 N.C. 637 (1869).

Strict Compliance Necessary — Purpose of Requirements.—The requisites of this statutory provision [former § 31-18] must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent practices on the part of such persons as would be disposed to obtain undue advantage of persons in their last sickness as to the final disposition of their property; and also to prevent mischiefs that might arise from the ignorance, misapprehension or dishonest purposes of persons called upon to be the witnesses of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to observe them strictly. *Brown v. Brown*, 6 N.C. 350 (1818); *Rankin v. Rankin*, 31 N.C. 156 (1848); *Webster v. Webster*, 50 N.C. 95 (1857); *Haden v. Bradshaw*, 60 N.C. 259 (1864); *Smith v. Smith*, 63 N.C. 637 (1869); *Bundrick v. Haygood*, 106 N.C. 468, 11 S.E. 423 (1890); *Long v. Foust*, 109 N.C. 114, 13 S.E. 889 (1891).

The testator must state his wishes in the presence of two witnesses and specially require them to bear witness thereto in order to constitute a valid nuncupative will. *Kennedy v. Douglas*, 151 N.C. 336, 66 S.E. 216 (1909).

Where a woman in her last illness, with-

out expressing any purpose to make a will said she wanted to give to her sister certain articles of personal property, and called her to her bedside and gave them to her, in the presence of two other persons but did not call them, or either of them, to witness the transaction, it was held that this did not constitute a nuncupative will. *Bundrick v. Haygood*, 106 N.C. 468, 11 S.E. 423 (1890).

Designation of Witnesses by Name Not Necessary.—It is sufficient that the testator saw the witnesses and charged them to bear witness to his will, and they did so, and it is not a good objection that he failed to designate them particularly by name. That he required them, each, all of them, to bear witness, was what the section requires. The purpose is that the testator shall require two witnesses at least to take notice and bear witness that he makes his will. He must require and direct a competent person, and that person must be able to testify that he was one of the persons—the witnesses—so required, and that he did take notice and bear witness. *Long v. Foust*, 109 N.C. 114, 13 S.E. 889 (1891).

Sufficiency of Showing.—Under this section [former § 31-18], it is sufficient to show, on the question of the testator's requesting that the witness "bear witness" to the will, that believing himself to be in extremis, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had therefore expressed his wish to make a written will, and had failed in his effort to do so, the matters sought to be established as the nuncupative will were declared at a time when he was apprehensive that he would become unable to talk, and about four days before his death. In re *Garland's Will*, 160 N.C. 555, 76 S.E. 486 (1912).

Where a person, being in extremis, and conscious of it, sent for a friend with

whom he had often talked on the subject of a will and told him what disposition he wanted to make of his property, and then such friend replied that if he wanted to do anything of that kind he had better have some other person in the room, and thereupon the speaker went out and brought in another person, and in the presence of the sick man repeated the proposed disposition of the property, to which the latter assented, it was held, to be a sufficient *rogatio testium* to satisfy the requirements of a nuncupative will. *Smith v. Smith*, 63 N.C. 637 (1869).

No Probate until Citation or Publication—Limitation of Six Months.—After the contents of the will are established within the time and in the manner prescribed by this section [former § 31-18] it cannot be admitted to probate until the citation or publication, and the probate based thereon shall be completed within six months from the making of the alleged will. The limitation of six months refers only to the proof and establishment of the contents, and that only where it is not reduced to writing within ten days of its making. In *re Haygood's Will*, 101 N.C. 574, 8 S.E. 222 (1888).

The purpose of the statute [former § 31-18] is not to prevent the examination of the witnesses of the will, after such lapse of six months, on the trial of the issue *devisavit vel non* in the course of a contest of it, but it is to require that they shall not be allowed to prove it in the first instance, when it is first presented for probate after that time, unless it shall have been put in writing within ten days next after the making thereof. In *re Haygood's Will*, 101 N.C. 574, 8 S.E. 222 (1888).

Will Reduced to Writing May Be Proved before or after Six Months.—A just interpretation of the provision relative to the proof of a nuncupative will is, that if such will shall be put in writing within ten days next after it was made, it may be proved by the witnesses thereof either before or after the lapse of six months next after the making thereof, because the will being in writing with the sanction of the

witnesses, their recollection so as to what it was is helped and strengthened thereby, and they could the better be trusted to testify as to the making of the same, and what it was in its detail, at any time within a reasonable period. In *re Haygood's Will*, 101 N.C. 574, 8 S.E. 222 (1888).

It will be observed that it is not required that the will shall not be proved by the witnesses until the citation and notice provided for shall be made, but it shall not be proved—that is, proved in the sense of admitting it to probate at once—until citation shall be made, the purpose being to give the widow and next of kin opportunity to contest the will—the proof thereof by the witnesses thereof—if they shall see fit to do so. In *re Haygood's Will*, 101 N.C. 574, 8 S.E. 222 (1888).

Writing Dictated to One Witness but Execution Postponed.—A paper-writing which the deceased had therefore dictated but postponed executing from time to time and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative will: (1) His intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law “during his last sickness.” *Kennedy v. Douglas*, 151 N.C. 336, 66 S.E. 216 (1909).

The declaration of a testator made in the presence of two witnesses that a paper-writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will: (1) The dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. *Kennedy v. Douglas*, 151 N.C. 336, 66 S.E. 216 (1909).

§ 31-18.4. Probate of wills of members of the armed forces.—In addition to the methods already provided in existing statutes therefor, a will executed by a person while in the armed forces of the United States or the Merchant Marine, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the State at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases

pending in courts and at issue on the date of its ratification. (1919, c. 216; C. S., s. 4151; Ex. Sess. 1921, c. 39; 1943, c. 218; 1945, c. 81; 1953, c. 1098, s. 13.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, renumbered former § 31-26 to appear as this section. For comment on the 1945 amendment, see 21 N.C.L. Rev. 381.

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.—Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal. Provided, that whenever in a will so probated or recorded a bank or trust company shall be named executor and/or trustee and shall have at the time of such probate and recording become absorbed by or consolidated with another bank or trust company or shall have sold and transferred all its assets and liabilities to another bank or trust company doing business in North Carolina, such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company. (C. C. P., s. 438; Code, s. 2150; Rev., s. 3128; C. S., s. 4145; 1929, c. 150; 1941, c. 79.)

This section is restricted to a decree of probate regular on its face, and does not apply where on the face of the decree of probate it affirmatively shows that the will was not probated as required by mandatory applicable statutes for the probate of wills. *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

Conclusively Valid until Declared Void.—When executed, proven and recorded in manner and form as prescribed, a paper-writing designed as a testamentary disposition of property is given conclusive legal effect as the last will and testament of the decedent, subject only to be vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose. Until so set aside it is presumed to be the will of the testator. In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).

A will probated in common form before the clerk of the superior court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. *Holt v. Ziglar*, 163 N.C. 390, 79 S.E. 805 (1913). See *In re Beauchamp's Will*, 146 N.C. 254, 59 S.E. 687 (1907).

Under this section the order of the clerk admitting a paper-writing to probate constitutes conclusive evidence that the paper-writing is the valid will of the decedent until it is declared void by a competent tribunal on an issue of *devisavit vel non* in a caveat proceeding. *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950); *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Cannot Be Attacked Collaterally. — Where a will has been admitted to probate a party claiming property disposed of by it to another cannot, in an action to recover

the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded. *Varner v. Johnston*, 112 N.C. 570, 17 S.E. 483 (1893).

A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. *Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928). Until so set aside it is conclusively presumed to be the will of the testator. In *re Will of Cooper*, 196 N.C. 418, 145 S.E. 782 (1928).

Same—Even for Fraud.—A will which has been duly probated in common form may not be collaterally attacked even for fraud. *Crowell v. Bradsher*, 203 N.C. 492, 166 S.E. 731 (1932).

Same—Muniment of Title.—A probated will constitutes a muniment of title unsailable except in a direct proceeding. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945); In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948); *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Same—Offer of Subsequent Will. — Where a paper-writing has been duly probated in common form, offer of proof of a will alleged to have been subsequently executed by the testatrix is a collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof. In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).

Probate a Judicial Act—Conclusive Presumption of Validity.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted

for that purpose. It cannot be vacated in a collateral manner. *Mayo v. Jones*, 78 N.C. 402 (1878); *McClure v. Spivey*, 123 N.C. 678, 31 S.E. 857 (1898).

An order of the clerk adjudging a will to be fully proved in common form is not "conclusive in evidence of the validity of the will" under this section, on the issue of *devisavit vel non*, raised by a caveat filed thereto. *Wells v. Odum*, 205 N.C. 110, 170 S.E. 145 (1933); *In re Will of Etheridge*, 231 N.C. 502, 57 S.E.2d 768 (1950).

The probate of a will may be set aside upon motion after notice where it is clearly made to appear that the court was imposed upon or misled, but otherwise the probate is conclusive and cannot be collaterally attacked, and the paper-writing stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat under § 31-32. *In re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).

Clerk May Not Set Aside Probate on Grounds Determinable by Caveat.—While the clerk of the superior court in proper instances may set aside a probate in common form, he may not do so on grounds which are properly determinable by caveat. *In re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

After Cause Transferred to Civil Issue Docket.—See note to § 31-36.

Effect of Order of Clerk.—An order of the clerk adjudging paper-writing to be fully proved in common form is not "conclusive in evidence of the validity of the will," under this section, on the issue of *devisavit vel non*, but as between the probated instrument and the prior purported wills, the former stands until "declared void by a competent tribunal." *In re Neal's Will*, 227 N.C. 136, 41 S.E.2d 90 (1947).

Rents and profits of lands devised belonged to beneficiaries and their ancestors until the probate was set aside and the will

adjudged void. *Hinton v. Whitehurst*, 214 N.C. 99, 198 S.E. 579 (1938).

When devisees Entitled to Rents and Profits until Probate Set Aside.—Where there is no evidence tending to show that at any time prior to the institution of the caveat proceeding, the defendants, or their ancestors, had any knowledge or intimation that the plaintiffs would attack the validity of the will and there is no evidence tending to show that any of the devisees in said will procured its execution by undue or fraudulent influence, the defendants and their ancestors were entitled to the rents and profits of the lands devised to them until the probate was set aside and the will adjudged void. *Whitehurst v. Hinton*, 209 N.C. 392, 184 S.E. 66 (1936).

Effect of Revocation of Probate upon Administration.—The revocation of the probate in common form did not have the effect of annulling the administration properly granted. *Floyd v. Herring*, 64 N.C. 412 (1870).

Title of Innocent Purchasers Not Affected by Judgment Setting Aside Will.—Where the devisees named in a will, which has been duly probated in common form, sell and dispose of part of the lands devised to innocent purchasers for value without notice, and thereafter caveat proceedings are instituted and the will set aside, the heirs at law, by operation of the judgment setting aside the will, become tenants in common in the lands not disposed of, but the title conveyed by the devisees named in the paper-writing to purchasers for value without notice, or knowledge of facts from which a purpose to file caveat proceedings could be intimated, is not affected, the probate in common form being conclusive evidence of the validity of the will until it is attacked by caveat proceedings duly instituted. *Whitehurst v. Hinton*, 209 N.C. 392, 184 S.E. 66 (1936).

§ 31-20. Wills filed in clerk's office.—All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records. If said will contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the State in which said land is situated with the same effect as to passing the title to said real estate as if said will had originally been probated and filed in said county and the clerk of the superior court of said last-mentioned county had had jurisdiction to probate the same. (1777, c. 115, s. 59; R. C., c. 119, s. 19; Code, s. 2173; Rev., s. 3129; C. S., s. 4146; 1921, c. 108, s. 1.)

Cross References.—See § 31-39. See also note to § 31-21.

Will Taken from Record as Evidence of Testator's Handwriting.—An original will

taken from the records of the court is competent, without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of

testator to the instrument in controversy. *Croom v. Sugg*, 110 N.C. 259, 14 S.E. 748 (1892).

§ 31-21. Validation of wills heretofore certified and recorded. — All wills which have prior to March 9, 1921, been certified and recorded in the office of the clerk of the superior court of any county, substantially following the provisions of § 31-20 are hereby validated and approved as to the conveyance and transfer of any title to real estate as contained therein, to the same extent as if said wills had originally been probated and filed in said county, and the clerk of the superior court of said county had had jurisdiction to probate the same, provided the probates and witnesses to the said wills are sufficient and according to law. (1921, c. 108, s. 2; C. S., s. 4146(a).)

Statute Not Retroactive.—Public Laws 1921, c. 108 (§§ 31-20, 31-21), does not control rights which accrued prior to its enactment. Hence, when an original will probated in 1910 is invalidated by judicial decree, a certified copy thereof recorded in another county becomes void and one who purchases with notice of the caveat cannot

convey any title thereunder, either before or after notice of its invalidity has been filed in the county where the certified copy has been recorded. The only purpose of such certified copy was to give notice of the source of title. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

§ 31-22. Certified copy of will proved in another state or country. —When a will, made by a citizen of this State, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this State, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording such copy as by law might be taken upon the production of the original. (1802, c. 623; R. C., c. 44, s. 9; C. C. P., s. 445; Code, s. 2157; Rev., s. 3130; C. S., s. 4147.)

Defective Certificate of Clerk.—The certificate of probate of a will executed in another state, disposing of real estate in this State, is defective which does not show affirmatively that the will was executed according to the laws of this State. *Raleigh & W. Ry. v. Glendon & G. Mining & Mfg. Co.*, 113 N.C. 241, 18 S.E. 208 (1893).

When a resident of this State dies outside the State and his will is probated in

another state, a duly certified copy of the will so probated may be offered for original probate in this State, and its validity as a testamentary disposition of property established in the same manner as if the original had been offered for probate here. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Applied in *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

§ 31-23. Probate of will made out of the State; probate when witnesses out of State.—Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the State, or that a will has been made in the State and the witnesses thereto have moved out of the State, disposing of or charging land or other property within the State, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded. (C. C. P., s. 443; Code, s. 2155; 1899, c. 55; Rev., s. 3131; C. S., s. 4148.)

Defective Certificate. — Where a will, of the clerk of the court wherein the proved in another state, bore the certificate probate was had, to the oath of the attest-

ing witnesses, but had no other authentication, it was held inadmissible in evidence, as departing from the requirements of this

section. *Hunter v. Kelly*, 92 N.C. 285 (1885).

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this State, reside in another state, or in another country in this State than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside or the clerk of superior court thereof; and the affidavits, so taken and subscribed, shall be transmitted by the notary public or clerk of superior court, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; C. S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A.)

Editor's Note.—As to 1933 amendment, see 11 N.C.L. Rev. 262.

§ 31-25. Probate when witnesses in another county. — When a will is offered for probate in one county of this State and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside outside of the county in which the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (1899, c. 55; Rev., s. 3132; 1911, c. 13; C. S., s. 4150; 1923, c. 59; 1957, c. 587, s. 2.)

Identifying Paper-Writing as Part of Depositions.—Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached, and it was held competent for the commissioner to identify the paper-writing as a part of the deposition. In *re Clodfelter's Will*, 171 N.C. 528, 88 S.E. 625 (1916).

§ 31-26: Renumbered as § 31-18.4 by Session Laws 1953, c. 1098, s. 13.

§ 31-27. Certified copy of will of nonresident recorded. — Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced,

proved and allowed before such clerk. Any such will containing any devise or disposition of real estate in this State shall be valid to pass title to or otherwise dispose of such real estate provided the will is executed according to the laws of this State, notwithstanding the fact that said will was not probated in accordance with the laws of this State, and provided that the execution of said will according to the laws of this State must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise (to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate), in such certified copy or exemplification of the will and probate proceedings, and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proof touching the execution of the will, as prescribed in § 31-23, and the same may be adjudged duly proved, and shall be recorded as herein provided. Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C. C. P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C. S., s. 4152; 1941, c. 381; 1965, c. 995.)

Editor's Note. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 547.

The 1965 amendment rewrote the second sentence and added the last sentence.

Probate on Exemplified Copy of Will and Foreign Probate Proceedings—Effect.

—Instead of offering a will of a nonresident dying outside the State and disposing of property in the state for original probate in this State, the interested parties may have it probated in the state in which the testator was domiciled. When probated according to the laws of that state, an exemplified copy of the will and the probate proceedings may be brought to this State and probated here. Such a will, unless probated in accordance with the laws of this State, is not sufficient to dispose of real property in this State. It has no efficacy for any purpose in this State until probated here, but when probated here on the exemplified copy, it suffices to pass title to personalty and the right to enforce claims which testator could assert against citizens or properties in this State, even though not executed or proven as required by the laws of this State. In *re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Orderly Arrangement of Pages of Exemplification. — Where the will has been admitted to probate in the court having jurisdiction to admit wills and testaments to probate, even though the pages of the manuscript exemplified copy are not orderly arranged, the will will be admitted to probate and record in this State, under the provisions of this section. *Roscoe v. John L. Roper Lumber Co.*, 124 N.C. 42, 32 S.E. 389 (1899); *John L. Roper Lumber Co. v. Hudson*, 153 N.C. 96, 68 S.E. 1065 (1910).

Authentication by Clerk of Court and Not Register of Deeds.—It is necessary to the registration of a copy of a will in this

State that the copy or exemplification of the will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed, and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another state it is ineffectual as evidence in a claimant's chain of title. *Riley v. Carter*, 158 N.C. 484, 74 S.E. 463 (1912).

Appearance and Examination of Attesting Witness Not Necessary. — Under the provisions of this section, it is not required that a will executed and admitted to probate in another state be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State. The doctrine of *Hunter v. Kelly*, 92 N.C. 285 (1885), is no more the law. *Vaught v. Williams*, 177 N.C. 77, 97 S.E. 737 (1919).

Due Record and Certificate of Foreign Probate — Effect. — Where a nonresident testator devises land in this State, and the record of foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of § 31-17, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. *Roscoe v. John L. Roper Lumber Co.*, 124 N.C. 42, 32 S.E. 389 (1899).

A will, duly proven and allowed in New York according to this section, when it appears that an exemplified copy thereof so showing has been recorded here in the county where the land lies, is admissible

in evidence in the courts of this State, as a link in a chain of title. *Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943).

Dissent Proceedings. — The will of a South Carolina testator was duly probated there and his widow filed a valid dissent thereto. An authenticated copy of the will to be recorded here, under this section, should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court in the county in which the will was probated. *Coble v. Coble*, 227 N.C. 547, 42 S.E.2d 898 (1947).

Subscription by Two Witnesses Must Appear from Certificate. — Where a certi-

fied copy from another state has been recorded, the fact of subscribing by at least two witnesses must appear affirmatively "in the certificate probate or exemplification of the will." The mere recitation in the attestation clause is not affirmative evidence. *Raleigh & W. Ry. v. Glendon & G. Mining & Mfg. Co.*, 113 N.C. 241, 18 S.E. 208 (1893).

Applied in *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571 (1924); *In re Will of Chatman*, 228 N.C. 246, 45 S.E.2d 356 (1947); *In re Brauff's Will*, 247 N.C. 92, 100 S.E.2d 254 (1957).

§ 31-28. Probates validated where proof taken by commissioner or another clerk.—In all cases of the probate of any will made prior to March 8, 1899, in common form before any clerk of the superior courts of this State, where the testimony of the subscribing witnesses has been taken in the State or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this State, and the will admitted to probate upon such testimony, the proceedings are validated. (1899, c. 680; Rev., s. 3134; C. S., s. 4153.)

§ 31-29. Probates in another state before 1860 validated. — In all cases where any will devises land in this State, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this State, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and is hereby declared to be, good and valid for the purpose of passing title to the lands devised thereby, situated in this State, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this State in accordance with the laws of this State. (1913, c. 93, s. 1; C. S., s. 4155.)

§ 31-30. Validation of wills recorded without probate by subscribing witnesses.—In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and seventy-five, and which appear as recorded in the record of last wills and testaments to have had two or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this State prior to the first day of January, one thousand eight hundred and eighty-eight, without having been duly proven as provided by law, and such wills were presented to the clerk of the superior court in any county in this State where the makers of said wills owned property, and where the makers of such wills lived and died, and were by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two subscribing witnesses thereto in the manner provided by law of this State. Nothing herein shall be construed to prevent such wills from being impeached for fraud. (1921, c. 66; C. S., s. 4157(a).)

§ 31-31. Validation of wills admitted on oath of one subscribing witness.—In all cases where last wills and testaments which appear as recorded in the record of last wills and testaments to have had two witnesses thereto and

such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this State prior to the first day of January, one thousand eight hundred and ninety, upon the oath and examination of one of the witnesses, such proof being taken in writing and recorded, and the certificate of probate of the clerk of the court states that such a will is proven by one of the subscribing witnesses thereto and the handwriting of the other subscribing witness being a nonresident is proven under oath, and such a will and certificate has been recorded in the record of wills of the proper county, such probate is hereby validated as fully as if the proof of the handwriting of the nonresident witness had been taken in regular form in writing and recorded. (1929, c. 41, ss. 1, 2.)

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.—Whenever any last will and testament has been probated, based upon the examination of the subscribing witness or the subscribing witnesses, taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, it is hereby in all respects validated and shall be sufficient to pass the title to all real and personal property purported to be transferred thereby.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probate of any wills, deeds and other instruments required or permitted by law to be recorded, are hereby validated. Nothing herein contained shall affect pending litigation. (1945, c. 822.)

Cited in *In re Will of Wood*, 240 N.C. 134, 81 S.E.2d 127 (1954).

§ 31-31.2. Validation of wills when recorded without order of probate or registration upon oath and examination of subscribing witness or witnesses.—Whenever any last will and testament has been duly presented to the clerk of the superior court, and the said will together with the oath and examination of the subscribing witness or witnesses thereto taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, or before the clerk of the superior court of said county, or any other county, is duly recorded in the office of the clerk of the superior court of the said county, without a formal order of probate or registration, such will, if executed in accordance with the laws of this State, is hereby validated with respect to the probate and registration thereof and shall be sufficient to pass title to all real and personal property purported to be transferred thereby to the same extent that the said will would have done so if there had been a formal order of probate and registration. This section shall apply only to wills presented to the clerk of the superior court and recorded prior to the first day of January, 1943. (1951, c. 725.)

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability.

Notwithstanding the provisions of the first paragraph of this section, as to persons not under disability, a caveat to the probate of a will probated in common form prior to May 1, 1951, must be filed within seven years of the date of probate or within three years from May 1, 1951, whichever period of time is shorter.

(C. C. P., s. 446; Code, s. 2158; Rev., s. 3135; 1907, c. 862; C. S., s. 4158; 1925, c. 81; 1951, c. 496, ss. 1, 2.)

Editor's Note.—For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 427.

Clerk of Superior Court Has Exclusive and Original Jurisdiction.—Upon the clerk of the superior court the statutes of this State confer exclusive and original jurisdiction of proceedings for probate of wills. By this it is meant that the clerk of the superior court has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will. *Walters v. Baptist Children's Home of N.C., Inc.*, 251 N.C. 369, 111 S.E.2d 707 (1959).

But when a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Section Strictly Construed.—This section permitting caveats is in derogation of the common law and must be strictly construed. In *re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950).

Statute Gives Right and Outlines Procedure.—In this jurisdiction the right to contest a will by caveat is given by statute; and the procedure to be followed is outlined in the statute conferring the right. In *re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

Often the issue *devisavit vel non* is subdivided, according to the angle or nature of the attack, into ancillary issues, the most common of which are those relating to undue influence and testamentary capacity; but every caveat to a will leads to the simple inquiry *devisavit vel non*, and the rules of procedure are framed with reference to that feature. In *re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

Probate in Common Form Is Valid until Set Aside.—The probate of a will in common form is valid until set aside. In *re Beauchamp's Will*, 146 N.C. 254, 59 S.E. 687 (1907). See § 31-19 and note.

And Good Faith Claimants Are Protected until Probate Attacked.—All persons who claim in good faith under a will which has been duly probated in common form as provided by statute are protected by its provisions, until the probate is attacked by a caveat proceeding instituted as provided by this section. *Whitehurst v. Hinton*, 209 N.C. 392, 184 S.E. 66 (1936).

When Proceeding in Nature of Caveat Necessary.—Where there is no allegation that the probate of the will was otherwise

than in strict accord with the statute, and there is no suggestion that the court was imposed upon or misled, the validity of the will may be attacked only by direct proceeding in the nature of a caveat under this section. In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948), citing *In re Little's Will*, 187 N.C. 177, 121 S.E. 453 (1924).

The proceedings in the matter of the probate of a will is summary and in rem, and the contest of the probate is begun by a caveat under this section. In *re Haygood's Will*, 101 N.C. 574, 8 S.E. 222 (1888).

The attack upon a will offered for probate must be direct and by caveat. A collateral attack is not permitted. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

When a paper-writing purporting to be a will is presented to the judge of probate, he takes proof with respect to its execution. If found in order the script is admitted to probate in common form as a will. Thus far the proceeding is *ex parte*. It stands as the testator's will, and his only will, until challenged and reversed in a proper proceeding before a competent tribunal. The challenge must be by caveat and be heard in the superior court. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Offering Another Will in Another Proceeding Is Collateral Attack.—Offering another will for probate in another proceeding is a collateral and not a direct attack. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

But Any Material Script May Be Presented in Caveat Proceeding.—In a caveat proceeding any interested person may present to the court any script which is material to the issue whether there is a will, and if so, what is it. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

The probate of a will in common form, being an *ex parte* proceeding on application of the propounder, may be caveated at the time of application for probate or at any time within seven [now three] years thereafter by "any person entitled under such will, or interested in the estate." In *re Ellis' Will*, 235 N.C. 27, 69 S.E.2d 25 (1952).

Thus, Another Purported Will Should Be Offered in Caveat Proceeding.—Any other script purporting to be the decedent's will should be offered and its validity determined in the caveat proceeding. In *re Will*

of Charles, 263 N.C. 411, 139 S.E.2d 588 (1965).

The Contest Is a Special Proceeding in Rem.—The contest of a will by caveat is not an ordinary civil action, but a special proceeding in rem leading to the establishment of the will as a testamentary act under the issue *devisavit vel non*. The in rem nature of the proceeding dominates the investigation, and in many important respects the parties litigant have little of the usual control over the course of trial on the issue. In *re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948). See in *re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924).

A caveat entered to the probate of a will is an in rem proceeding. In effect it is nothing more than a demand that the will be produced and probated in open court, affording caveators an opportunity to attack it for the causes and upon the grounds set forth and alleged in the caveat. It is an attack upon the validity of the instrument purporting to be a will and not an "action affecting the title to real property." The will and not the land devised is the res involved in the litigation. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945); In *re Will of Cox*, 254 N.C. 90, 118 S.E.2d 17 (1961).

Upon the filing of the caveat, the proceeding is transferred to the civil issue docket for trial before a jury. Upon this transfer, notice is given to all interested persons of the challenge, giving them an opportunity to enter and participate in the proceedings to the end that the court may determine whether the decedent left a will and, if so, whether any of the scripts before the court is the will. The proceeding is in rem, in which the court pronounces its judgment as to whether the res, i.e., the script itself, is the will of the deceased. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Jury Trial Required. — See note to § 31-33.

And No Nonsuit Can Be Taken.—Once the will is propounded for probate in solemn form the proceeding must go on until the issue *devisavit vel non* is appropriately answered; and no nonsuit can be taken by the propounders or by the caveators. In *re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948). See In *re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924); In *re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

A proceeding to contest a will is begun by filing a caveat or objection to probate with the clerk of the superior court, who thereupon transfers the proceeding to the

civil issue docket of the superior court to the end that the issue of *devisavit vel non* may be tried in term by a jury. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950), commented on in 29 N.C.L. Rev. 331.

The probate powers of the judiciary afford a complete remedy to a person interested against an alleged will in instances where those interested for the alleged will do not propound it for probate. He may invoke such remedy by the simple expedient of simultaneously applying to the clerk of the superior court having jurisdiction to have the script probated or proved, i.e., tested, and filing a caveat asking that it be declared invalid as a testamentary instrument. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950), commented on in 29 N.C.L. Rev. 331.

This section permits a person in interest to file a caveat to an alleged will offered for probate, and to contest the validity of such alleged will before it has been admitted to probate. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950), commented on in 29 N.C.L. Rev. 331; *Walters v. Baptist Children's Home of N.C., Inc.*, 251 N.C. 369, 111 S.E.2d 707 (1959).

A caveat to a will may be filed only by persons "entitled under such will or interested in the estate." And § 31-33, directing the issue of citations, "to all devisees, legatees, or other parties in interest," does not enlarge the definition of interest given in this section. In *re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

Where a will is probated in common form any interested party may appear and enter a caveat. In *re Hedgepeth's Will*, 150 N.C. 245, 63 S.E. 1025 (1909); In *re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919); *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

The right to interfere in a question of probate belongs to a party in interest, which must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party. In *re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919). See *Armstrong v. Baker*, 31 N.C. 109 (1848).

The right to contest the validity of a writing offered for probate or probated in common form is, by this section, limited to "any person entitled under such will or interested in the estate." In *re Will of Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

Any interested person may challenge the will and contest its validity by filing a caveat setting forth the grounds of the challenge. In *re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Any person who has such a direct, im-

mediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is "a person interested." In *re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919).

And it is immaterial whether those appearing and protesting call themselves interveners, objectors or caveators if they place themselves in opposition to the propounders. By a caveat legal rights are put in stake. In *re Will of Rowland*, 202 N.C. 373, 162 S.E. 897 (1932); In *re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948).

It takes only one interested person to caveat a will under this section, and it becomes the duty of the clerk thereupon to bring in interested persons under § 31-33. When they come in they may align themselves as they will. *Bailey v. McLain*, 215 N.C. 150, 1 S.E.2d 372 (1939), discussed in 18 N.C.L. Rev. 76.

Purchasers from Heirs May File Caveat. — The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of this section. In *re Thompson's Will*, 178 N.C. 540, 101 S.E. 107 (1919).

Beneficiaries under Alleged Prior Will Are Interested. — Caveators who allege they are beneficiaries under a prior will of deceased made at a time when he possessed mental capacity are, if the facts be as alleged, interested in the estate. In *re Will of Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

Heirs Not Cited under § 31-33. — The heirs at law of a deceased testator whose will is duly probated and who have no knowledge of proceedings to caveat the will, and who were not cited under the provisions of § 31-33, are not estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. *Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928).

Limitation of Actions. — Prior to the 1907 amendment there was no express period of limitation upon the right to file a caveat to the probate of a will, but it was judicially recognized that the right might be lost by unreasonable delay. *Gray v. Maer*, 20 N.C. 41 (1838); *Etheridge v. Corprew*, 48 N.C. 14 (1855); In *re Beauchamp's Will*, 146 N.C. 254, 59 S.E. 687 (1907); In *re Hedgepeth's Will*, 150 N.C. 245, 63 S.E. 1025 (1909); In *re Dupree*, 163 N.C. 256, 79 S.E. 611 (1913); In *re Bateman's Will*, 168 N.C. 234, 84 S.E. 272 (1915); In *re Witherington's Will*, 186 N.C. 152, 119 S.E. 11 (1923).

While the 1907 amendment fixed seven years [now three years] after probate as a limitation, and permitted seven years after its ratification as to wills theretofore proven, it did not apply to revive a cause of action theretofore barred. In *re Beauchamp's Will*, 146 N.C. 254, 59 S.E. 687 (1907).

By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to uncertainties for an indefinite length of time. In *re Will of Johnson*, 182 N.C. 522, 109 S.E. 373 (1921).

A will is not subject to caveat or collateral attack 27 years after it has been probated in common form; but if the will is void for vagueness and uncertainty it is a nullity and may be attacked directly or collaterally or treated as ineffective, anywhere at any time. *Burchett v. Mason*, 233 N.C. 306, 63 S.E.2d 634 (1951).

Same—Condition Not Subject to Waiver. — The requirement that caveat proceedings be instituted within seven [now three] years from the probate of the will in common form is a condition attached to the right to file caveat and may not be waived by the parties. In *re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950).

Caveat in Spite of Outstanding Life Estate. — One who is authorized by law to caveat a will is not required to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a caveat to a will may be filed. In *re Will of Witherington*, 186 N.C. 152, 119 S.E. 11 (1923).

When Application to Clerk within Time No Excuse for Delay. — Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required by law, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. In *re Dupree*, 163 N.C. 256, 79 S.E. 611 (1913).

Married Women. — Prior to the 1925 amendment the proviso also applied to married women as well as to minors and insane or imprisoned persons.

Since the enactment of statutes fully emancipating a feme covert from her disa-

bilities, the provisions of this section barring the right to caveat a will after seven years [now three years] with certain exceptions, apply equally to her. In re Will of Witherington, 186 N.C. 152, 119 S.E. 11 (1923).

Effect of Infancy and Absence from State.—Where the common-law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevailed, the matters of infancy and absence from the State were not necessarily controlling, but they are considered as relevant facts bearing on the question

as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. In re Dupree, 163 N.C. 256, 79 S.E. 611 (1913).

Applied in In re Will of Roediger, 209 N.C. 470, 184 S.E. 74 (1936).

Cited in In re Bartlett's Will, 235 N.C. 489, 70 S.E.2d 482 (1952).

§ 31-33. Bond given and cause transferred to trial docket.—When a caveator shall have given bond with surety approved by the clerk, in the sum of two hundred dollars (\$200.00), payable to the propounder of the will, conditioned upon the payment of all costs which shall be adjudged against such caveator in the superior court by reason of his failure to prosecute his suit with effect, or when a caveator shall have deposited money or given a mortgage in lieu of such bond, or shall have filed affidavits and satisfied the clerk of his inability to give such bond or otherwise secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the State, and cause publication to be made, for four weeks, in some newspaper printed in the State, for non-residents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding. (C. C. P., s. 447; Code, s. 2159; 1899, c. 13; 1901, c. 748; Rev., s. 3136; 1909, c. 74; C. S., s. 4159; 1947, c. 781.)

Editor's Note.—For brief comment on the 1947 amendment, see 25 N.C.L. Rev. 478.

Proceedings Transferred to Civil Issue Docket.—Where a caveat to a will is duly filed, with the required bond, etc., it is required of the clerk to transfer the proceedings to the civil issue docket for trial of the issue of *devisavit vel non*, and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. In re Little's Will, 187 N.C. 177, 121 S.E. 453 (1924).

For Trial by Jury.—When an issue of *devisavit vel non* is raised by caveat it is tried in the superior court by a jury. In re Will of Chisman, 175 N.C. 420, 95 S.E. 769 (1918); In re Rowland, 202 N.C. 373, 162 S.E. 897 (1932); In re Bartlett's Will, 235 N.C. 489, 70 S.E.2d 482 (1952).

When a caveat is filed and bond given, the clerk does not take testimony, he sub-

mits no issue to the jury, but immediately transfers the cause to the superior court in term, which submits to a jury issues necessary to determine the validity of the instrument asserted to be the will of deceased. In re Will of Belvin, 261 N.C. 275, 134 S.E.2d 225 (1964).

Which Cannot Be Waived.—Upon the proper filing of a caveat the cause must be transferred to the civil issue docket where the proceeding is in rem for trial by jury, and neither party may waive jury trial, consent that the court hear the evidence and find the determinative facts or have nonsuit entered at his instance. In re Will of Hine, 228 N.C. 405, 45 S.E.2d 526 (1947). See In re Will of Roediger, 209 N.C. 470, 184 S.E. 74 (1936).

Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will per testes in solemn form. In re Will of Chisman, 175 N.C. 420, 95

S.E. 769 (1918); *In re Rowland*, 202 N.C. 373, 162 S.E. 897 (1932).

Upon the filing of a caveat to a will probated in common form the propounder must prove the will per testes in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents, if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement. *In re Hedgepeth*, 150 N.C. 245, 63 S.E. 1025 (1909).

Compliance with this section in respect to bond for costs is prerequisite to the institution of a caveat proceeding, and the mere filing of the caveat without compliance with the statute constitutes no valid attack upon the will and is insufficient to authorize the clerk to issue the required citations to bring interested parties into court. *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950).

Where caveat is filed without compliance with this section relating to bond, there is no valid caveat, and after the expiration of seven [now three] years the right to file caveat ceases to exist and may not be revived by the giving of a cash bond under an extension of time granted by the court after the expiration of the statutory period. *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950).

A check deposited with the clerk to be held in lieu of bond is insufficient to meet the requirements of this section. *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950).

Bringing in Interested Persons. — In this State it takes only one interested person to caveat a will under § 31-32 and it becomes the duty of the clerk, under this section, to bring in interested persons.

§ 31-34. Prosecution bond required in actions to contest wills. — When any action is instituted to contest a will the clerk of the superior court will require the prosecution bond required in other civil actions: Provided, however, that provisions for bringing suit in forma pauperis shall also apply to the provisions of this section. (1937, c. 383.)

Editor's Note.—The purpose of this section is not entirely clear. The usual method of contesting a will is to file a caveat, either at the time the will is presented for probate, or within seven [now three] years thereafter. This is said to be neither a civil action nor a special proceeding, but is in the nature of a proceeding in rem, in

When they come in they may align themselves as they will. *Bailey v. McLain*, 215 N.C. 150, 1 S.E.2d 372 (1939).

The persons interested are not cited as parties to the proceeding but merely as interested persons to view proceedings and participate if they elect to do so, although no doubt the court, when properly and timely advised, would cause citation to issue to anyone designated by statute as interested who has been omitted. *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

In a caveat proceeding, neither the grantees in deeds executed by testator prior to his death nor the persons to whom such grantees have conveyed the property, either before or after testator's death, nor the heirs at law of deceased grantees are necessary parties to the determination of the issue of *devisavit vel non* when such persons are not beneficiaries under the will nor heirs of testator, and therefore, even if it be conceded they are proper parties, the trial judge, in the exercise of his discretion, is under no legal obligation to order citations to bring them in. *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

When Personal Representative of Executrix Not Necessary Party.—Where the executrix has fully administered the estate and filed her final account prior to the filing of a caveat, and has died pending the caveat proceeding, it is not necessary that the court appoint a personal representative for the deceased executrix nor an administrator d.b.n. for the estate of the testator so that they may be made parties to the proceeding. *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948).

Cited in *Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928); *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960).

which the propounder has the burden of establishing the formal execution of the will, and the caveators the burden of showing that it is not a valid will. It may be the purpose of the statute to require the propounder to give bond, when a caveat is filed, so as to have the costs secured by both parties. 15 N.C.L. Rev. 352.

§ 31-35. Affidavit of witness as evidence.—Whenever the subscribing witness to any will shall die, or be insane or mentally incompetent, or be absent beyond the State, it shall be competent upon any issue of *devisavit vel non* to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to

probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (1899, c. 680, s. 2; Rev., s. 3121; C. S., s. 4160; 1947, c. 781.)

Editor's Note. — For brief comment on the 1947 amendment, see 25 N.C.L. Rev. 478.

§ 31-36. Caveat suspends proceedings under will. — Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts and payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court, until a decision of the issue is had. (C. C. P., s. 448; Code, s. 2160; Rev., s. 3137; C. S., s. 4161; 1927, c. 119.)

Purpose of Section. — This section is manifestly intended, in cases to which it is applicable, to dispense with the necessity of appointing an administrator pendente lite, and confers very similar forms upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered. *Syme v. Broughton*, 86 N.C. 153 (1882). The prosecution of the action in order to collect the debts is evidently sanctioned by the statute and in furtherance of the purpose of its enactment. *Hughes v. Hodges*, 94 N.C. 57 (1886).

Effect of Caveat upon Rights and Duties of Representative. — The filing of a caveat suspends further proceedings in the administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. *Elledge v. Hawkins*, 208 N.C. 757, 182 S.E. 468 (1935).

The executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the issue touching the will is made up to be tried; nor is there a necessity meanwhile for the appointment of an administrator pendente lite. The function of the executor is suspended only until the controversy is ended, and he is still required to take care of the estate in his hands and may proceed in the collection of debts due the deceased. *Randolph v. Hughes*, 89 N.C. 428 (1883); *In re Palmer*, 117 N.C. 133, 23 S.E. 104 (1895).

In the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or

he may apply to the clerk in his probate jurisdiction for such authorization. *Hardy & Co. v. Turnage*, 204 N.C. 538, 168 S.E. 823 (1933).

Preservation of Estate Pending Final Determination of Issue.—Under the provisions of this section, the executor is charged with the preservation of the estate pending final determination of the issue raised by the caveat, unless and until he be removed, and it is error for the court to appoint commissioners to handle the estate. *In re Tatum's Will*, 233 N.C. 723, 65 S.E.2d 351 (1951).

Suspension does not prevent the administrator from suing and being sued. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Thus, administrator has authority to defend an action against the estate for collection of an alleged debt. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Office of Representative Continued. — The proper construction of this section is that after probate is granted in common form and there is an executor who acts or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the power and is subjected to all the liabilities of an administrator or an executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. *In re Palmer*, 117 N.C. 133, 23 S.E. 104 (1895).

Effect of Absence of Order to Suspend Proceeding.—In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by this section, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 139 N.C. 145, 51 S.E. 968 (1905).

May Be Sued and Sell Land; May Not

Pay Legacies.—An executor, or administrator c.t.a., after the will is proved in common form, may be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or exercise other special powers given in the will, where issues upon a caveat are pending; the right to execute the will is suspended until the determination of the suit. *Syme v. Broughton*, 86 N.C. 153 (1882).

The clerk of a superior court cannot enter an order vacating the probate of a will after a caveat has been filed and the cause transferred to the civil issue docket of the superior court for trial in term. In *re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947). See note to § 31-19.

Where the clerk of the superior court has admitted to probate in common form a purported will and two purported codicils as the last will and testament of a deceased, and caveat has been properly filed as to the second codicil and the cause

transferred to the civil issue docket, the clerk may not thereafter upon motion expunge from his records the entire probate proceedings and reprobate the purported will and second codicil on the ground that the second codicil revoked the first. In *re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

Error Held Not Cured by Affirmance of Order.—Where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error in making the order is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order, for the jurisdiction of the superior court in such a case is derivative, and § 1-276 does not apply. In *re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

Cited in *Matter of Covington's Will*, 252 N.C. 546, 114 S.E.2d 257 (1960).

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.—Wherever a caveat is filed with the clerk of the superior court of any county in the State to any last will and testament which has been admitted to probate in said office, it shall be the duty of such clerk, and he is hereby directed to give notice of the filing of such caveat by making an entry upon the page of the will book where such last will and testament is recorded, evidencing that such caveat has been filed and giving the date of such filing. When such caveat and proceedings resulting therefrom shall have resulted in final judgment with respect to such will, the clerk of the court shall make a further entry upon the page of the will book where such last will and testament is recorded to the effect that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81.)

Applied in *Lewis v. Furr*, 228 N.C. 88, 44 S.E.2d 604 (1947).

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. (1784, c. 204, s. 12; R. C., c. 119, s. 26; Code, s. 2180; Rev., s. 3138; C. S., s. 4162.)

Section Changes Common-Law Rule.—The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by this section. *Henderson v. Western Carolina Power Co.*, 200 N.C. 443, 157 S.E. 425 (1931).

The purpose of this section was to change the common-law rule that a devise of lands without words of perpetuity conveyed a life estate only unless there was a

manifest intention to convey the fee. *Morris v. Morris*, 246 N.C. 314, 98 S.E.2d 298 (1957); *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

And it is similar to § 39-1 pertaining to deeds. Hence, what has been held in applying the rule of construction as to wills is pertinent in applying the rule of construction as to deeds. *Artis v. Artis*, 228 N.C. 754, 47 S.E.2d 228 (1948). See *Vickers v. Leigh*, 104 N.C. 248, 10 S.E. 308 (1889).

Unless Will Negatives Statutory Pre-

sumption of Unconditional Gift. — Where testator, after devising his wife a life estate in his realty with remainder over to his children, bequeathed his wife "all or so much of my personal property . . . as she may desire to have and to use or dispose of during her lifetime," and directed that all personal property not so sold or disposed of should be divided among his children, the residuary legatees, it was held that the expressed intent of the testator negated the statutory presumption that he gave his personal estate unconditionally to his wife. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

It Applies to Real and Personal Property.—The provisions of this section apply to the disposition by will of both personal and real property. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Gift of Personality with Full Power to Use Is Absolute.—Where there is no residuary clause in the will and no limitation over so far as the personal property is concerned, a gift of personal property for life to the primary object of testator's bounty, with power to use "in any way that she may desire" is generally construed to be an absolute gift of the property. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

No technical words of conveyance are required in wills. *Alston v. Davis*, 118 N.C. 202, 24 S.E. 15 (1896); *Keith v. Scales*, 124 N.C. 497, 32 S.E. 809 (1899).

The testator's intent gathered from the entire will controls its interpretation. This rule applies to the construction of this section when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. *Rees v. Williams*, 165 N.C. 201, 81 S.E. 286 (1914).

And a General Interest Prevails over a Particular Interest. — The provisions of this section, while laying down a rule of construction, still leave the question of the intention of the testator open for construction, and where there is a particular and a general paramount interest apparent in the same will, and they clash, the general interest must prevail. *Leeper v. Neagle*, 94 N.C. 338 (1886).

Unrestricted Devise Passes Fee.—It has been uniformly held, since the passage of this statute in 1784, that an unrestricted devise of real estate passes the fee. *Roane v. Robinson*, 189 N.C. 628,

127 S.E. 626 (1925); *Barbee v. Thompson*, 194 N.C. 411, 139 S.E. 838 (1927); *Bell v. Gillam*, 200 N.C. 411, 157 S.E. 60 (1931); *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937); *Strickland v. Johnson*, 213 N.C. 581, 197 S.E. 193 (1938).

A devise will carry the fee unless it appears from the will that the testator intended to convey an estate of less dignity. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

Unless a will contains plain and express language, showing that the testator did not intend to devise a fee, the devise will be construed as one in fee simple. *Basnight v. Dill*, 256 N.C. 474, 124 S.E.2d 159 (1962).

Words of Perpetuity Not Required to Create Fee.—Since this section no words of perpetuity are required and a devise without them will carry the fee unless it appears from the will the testator intended to convey an estate less than the fee. *Morris v. Morris*, 246 N.C. 314, 98 S.E.2d 298 (1957).

An unrestricted devise of realty, nothing else appearing, constitutes a devise in fee. *Elder v. Johnston*, 227 N.C. 592, 42 S.E.2d 904 (1947).

A devise generally or indefinitely with power of disposition creates a fee. But a devise for life with power of disposition creates a life estate only. *Hardee v. Rivers*, 228 N.C. 66, 44 S.E.2d 476 (1947).

A testator devised to his daughters, B. and M., all of his real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee simple estate, the intent of the testator being to provide for T., who remained unmarried and is now deceased, during her widowhood. *Barbee v. Thompson*, 194 N.C. 411, 139 S.E. 838 (1927).

Unless it appears from the will that the testator intended to convey an estate of less dignity, a devise of real property will be construed to be in fee simple. *Bell v. Gillam*, 200 N.C. 411, 157 S.E. 60 (1931); *Jolley v. Humphries*, 204 N.C. 672, 169 S.E. 417 (1933); *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947).

The presumption established by this section that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. *Roberts v. Saunders*, 192 N.C. 191, 134 S.E. 451 (1926).

A general devise of realty does not pass the fee when it clearly appears from the will that the testator intended to convey an estate of less dignity. *Hampton v. West*, 212 N.C. 315, 193 S.E. 290 (1937); *Strickland v. Johnson*, 213 N.C. 581, 197 S.E. 193 (1938).

The clause "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes a devise in fee simple. *Buckner v. Hawkins*, 230 N.C. 99, 52 S.E.2d 16 (1949).

The words "give, devise and bequeath," used by a testatrix in devising her property to a husband and wife as tenants by the entireties, in light of the provisions of this section, gave them a fee simple title to the devised property. *Basnight v. Dill*, 256 N.C. 474, 124 S.E.2d 159 (1962).

A devise of real estate to devisees "to do as they like with it," with subsequent provision that after their death whatever property is left should go to testatrix' niece, vests the fee simple in the beneficiaries first named. *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947).

A devise generally to one person with limitation over to another of "whatever is left" at the death of the first taker is regarded as a devise in fee simple. *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947), citing *Patrick v. Morehead*, 85 N.C. 62, 39 Am. Rep. 684 (1881); *Carroll v. Herring*, 180 N.C. 369, 104 S.E. 892 (1920).

Devise with Full Power of Disposal.—A devise to a husband with full power of disposal, but on certain conditions any part undisposed of by him to go to a nephew, vests a fee simple in the husband. *Roane v. Robinson*, 189 N.C. 628, 127 S.E. 626 (1925); *Heefner v. Thornton*, 216 N.C. 702, 6 S.E.2d 506 (1940).

A devise of real estate to testator's son for his own use and benefit with the expressed intent that it should vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life, gives the devisee a fee simple title. *Lineberger v. Phillips*, 198 N.C. 661, 153 S.E. 118 (1930).

A will devising to wife all of testator's property, with full power to manage, control, sell and dispose of it at her discretion, also provided that it was the testator's will and desire that she should devise whatever property she had not thus disposed of during her natural life, or the proceeds thereof, to the person who had been the "kindest to us in aiding and comforting us in our old age." It was held that the wife acquired a fee simple title.

Weaver v. Kirby, 186 N.C. 387, 119 S.E. 564 (1923).

Devise with Limited Power of Disposal.—A general devise to testator's wife with subsequent items providing that one half the estate "remaining" at her death should go to his adopted son in fee, and the other half, in the event the wife did not dispose of the residue of the estate by will, to go to the children of L., is held to show an intent to convey an estate of less dignity than a fee simple to testator's wife, rebutting the presumption that the general devise to the wife should be construed to be in fee, the power of disposition of part of the estate, at least, being limited to disposition by will, and the widow does not have the power to convey the entire estate by deed in fee simple. *Hampton v. West*, 212 N.C. 315, 193 S.E. 290 (1937).

Devise with Power of Disposition neither Expressed nor Implied.—Where the gift to the first taker is in language sufficient, standing alone, to pass a fee simple estate, but no absolute power of disposition is expressed or necessarily implied, the gift is a life estate, provided from other clauses of the will it appears that, at the death of the first taker, testator intends and directs a limitation over to another or others. *Andrews v. Andrews*, 253 N.C. 139, 116 S.E.2d 436 (1960).

Devise for Life with Remainder to Heirs.—When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee simple estate upon the death of the testator subject to any prior life estate created by the will. *Hammer v. Brantley*, 244 N.C. 71, 92 S.E.2d 424 (1956).

Devise Vesting Fee in Children.—A devise of land with provision that the rents should be used by testator's wife and children until they should become of age, and that the lands should be divided among them all upon the children coming of age or upon the prior death of the widow, with further provision that they should have no right to sell the lands except to each other, was held upon the death of the widow, to vest in fee simple in the children. *Langston v. Wooten*, 232 N.C. 124, 59 S.E.2d 605 (1950).

A devise to testator's wife of all of his estate absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judge or decree of any court other than her own conscience, judgment, and affection shall

prompt her to so regard it," was in fee absolute. *Fellowes v. Durfey*, 163 N.C. 305, 79 S.E. 621 (1913).

Devise of Proceeds of Land.—Under this section the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker. *Hambright v. Carroll*, 204 N.C. 496, 168 S.E. 817 (1933).

Devise with Power of Appointment.—A devise to A, and to such persons as he shall appoint, vests the absolute property in A, without an appointment. But if it be to him for life and after his death to such person as he shall appoint, he must make an appointment in order to entitle that person to anything. The express life estate to him repels the implication of a fee simple for himself. *Levy v. Griffis*, 65 N.C. 236 (1871).

A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under this section. *Levy v. Griffis*, 65 N.C. 236 (1871).

Estate Tail Converted into Fee Simple.—There was a devise of lands to wife of testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies. It was held that, after the death of the widow, the devise was not a trust created in the children as trustees for the "heirs of their bodies," and there being no expression in the will to show an intent to create an estate of less degree than fee, it constituted an estate tail, converted by our statute into a fee simple. *Washburn v. Biggerstaff*, 195 N.C. 624, 143 S.E. 210 (1928).

Where testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on," the brother took a life estate with remainder to his children and the named grandson in fee under the Rule in *Shelley's Case*, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession and created an estate tail converted into a fee by § 41-1. In re *Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

Fee Simple Defeasible upon Condition.

—Where testator devises realty to grandson, and in the event of death of the latter without children, then the land to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. *Whitfield v. Garris*, 131 N.C. 148, 42 S.E. 568 (1902); *Whitfield v. Garris*, 134 N.C. 24, 45 S.E. 904 (1903).

An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body." *Jarman v. Day*, 179 N.C. 318, 102 S.E. 402 (1920).

Language Insufficient to Show Intent to Pass Less than Fee Simple Estate.—See *Mangum v. Wilson*, 235 N.C. 353, 70 S.E.2d 19 (1952).

A devise of all testator's property, employing the words "give, devise, and bequeath" and expressing testator's desire that the estates devised and bequeathed be held intact as nearly as practicable, by marriage contract if the devisees married, and at the death of the devisees be divided among nephews and nieces, vested an absolute fee simple title in the named devisees. *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957).

Language Showing Intention to Give Estate in Residuary Devise of Less Dignity than Fee Simple.—See *Woodard v. Clark*, 234 N.C. 215, 66 S.E.2d 888 (1951).

Where an estate is reduced from a life estate to a dower interest, in the event of remarriage, it is a manifest indication of the testator's purpose to devise his wife an estate of less dignity than a fee simple. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Vested Remainder to Be Divested upon Condition.—Under a devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow Heirs," it was held that, after the falling-in of the life estate, G. and M. take the fee in the remainder defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principles of a shifting use operating

by way of an executory devise. *Kirkman v. Smith*, 174 N.C. 603, 94 S.E. 423 (1917).

For precatory words in a will to be regarded as creating a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character. *Springs v. Springs*, 182 N.C. 484, 109 S.E. 839 (1921).

Where the testator, after bequeathing or devising property to a person, expresses a wish or desire as to its use or disposition, such expression will not be construed to create a trust in the legatee or devisee unless it clearly appears from the instrument as a whole that testator so intended since the devise or bequest will be deemed absolute in the absence of a clearly expressed intention to convey an estate of less dignity, but precatory words will create a trust when it appears from the instrument as a whole that the testator so intended, provided testator has pointed out with sufficient clearness and certainty both the subject matter and objects of the intended trust. *Brinn v. Brinn*, 213 N.C. 282, 195 S.E. 793 (1938).

Subsequent Expressions Not Affecting Devise of Fee.—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will. *Fellowes v. Durfey*, 163 N.C. 305, 79 S.E. 621 (1913).

In the absence of a contrary intent expressed in the will an unrestricted or indefinite devise of real property is a devise in fee simple, and a subsequent clause expressing a wish, desire or even direction for the disposition of what remains at the death of the devisee will not be allowed to defeat the devise nor limit it to a life estate. *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947).

Where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee, and a subsequent clause in the will purporting to dispose of what remains at his death is not allowed to defeat the devise nor limit it to a life estate.

Quickel v. Quickel, 261 N.C. 696, 136 S.E.2d 52 (1964).

An unrestricted devise followed by a provision that in the event the devisee died intestate, testator wished such devisee's share to descend to her children, vests the fee in the devisee, the precatory words being repugnant to the estate previously devised and sufficient to limit or divest it. *Croom v. Cornelius*, 219 N.C. 761, 14 S.E.2d 799 (1941).

Devise for "Use and Benefit without Let or Hindrance."—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her own use and benefit without let or hindrance," upon such demand and compliance therewith, the wife takes and can convey a fee simple, notwithstanding a further provision in the will that a third person should take a life estate in property remaining in the hands of trustees at the wife's death. *O'Quinn v. Crane*, 189 N.C. 97, 126 S.E. 174 (1925).

Devise to Trustee Granting No Beneficial Interest.—The rule that a devise of real estate shall be construed to be in fee simple is inapplicable where the testamentary words negative the idea of the investiture of title in fee, or for life, or the granting of any other beneficial interest to the devisee, and express the intent, rather, to impose upon him duties as executor and trustee of an active trust, with directions as to the use of the property and as to how the income shall be applied during his life and after his death. *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937).

The construction required by this statute may not be invoked where no estate in fee is attempted to be devised and where the plain intent is not to grant an estate, but to impose a trust and direct the collection of rent for application to a specific purpose. *Stephens v. Clark*, 211 N.C. 84, 189 S.E. 191 (1937), citing *Young v. Young*, 68 N.C. 309 (1873); *Witherington v. Herring*, 140 N.C. 495, 53 S.E. 303, 6 Ann. Cas. 188 (1906); *Fellowes v. Durfey*, 163 N.C. 305, 79 S.E. 621 (1913).

Devise Creating Life Estate.—A devise for life with power of disposition creates a life estate only. *Chewning v. Mason*, 158 N.C. 578, 74 S.E. 357 (1912); *Tillett v. Nixon*, 180 N.C. 195, 104 S.E. 352 (1920); *Alexander v. Alexander*, 210 N.C. 281, 186 S.E. 319 (1936). The estate devised being specifically limited to the life of the devisee, the power of disposition does not enlarge the estate devised or convert it

into a fee. *Hardee v. Rivers*, 228 N.C. 66, 44 S.E.2d 476 (1947).

Testator devised to his wife all of his "estate real and personal," and by a later paragraph all of the rest of his property "as above stated" during her widowhood, and should she remarry her dower "according to law." It was held that only a life estate was given to his widow, the statutory presumption of a fee simple title being inoperative. *Roberts v. Saunders*, 192 N.C. 191, 134 S.E. 451 (1926).

Rules of Construction — Intention of Testator.—The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator is the primary source of information, as it is the expressed intention of the testator which is sought. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

The intent of the testatrix is her will and must be carried out unless some rule of law forbids it. In *re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

The basic rule of construction, and the refrain of every opinion which seeks to comprehend a testamentary plan, is that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. In *re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

The rule, that an unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause in the will purporting to dispose of what remains at his death is not allowed to defeat the devise nor limit it to a life estate, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will. *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964).

Same—Ordinary Words.—Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

§ 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.—No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive

Same—Words with Well-Defined Legal Significance.—If words or phrases are used which have a well-defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

Same—Isolated Clauses or Sentences.—Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

Same—Prior Decisions.—Little or no aid can be derived by a court in construing a will from prior decisions in other will cases. It is not sufficient that the same words in substance or even literally have been construed in other cases. It often happens that the same identical words require very different constructions according to context and the peculiar circumstances of each case. *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960).

Void Restraint on Alienation.—Where a restraint on alienation was declared void, the devise was unrestricted and vested the fee in the devisee. *Williams v. McPherson*, 216 N.C. 565, 5 S.E.2d 830 (1939).

Applied in *Morris v. Waggoner*, 209 N.C. 183, 183 S.E. 353 (1936); *Blackwood v. Blackwood*, 237 N.C. 726, 76 S.E.2d 122 (1953); *Walters v. Baptist Children's Home of N.C., Inc.*, 251 N.C. 369, 111 S.E.2d 707 (1959); *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

Quoted in *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

Cited in *West v. Murphy*, 197 N.C. 488, 149 S.E. 731 (1929); *Brown v. Lewis*, 197 N.C. 704, 150 S.E. 328 (1929); *Merritt v. Inscoe*, 212 N.C. 526, 193 S.E. 714 (1937); *Early v. Tayloe*, 219 N.C. 363, 13 S.E.2d 609 (1941); *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941); *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

as to the execution thereof against the heirs and devisees of the testator, whenever the probate thereof under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator or when such purchase is made after the filing of the final account by the duly authorized administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid as against the heirs and devisees of the testator, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime a proceeding shall have been instituted in the proper court to probate the will of the testator. (1784, c. 225, s. 6; R. C., c. 119, s. 20; Code, s. 2174; Rev., s. 3139; 1915, c. 219; C. S., s. 4163; 1953, c. 920, s. 1.)

Cross Reference.—For further provisions as to wills fraudulently withheld from probate, see § 31-12.

Probate an Indispensable Prerequisite.—The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. *Osborne v. Leak*, 89 N.C. 433 (1883); *Paul v. Davenport*, 217 N.C. 154, 7 S.E.2d 352 (1940).

An unprobated will is not muniment of title; it cannot be established as a will in a collateral proceeding; it conveys no title to property until it is probated and recorded. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Where the probate shows on its face that the paper-writing has never been validly proven and probated as a holographic will, it is ineffective to pass real or personal property. *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

Will Ineffectual as Transfer of Title or Cloud Thereon during Lifetime of Testator.—A paper-writing making testamentary disposition of property is without legal significance either as a transfer of title or as a cloud thereon during the lifetime of the person executing it, since a will takes effect only upon the death of the testator and the probate of the instrument. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E.2d 278 (1954).

Prior to the 1915 amendment there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to a will. The will became effective from the death of the testator, ordinarily passing the title to devisees from that date

against all dispositions or conveyances from the heirs to the contrary. *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919). See *Cooley v. Lee*, 170 N.C. 18, 86 S.E. 720 (1915).

The amendment fixed the time at two years within which a will must be probated and recorded in order to affect the rights of innocent purchasers for value from the heirs at law, and this limitation is exclusively within the authority of the legislature to make. *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919).

Ownership under will is not made dependent upon the certified copy directed to be recorded in the county where the land lies. The only purpose of the certified copy is to give information to abstractors and to direct their attention to the source of title. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129, 159 A.L.R. 380 (1945).

Section Not Retroactive.—This section requiring copies of wills to be recorded in the county where the devised lands are situate, is prospective and refers only to wills proved after November 1, 1883. *Curles v. Smith*, 91 N.C. 172 (1884).

The 1915 amendment was prospective in effect, and the former right of devisees to have unlimited time to probate a will was not affected except from the effective date of the amendment. *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919).

Section 47-18, our ordinary registration act, has no application to wills. *Cooley v. Lee*, 170 N.C. 18, 86 S.E. 720 (1915). See *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919).

§ 31-40. What property passes by will.—Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon

his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (1844, c. 88, s. 1; R. C., c. 119, s. 5; Code, s. 2140; Rev., s. 3140; C. S., s. 4164.)

A conveyance of "all the property I possess," where there is no apparent motive for making an exception, conveys all property the party owned. *Hollowell v. Manly*, 179 N.C. 262, 102 S.E. 386 (1920).

Right of Entry for Condition Broken.—"And also to all rights of entry for conditions broken," etc., evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. *Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902).

Where a church receives an absolute fee in land, subject to be defeated only by the breach of a condition, and this condition is not broken until after the death of the grantor and a daughter, neither the grantor nor the daughter have any estate in the land (before the breach of the condition, the testator having a mere possibility of reverter) at the time of their death which can be willed or inherited, and upon breach of the condition the estate goes to the heirs at law of the grantor. *Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902).

§ 31-41. Will relates to death of testator.—Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (1844, c. 88, s. 3; R. C., c. 119, s. 16; Code, s. 2141; Rev., s. 3141; C. S., s. 4165.)

The general rule is that a will speaks as of the date of the death of the testator, and any property acquired after the making of a will, by reversion or otherwise, is subject to its terms. *Ferguson v. Ferguson*, 225 N.C. 375, 35 S.E.2d 231 (1945).

The general rule seems to be established that where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of his death. *Hines v. Mercer*, 125 N.C. 71, 34 S.E. 106 (1899).

A will takes effect and speaks as of the date of the testator's death. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963).

Will Relates Back to Death When Pro-

Possibility of Reverter Not Devisable.

—A mere possibility of reverter cannot be the subject of a devise. *Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902); *Hollowell v. Manly*, 179 N.C. 262, 102 S.E. 386 (1920).

Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy. *Holmes v. York*, 203 N.C. 709, 166 S.E. 889 (1932).

Items of will disposing of real estate not owned by testator were held valid to the extent that they disposed of real and personal property owned by the testator. *Taylor v. Taylor*, 243 N.C. 726, 92 S.E.2d 136 (1956).

Cited in Wachovia Bank & Trust Co. v. Waddell, 234 N.C. 454, 67 S.E.2d 651 (1951); *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955).

bated and Recorded.—Once a will is admitted to probate and recorded by the clerk, it relates back to the death of the testator. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Exception to General Rule.—Ordinarily a will will be construed as though executed immediately prior to testator's death, and it is only when the will describes a specific subject of gift with sufficient particularity to show that an object in existence at the date of the execution of the will was intended that the general rule is excluded. *Tyer v. Meadows*, 215 N.C. 733, 3 S.E.2d 264 (1939).

Where the testator refers to a specific subject of gift, with sufficient particularity

in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. *Hines v. Mercer*, 125 N.C. 71, 34 S.E. 106 (1899).

While the dispositive provisions of a will speak as of the death of the testator, in ascertaining testator's intent the will must be considered in the light of the conditions and circumstances existing at the time it was made. *Wachovia Bank & Trust Co. v. Green*, 239 N.C. 612, 80 S.E.2d 771 (1954).

Section Relates to Subject Matter and Not to Objects of Will.—This section, making the will speak from the death of the testator, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. *Robbins v. Windley*, 56 N.C. 286 (1857); *Hines v. Mercer*, 125 N.C. 71, 34 S.E. 106 (1899); *Thomas v. Thomas*, 258 N.C. 590, 129 S.E.2d 239 (1963).

This section has no retroactive effect, and does not apply to wills made prior to its enactment, though the testator dies subsequent to its enactment. Such wills, with reference to the property they devise, speak as of the date of their execution, and not as of the date of testator's death under the rule of construction promulgated by this section. *Williamson v. Williamson*, 58 N.C. 142 (1859).

Devise of "the Whole of My Lands" Passes After-Acquired Property.—A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of his will when no intention to the contrary appears. A subsequent clause in the will, directing "my other property of every kind not before mentioned to be sold," refers to other personal property. *Edwards v. Warren*, 90 N.C. 604 (1884).

Date on Will Immaterial.—When a writing purporting to be a will has been duly

probated and thereby determined to be the last will of the deceased, it is effective as of the moment of testator's death, and the date appearing on the instrument then becomes immaterial. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Effect of Will Speaking as of Time of Testator's Death.—Inasmuch as a will speaks as of the time of testator's death, a devise by O. of her "undivided interest and property in the estate of the late G. C." passes no such part of the distributive share in such estate as has been collected and received by O., for, immediately upon its payment to O., it became her property and ceased to be a part of the estate of G. C. *Aydlett v. Small*, 115 N.C. 1, 20 S.E. 163 (1894).

Designation of Quantity of Land Does Not Prevent Operation of Rule.—Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres," and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise. *Brown v. Hamilton*, 135 N.C. 10, 47 S.E. 128 (1904).

Land under Contract of Purchase after Execution of Will.—In *re Champion*, 45 N.C. 246 (1853), the devise was to testator's wife: Item 1: "All my real estate, consisting of several lots in Shelby," etc., and in item 2: "All of my personal estate of whatever nature." After the date of the will he contracted to purchase another tract, but had not paid for it at his death. It was held that his rights in the unpaid for land passed to his wife, on the ground that looking at the whole instrument, the intention to give the whole estate to his wife was manifest. *Hines v. Mercer*, 125 N.C. 71, 34 S.E. 106 (1899).

Applied in *Gatling v. Gatling*, 239 N.C. 215, 79 S.E.2d 466 (1954); *Wachovia Bank & Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E.2d 182 (1965).

Stated in *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E.2d 278 (1954).

Cited in *Wright v. Wright*, 198 N.C. 754, 153 S.E. 321 (1930).

§ 31-42. Failure of devises and legacies by lapse or otherwise.—(a) **Devolution of Devise or Legacy to Person Predeceasing Testator.**—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir

of the testator under the provisions of the Intestate Succession Act had there been no will.

(b) Devolution of Devise or Legacy to Member of Class Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken as a member of a class had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will: Provided, however, if such devisee or legatee is not survived by such issue, then the entire property interest therein shall devolve upon the remaining members of the class who survive the testator.

(c) Devolution of Void, Revoked, Renounced or Lapsed Devises or Legacies.—If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

- (1) Where a devise or legacy of any interest in property is void, is revoked, is renounced, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass
 - a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
 - b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and
- (2) Where a residuary devise or legacy is void, revoked, renounced, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto. (1844, c. 88, s. 4; R. C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C. S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1.)

Cross Reference.—As to intestate succession, see § 29-1 et seq.

Editor's Note. — The 1951 amendment rewrote former § 31-42 to appear as this section and former §§ 31-42.1 and 31-42.2. For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 425.

The 1953 amendment inserted the words "is issue of the testator or."

The 1965 amendment, effective July 1, 1965, again rewrote this section, incorporating therein provisions similar to former §§ 31-42.1 and 31-42.2. Section 3 of the amendatory act provides: "This act shall apply to wills of persons who die on or after the effective date hereof." In view of this language, former §§ 31-42, 31-42.1 and 31-42.2 are set out in this note for the convenience of the practitioner.

Former §§ 31-42, 31-42.1 and 31-42.2.—§ 31-42. Unless a contrary intent is indicated by the will, where a devise of any estate not terminable at or before death of the devisee is given to a devisee who predeceases the testator, such devise does not

lapse but passes to such issue of the devisee as survive the testator in all cases where the devisee is issue of the testator or would have been an heir of the testator if the devisee had survived the testator and there had been no will.

§ 31-42.1. Unless a contrary intent is indicated by the will, where a legacy of any interest in a personal property not terminable at or before death of the legatee is given to a legatee who predeceases the testator, such legacy does not lapse but passes to such issue of the legatee as survive the testator in all cases where the legatee is issue of the testator or would have been a distributee of the testator if the legatee had survived the testator and there had been no will.

§ 31-42.2. Unless a contrary intent is indicated by the will, a legacy or devise to a person who predeceases the testator which lapses, or is revoked, or is void, or which for any reason fails to take effect, passes as follows:

- (1) Under the residuary clause in the

will, if there is such a clause, applicable to real property in case of such a devise, or applicable to personal property in case of such legacy, or

(2) As if the testator had died intestate with respect thereto, when there is no such applicable residuary clause.

Some of the cases in the following note were decided under § 31-42 as it appeared prior to the 1951 amendment and former §§ 31-42.1 and 31-42.2.

For article on lapse, abatement and ademption, see 39 N.C.L. Rev. 313 (1961). For note concerning adopted children as issue, see 40 N.C.L. Rev. 650 (1962).

Original Section a Copy of English Statute.—This section, as enacted in 1844 was a copy of the English statute upon the same subject. *Holton v. Jones*, 133 N.C. 399, 45 S.E. 765 (1903).

This section is not ambiguous. The intention of the General Assembly in its enactment [of original § 31-42] is expressed in language which leaves no room for judicial construction. The distinction found in the common law for purposes of devolution is recognized and preserved. *Farnell v. Dongan*, 207 N.C. 611, 178 S.E. 77 (1935); *Beach v. Gladstone*, 207 N.C. 876, 178 S.E. 546 (1935).

Limitation Over Held to Lapse.—Where testatrix left property in trust to her son for life with remainder over to his issue, and in the event the son should leave no issue, to testatrix's brothers and sisters, and all except one of testatrix's brothers and sisters predeceased her, and the sister who survived her died during the lifetime of the son, the limitation over to the brothers and sisters of testatrix lapsed, since the children of the brothers and sisters of testatrix who predeceased testatrix did not qualify under this section, and no transmittable estate vested in the sister of testatrix who died during the lifetime of testatrix's son. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

Standing of Adopted Child.—Where a parent by adoption is named a legatee in the will of her mother, but dies prior to the death of her mother, the adopted child takes the personalty bequeathed his mother by adoption under this section, even though the adoption was subsequent to the execution of the will, since under the provisions of § 48-23 the adopted child has the same standing as though he had been born to his adoptive parent at the time of the adoption. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961).

Residuary Clause Comprises All Prop-

erty Not Otherwise Provided for.—It was intended by this section that the property passing by residuary clause of a will should comprise all the estate owned by the testator at time of his death not otherwise specifically devised or provided for, and should include any described in a devise which may have lapsed, or become void or incapable of taking effect. *Renn v. Williams*, 233 N.C. 490, 64 S.E.2d 437 (1951).

Subject Matter of Void Legacy Included in Residuary Legacy.—A legacy which is void under the terms of § 31-10, which makes those legacies whose beneficiaries were attesting witnesses to the will void, passes under the residuary clause of the will. *Renn v. Williams*, 233 N.C. 490, 64 S.E.2d 437 (1951).

Devise Passing under Residuary Clause.—It is settled law in this jurisdiction, by reason of the provisions of this section, that where a contrary intent does not appear in a will, ordinarily a lapsed, void or rejected devise will pass under an effective residuary clause. *Featherstone v. Pass*, 232 N.C. 349, 60 S.E.2d 236 (1950).

Devise Not Passing under Residuary Clause.—Testator devised certain property to his sister for life, remainder to the county to be used as a charitable hospital, with further provision that if the property should not be so used, the county should forfeit the right of possession and title, and the property pass to testator's heirs at law. It was held that upon the renunciation by the county after the death of the life tenant, the remainder passes to testator's heirs in accordance with the expressed intent of testator, leaving no interest to pass under the subsequent residuary clause of the will. *Featherstone v. Pass*, 232 N.C. 349, 60 S.E.2d 236 (1950).

Rule as to Residuary Clause Applies Only in Absence of Contrary Intention.—A lapsed devise of lands will not fall within the residuary clause of a will, under this section [former § 31-42], where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provisions for his widow, and gives her, in the residuary clause, "all other property not herein specified," and the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow or her devisees under her will. *Howell v. Mehegan*, 174 N.C. 64, 93 S.E. 438 (1917).

And if the will expresses an intent that

a legacy shall not lapse in the event the legatee predeceases testatrix, the statutory provision for lapse [under former § 31-42] does not apply. This intent need not be stated in exact terms, but is to be ascertained from the four corners of the will. *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948), wherein will showed no intent that legacy should not lapse upon prior death of legatee.

No particular mode of expression is necessary to constitute a residuary clause in a will, and while the words "rest," "residue," or "remainder" are commonly used for the purpose, naturally placed at the end of the dispositive portion of the will, all that is required is an adequate designation of what has not been otherwise disposed of; and the fact that a provision so operating is not spoken of in the will as the residuary clause is immaterial. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

And It Is Dependent upon the Intention of the Testator.—Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. *Stevenson v. Wachovia Bank & Trust Co.*, 202 N.C. 92, 161 S.E. 728 (1932).

"All of the Residue" Embraces Personality and Realty. — General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Construction of Residuary Clause in General.—In a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded; and one must find words sufficiently large, definite and distinct to enable him to say that some item is excluded, so that what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Construction to Prevent Intestacy.—A residuary clause in a will should be con-

strued so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Intestacy Not Favored.—No one supposes that he has failed in his intention to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Effect of Failure to Name Devisee.—There was a devise of land "to my . . ." without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons. It was held, that the failure to name the devisee brings the devise within the terms of the statute as to void devises, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Devise Failing for Misdescription. — A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916).

Subject Matter of Void Legacy Included in Residuary Legacy.—Under the provisions of this section [former § 31-42], the property which is the subject matter of a void legacy, is included within the residuary legacy provided by the will, and should be delivered by the executor to the residuary legatees. *Wilmington Sav. & Trust Co. v. Cowan*, 208 N.C. 236, 180 S.E. 87 (1935).

Lapse of Shares of Some of Residuary Legatees.—Where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been established, the beneficiaries whose names have been thus erased take nothing, and the whole estate, under the residuary clause, goes to the others therein named together with such legacies as may have lapsed. *Barfield v. Carr*, 169 N.C. 574, 86 S.E. 498 (1915).

Legacy Not Lapsed by Fact That Leg-

atee Predeceased Testator.—In *Beach v. Gladstone*, 207 N.C. 876, 178 S.E. 546 (1935), a judgment that a legacy did not lapse by reason of fact that legatee predeceased testator is affirmed, it appearing that legatee would have been distributee of testator had she survived him.

Who Are Distributees.—A distributee is a person who has the right under the statute of distribution to a share in the surplus estate of an intestate; one entitled to take a share of an estate of a decedent, under the statute of distribution; one to whom something has to be distributed in the division of an estate; a person upon whom personal property devolves by act of law in cases of intestacy. The determinative criterion is the right to share in the distribution of the personal estate of the intestate. Those who take by succession the estate of a person who dies intestate are named and defined in § 28-149 [now § 29-1 et seq.]. *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948).

Must Be Determined as of Date of Death of Testatrix.—Who would have been distributees of the estate had the testatrix died intestate must be determined as of the date of her death and not as of the date of the execution of her will. *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948).

§§ 31-42.1, 31-42.2: Repealed by Session Laws 1965, c. 938, s. 2, effective July 1, 1965.

Cross Reference. — For similar provisions, see § 31-42.

§ 31-43. General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (1844, c. 88, s. 5; R. C., c. 119, s. 8; Code, s. 2143; Rev., s. 3143; C. S., s. 4167.)

Cross Reference.—See § 31-4.

Editor's Note. — For article on estate planning and powers of appointment, see 30 N.C.L. Rev. 225 (1953).

Conveyance in General Terms. — Whether a conveyance of property in general terms or by general description constitutes a valid exercise of a power of ap-

Wife Surviving Testator Not Heir at Law but Distributee.—Where the owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife, the collateral heirs at law of the testator are entitled to the real property, the devise to the wife having lapsed by reason of her prior death, and the provisions of this section, not applying to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse, but should go to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. *Farnell v. Dongan*, 207 N.C. 611, 178 S.E. 77 (1935).

Where a wife dies leaving her husband but no issue he is her sole distributee, and her collateral kin are not entitled to share in the estate and are not "distributees." *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E.2d 41 (1948).

pointment is governed by this section in respect to the exercise of such power by will. *Schaeffer v. Haseltine*, 228 N.C. 484, 46 S.E.2d 463 (1948).

Intent Manifested by Entire Will.—Where the execution by will of a power is not exercised in express terms by reference to the power or the subject, a

construction must be given by looking to the whole instrument and giving effect to the intent therein manifested. *Johnston v. Knight*, 117 N.C. 122, 23 S.E. 92 (1895); *Walsh v. Friedman*, 219 N.C. 151, 13 S.E.2d 250 (1941).

Residuary Devise Executes Power Unless Contrary Intention Shown.—Unless there is something to show a contrary intention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of property by will. *Johnston v. Knight*, 117 N.C. 122, 23 S.E. 92 (1895); *Walsh v. Friedman*, 219 N.C. 151, 13 S.E.2d 250 (1941).

§ 31-44: Repealed by Session Laws 1951, c. 762, s. 2.

§ 31-45: Rewritten and renumbered as § 31-5.5 by Session Laws 1953, c. 1098, s. 7.

§ 31-46. **Validity of will; which laws govern.**—A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator. (1953, c. 1098, s. 14.)

ARTICLE 8.

Devise or Bequest to Trustee of an Existing Trust.

§ 31-47. **Devise or bequest to trustee of an existing trust.**—A devise or bequest in a will duly executed pursuant to the provisions of this chapter may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills, nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest. (1955, c. 388; 1957, c. 783, s. 1.)

Where the donee of a power to dispose of property by will to certain persons devises the property to such persons by a residuary clause, without referring to the power, the devise will be considered an intentional and not an accidental exercise of the power. *Johnston v. Knight*, 117 N.C. 122, 23 S.E. 92 (1895).

Valid Exercise of Power.—Will held a valid exercise of power of appointment under this section, there being nothing in the will to indicate any contrary intent. *Schaeffer v. Haseltine*, 228 N.C. 484, 46 S.E.2d 463 (1948).

Chapter 31A.

Acts Barring Property Rights.

Article 1.

Rights of Spouse.

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31A-1. Acts barring rights of spouse.

Article 2.

Parents.

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Article 3.

Willful and Unlawful Killing of Decedent.

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31A-14. Uniform Simultaneous Death Act not applicable.

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ARTICLE 1.

Rights of Spouse.

§ 31A-1. **Acts barring rights of spouse.**—(a) The following persons shall lose the rights specified in subsection (b) of this section:

- (1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained; or
- (2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or
- (3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or
- (4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or
- (5) A spouse who knowingly contracts a bigamous marriage.

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

- (1) All rights of intestate succession in the estate of the other spouse;
- (2) All right to claim or succeed to a homestead in the real property of the other spouse;
- (3) All right to dissent from the will of the other spouse and take either the intestate share provided or the life interest in lieu thereof;
- (4) All right to any year's allowance in the personal property of the other spouse;
- (5) All right to administer the estate of the other spouse; and
- (6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

(c) Any act specified in subsection (a) of this section may be pleaded in bar of any action or proceeding for the recovery of such rights, interests or estate as set forth in subsection (b) of this section.

(d) The spouse not at fault may sell and convey his or her real and personal property without the joinder of the other spouse, and thereby bar the other spouse of all right, title and interest therein in the following instances:

- (1) During the continuance of a separation arising from a divorce from bed and board as specified in subsection (a) (1) of this section, or
- (2) During the continuance of a separation arising from adultery as specified in subsection (a) (2) of this section, or during the continuance of a separation arising from an abandonment as specified in subsection (a) (3) of this section, or
- (3) When a divorce is granted as specified in subsection (a) (4) of this section, or a bigamous marriage contracted as specified in subsection (a) (5) of this section. (1961, c. 210, s. 1; 1965, c. 850.)

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

Editor's Note.—The act adding this chapter was effective as of Oct. 1, 1961.

The 1965 amendment substituted "without the joinder of the other spouse" for "as if such person were unmarried" near the beginning of subsection (d).

For article discussing this chapter, section by section, see 40 N.C.L. Rev. 175 (1962).

Failure to Provide Support Tantamount

to Abandonment.—Where the husband made his wife leave, or where she had to leave because he would not give her anything to eat, it was held that his conduct amounted to abandonment. *High v. Bailey*, 107 N.C. 70, 12 S.E. 45 (1890), construing former § 28-12.

Cited in *In re Estate of Perry*, 256 N.C. 65, 123 S.E.2d 99 (1961); *Durham Bank & Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E.2d 104 (1961); *Brinson v. Brinson*, 334 F.2d 155 (4th Cir. 1964).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.—Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—

- (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
- (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child. (1961, c. 210, s. 1.)

Applied in *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

ARTICLE 3.

Wilful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.—As used in this article, unless the context otherwise requires, the term—

- (1) "Decedent" means the person whose life is taken by the slayer as defined in subdivision (3).
- (2) "Property" means any real or personal property and any right or interest therein.
- (3) "Slayer" means
 - a. Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the wilful and unlawful killing of another person; or

- b. Any person who shall have entered a plea of guilty in open court as a principal or accessory before the fact of the wilful and unlawful killing of another person; or
- c. Any person who, upon indictment or information as a principal or accessory before the fact of the wilful and unlawful killing of another person, shall have tendered a plea of nolo contendere which was accepted by the court and judgment entered thereon; or
- d. Any person who shall have been found in a civil action or proceeding brought within one year after the death of the decedent to have wilfully and unlawfully killed the decedent or procured his killing, and who shall have died or committed suicide before having been tried for the offense and before the settlement of the estate. (1961, c. 210, s. 1.)

Acquittal of Murder Avoids Forfeiture. has forfeited her property rights as his
 —A plea by widow that she has been acquitted of the murder of her husband states 479, 91 S.E.2d 231 (1956), decided under
 a complete defense to the claim that she former § 28-10.

§ 31A-4. Slayer barred from testate or intestate succession and other rights.—The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

- (1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.
- (2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.
- (3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will. (1961, c. 210, s. 1.)

Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section [former § 28-10], his heirs may not claim under him the proceeds of the policy, since the law will not allow a man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to the husband's heirs at law. *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931).

Heir Murdering Ancestor Excluded from

Beneficial Interest in Estate.—The fact that this [former § 28-10] and other other sections forfeiting a murderer's interest in the estate of his victim apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. *Garner v. Phillips*, 229 N.C. 160, 47 S.E.2d 845 (1948). For suggested revisal of this section and related statutes, see 26 N.C.L. Rev. 232.

Former Law. — See *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888).

§ 31A-5. Entirety property.—Where the slayer and decedent hold property as tenants by the entirety:

- (1) If the wife is the slayer, one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and
- (2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife. (1961, c. 210, s. 1.)

§ **31A-6. Survivorship property.**—(a) Where the slayer and the decedent hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the decedent's share thereof shall pass immediately upon the death of the decedent to his estate, and the slayer's share shall be held by the slayer during his lifetime and at his death shall pass to the estate of the decedent. During his lifetime, the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer.

(b) Where three or more persons, including the slayer and the decedent, hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the portion of the decedent's share which would have accrued to the slayer as a result of the death of the decedent shall pass to the estate of the decedent. If the slayer becomes the final survivor, one half of the property then held by the slayer shall pass immediately to the estate of the decedent, and upon the death of the slayer the remaining interest of the slayer shall pass to the estate of the decedent. During his lifetime the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer. (1961, c. 210, s. 1.)

§ **31A-7. Reversions and vested remainders.** — (a) Where the slayer holds a reversion or vested remainder in property subject to a life estate in the decedent and the slayer would have obtained the right of present possession upon the death of the decedent, such property shall pass to the estate of the decedent during the period of the life expectancy of the decedent.

(b) Where the slayer holds a reversion or vested remainder in property subject to a life estate in a third person which is measured by the life of the decedent, such property shall remain in the possession of the third person during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ **31A-8. Contingent remainders and executory interests.**—As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:

- (1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent; but
- (2) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ **31A-9. Divesting of interests in property.** — Where the slayer holds any interest in property, whether vested or not, subject to be divested, diminished in any way or extinguished if the decedent survives him or lives to a certain age, such interest shall be held by the slayer during his lifetime or until the decedent would have reached such age but shall then pass as if the decedent had died immediately after the death of the slayer or the reaching of such age. (1961, c. 210, s. 1.)

§ **31A-10. Powers of appointment and revocation.**—(a) As to any exercise in the will of the decedent of a power of appointment in favor of the slayer, the slayer shall be deemed to have predeceased the decedent and the slayer shall not acquire any property or receive any benefit by virtue of such appointment and the appointed property shall pass in accordance with the applicable lapse statute, if any.

(b) Property held either presently or in remainder by the slayer subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent; and property so held by the slayer subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons

shall pass to such person or persons or in equal shares to the members of such class of persons, exclusive of the slayer. (1961, c. 210, s. 1.)

§ 31A-11. Insurance benefits.—(a) Insurance and annuity proceeds payable to the slayer:

- (1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or
- (2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this chapter. (1961, c. 210, s. 1.)

§ 31A-12. Persons acquiring from slayer protected.—The provisions of this chapter shall not affect the right of any person who, before the interests of the slayer have been adjudicated, acquires from the slayer for adequate consideration property or an interest therein which the slayer would have received except for the terms of this chapter, provided the same is acquired without notice of circumstances tending to bring it within the provisions of this chapter; but all consideration received by the slayer shall be held by him in trust for the persons entitled to the property under the provisions of this chapter, and the slayer shall also be liable both for any portion of such consideration which he may have dissipated, and for any difference between the actual value of the property and the amount of such consideration. (1961, c. 210, s. 1.)

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.—The record of the judicial proceeding in which the slayer was determined to be such, pursuant to § 31A-3 of this chapter, shall be admissible in evidence for or against a claimant of property in any civil action arising under this chapter. (1961, c. 210, s. 1.)

Cited in Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961).

§ 31A-14. Uniform Simultaneous Death Act not applicable.—The Uniform Simultaneous Death Act, G.S. 28-161.1 through 28-161.7, shall not apply to cases governed by this chapter. (1961, c. 210, s. 1.)

§ 31A-15. Chapter to be broadly construed.—This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable. (1961, c. 210, s. 1.)

Quoted in Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961); Brinson v. Brinson, 334 F.2d 155 (4th Cir. 1964).

Division VII. Fiduciaries.

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Chapter 32.

Fiduciaries.

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- 32-27. Powers which may be incorporated by reference in trust instrument.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-1. **Short title.**—This article may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C. S., s. 1864(d); 1965, c. 628, s. 2.)

Cross References.—For provisions as to investment securities under the Uniform Commercial Code, see §§ 25-8-101 to 25-8-406. As to removal of fiduciaries who cannot be found, see § 28-118.1.

Editor's Note.—This article contains §§ 32-1 through 32-13.

The 1965 amendment substituted "article" for "chapter."

Prior Law.—The cases cited in this note were decided prior to the enactment of the statute codified as this article. As to pledge or sale of trust assets as security for or in payment of fiduciary's own debt, see *Powell v. Jones*, 36 N.C. 337 (1841);

Lockhart v. Phillips, 36 N.C. 342 (1841); *Exum v. Bowden*, 39 N.C. 281 (1846); *Gray v. Armistead*, 41 N.C. 74 (1849); *Bradshaw v. Simpson*, 41 N.C. 243 (1849); *Wilson v. Doster*, 42 N.C. 231 (1851); *Hendrick v. Gidney*, 114 N.C. 543, 19 S.E. 598 (1894). As to rights and liabilities where a party united with fiduciary in a breach of trust or circumstances put him on guard, see *Buning v. Ricks*, 22 N.C. 130 (1838); *Dancy v. Duncan*, 96 N.C. 111, 1 S.E. 455 (1887). As to purchaser of legal title as trustee for *cestui que trust*, see *Maples v. Medlin*, 5 N.C. 220 (1809).

§ 32-2. **Definition of terms.**—(a) In this article unless the context or subject matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver,

trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

(b) A thing is done "in good faith" within the meaning of this article when it is in fact done honestly, whether it be done negligently or not. (1923, c. 85, s. 1; C. S., s. 1864(e); 1965, c. 628, s. 2.)

Cross Reference. — As to what constitutes business of banking, see § 53-1.

Editor's Note. — The 1965 amendment substituted "article" for "chapter."

Quoted in Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Cited in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

§ 32-3. Application of payments made to fiduciaries.—A person who in good faith pays or transfers to a fiduciary any money or other property, which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 85, s. 2; C. S., s. 1864(f).)

Editor's Note. — It was stated in 1 N.C.L. Rev. 291, that this section accords with *Tyrell v. Morris*, 21 N.C. 559 (1837); *Gray v. Armistead*, 41 N.C. 74 (1849), and *Kadis v. Weil*, 164 N.C. 84, 80 S.E. 229 (1913), unless a change results from the

elimination by the definition of "fiduciary" in § 32-2 of certain distinctions formerly recognized between some classes of fiduciaries. See *Exum v. Bowden*, 39 N.C. 281 (1846).

§ 32-4. Registration of transfer of securities held by fiduciaries.—If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith. (1923, c. 85, s. 3; C. S., s. 1864 (g).)

Editor's Note.—This section appears to change the rule of *Baker v. Atlantic Coast Line R.R.*, 173 N.C. 365, 92 S.E. 170 (1917), which required a corporation before registering a transfer of stock held in the name of a fiduciary as such, to inquire whether the fiduciary was committing a breach of trust in making the transfer. 1 N.C.L. Law Rev. 291.

Ground for actionable negligence in the transfer of stocks is greatly narrowed by this section. *Carolina Tel. & Tel. Co. v. Johnson*, 168 F.2d 489 (4th Cir. 1948).

Corporation Not Negligent. — In action for negligence in registering transfer of wards' stock, which was registered in guardian's name, this section was a de-

fense where corporation had no "actual knowledge" either of the commission by the fiduciary of a breach of his obligation or of facts revealing bad faith in the transfer. *Carolina Tel. & Tel. Co. v. Johnson*, 168 F.2d 489 (4th Cir. 1948).

Insistence by corporation upon a further decree was not a requisite of diligence where decree authorized guardian to partition stock and retain his wards' portion either in shares or money, and the corporation might with reason have believed the guardian was thereby entitled to reduce his wards' shares to cash. *Carolina Tel. & Tel. Co. v. Johnson*, 168 F.2d 489 (4th Cir. 1948).

§ 32-5. Transfer of negotiable instrument by fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a

fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. (1923, c. 85, s. 4; C. S., s. 1864(h).)

Editor's Note.—North Carolina, prior to enactment of the Uniform Commercial Code, followed the uniform application of the N.I.L. See *Setzer v. Deal*, 135 N.C. 428, 47 S.E. 466 (1904); *Smathers & Co.*

v. 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). And see 1 N.C.L. Rev. 291.

§ 32-6. Check drawn by fiduciary payable to third person. — If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. (1923, c. 85, s. 5; C. S., s. 1864(i).)

Section Illustrates General Rule of Liability.—The history of this provision indicates that it was intended to illustrate the general rule of liability rather than to create an exception to it. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Payee's Liability.—For the payee to become liable under this section it must be found either that it had actual knowledge of the misappropriation or that it acted in bad faith. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Contributory Negligence of Principal.—Liability is based on payee's conscious conduct or "bad faith" and contributory negligence of principal would not negate such fault. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Test for Determining Bad Faith. — In determining "bad faith" courts ask whether it was "commercially" unjustifiable for the payee to disregard and refuse to learn

facts readily available. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the creditor has notice of facts which, if unexplained, would show that he was taking the property of one who owed him nothing, in payment of a claim that he held against someone else. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

When Remaining Passive Is Bad Faith. —At some point, obvious circumstances become so cogent that it is "bad faith" to remain passive. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Neither criminal fraud nor downright corruption is an essential ingredient of legal "bad faith." *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Agreement Protecting Bank Void When

Bank Acts in Bad Faith.—Any agreement protecting a bank from liability for assisting a fiduciary in a misappropriation when the bank acts in “bad faith” or with “actual knowledge” of the fiduciary’s breach is void. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Fact That Bank Is Designated Payee Not Enough to Attribute “Actual Knowledge” or “Bad Faith.”—The bank is not liable for cashing the first check in the series and paying the proceeds to the fiduciary, since the mere fact that the bank was designated as payee was not enough to attribute to it either “actual knowledge” or “bad faith,” but it did act in “bad faith,” even if it lacked “actual knowledge,” when it received the second check in the series and credited the proceeds to the fiduciary’s debt. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

“Actual knowledge” means express factual information that funds are being used for private purposes. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

The crediting of checks to fiduciary’s private debts constitutes either “actual knowledge” or “bad faith.” *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

While a bank may have acted innocently in cashing a first check, it lost this innocence when a second check was received and used to pay fiduciary’s personal obligation. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

A bank, having gained “actual knowledge” of a breach of a fiduciary obligation when it received a second check in series

and applied it in reduction of fiduciary’s personal debt, could not divest itself of its continuing knowledge of the faithlessness of the fiduciary. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Creditor’s Liability for “Actual Knowledge.”—If the crediting of checks to fiduciary’s private debts constitutes “actual knowledge,” the creditor is liable because from the circumstances it would necessarily have “actual knowledge” that the fiduciary was misappropriating his principal’s funds. *Maryland Cas. Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965).

Evidence Sufficient for Jury.—Admissions by defendant that it entered into contracts for the sale of certain lands to an individual and that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the funds of a corporation by the individual as president of the corporation, together with evidence that the individual had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation, was sufficient to be submitted to the jury in an action by the receiver of the corporation under the provisions of this section. *LaVecchia v. North Carolina Joint Stock Land Bank*, 218 N.C. 35, 9 S.E.2d 489 (1940).

Judgment on Pleadings.—Allegations of defendant’s acceptance of a corporate check in payment of individual obligation of the president does not entitle the plaintiff to judgment on the pleadings. *LaVecchia v. North Carolina Joint Stock Land Bank*, 216 N.C. 28, 3 S.E.2d 276 (1939).

§ 32-7. Check drawn by and payable to fiduciary.—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. (1923, c. 85, s. 6; C. S., s. 1864(j).)

§ 32-8. Deposit in name of fiduciary as such.—If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 7; C. S., s. 1864(k).)

Cross Reference.—As to deposits made in trust for infants, see § 53-59.

Editor's Note.—This and the two following sections are in accord with the tendency of the North Carolina decisions as indicated in *Bank of Greensboro v. Clapp*,

76 N.C. 482 (1877); *Farmers' & Merchants' Bank v. Germania Life Ins. Co.*, 150 N.C. 770, 64 S.E. 902 (1909); *Miller v. Bank of Washington*, 176 N.C. 152, 96 S.E. 977 (1918). See 1 N.C.L. Rev. 291.

§ 32-9. **Deposit in name of principal.**—If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8; C. S., s. 1864(1).)

Editor's Note.—See note to § 32-8.

§ 32-10. **Deposit in fiduciary's personal account.** — If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9; C. S., s. 1864 (m).)

Editor's Note.—See note to § 32-8.

§ 32-11. **Deposit in names of two or more trustees.**—When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. (1923, c. 85, s. 10; C. S., s. 1864(n).)

Editor's Note.—See 1 N.C.L. Rev. 292.

§ 32-12. **Cases not provided for in article.**—In any case not provided for in this article the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C. S., s. 1864(p); 1965, c. 628, s. 2.)

Editor's Note.—The 1965 amendment substituted "article" for "chapter."

§ 32-13. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C. S., s. 1864(q); 1965, c. 628, s. 2.)

Editor's Note. — The 1965 amendment substituted "article" for "chapter."

ARTICLE 2.

Security Transfers.

§ 32-14. Definitions. — In this article, unless the context otherwise requires:

- (1) "Assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust or other instrument of transfer.
- (2) "Claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee, or a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties.
- (3) "Corporation" means a private or public corporation, association or trust issuing a security.
- (4) "Fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian or nominee.
- (5) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (6) "Security" includes any share of stock, bond, debenture, note or other security issued by a corporation which is registered as to ownership on the books of the corporation.
- (7) "Transfer" means a change on the books of a corporation in the registered ownership of a security.
- (8) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation. (1959, c. 1246, s. 1.)

Cross Reference.—For provisions as to Commercial Code, see §§ 25-8-101 to 25-8-406.
investment securities under the Uniform

§ 32-15. Registration in the name of a fiduciary.—A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security. (1959, c. 1246, s. 2.)

§ 32-16. Assignment by a fiduciary.—Except as otherwise provided in this article, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

- (1) May assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;

- (2) May assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and
- (3) Is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession. (1959, c. 1246, s. 3.)

§ 32-17. Evidence of appointment or incumbency. — A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

- (1) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the transfer; or
- (2) In any other case, a copy of a document showing the appointment or certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subdivision (2) provided such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subdivision (2) except to the extent that the contents relate directly to the appointment or incumbency. (1959, c. 1246, s. 4.)

§ 32-18. Adverse claims.—(a) A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer. Nothing in this article relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice, unless it proceeds in the manner authorized in subsection (b).

(b) As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order. (1959, c. 1246, s. 5.)

§ 32-19. Nonliability of corporation and transfer agent.—A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this article. (1959, c. 1246, s. 6.)

§ 32-20. Nonliability of third persons.—(a) No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary including a person who guarantees the signature of the fiduciary is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were

being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

(b) If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this article incurs no liability.

(c) This section does not impose any liability upon the corporation or its transfer agent. (1959, c. 1246, s. 7.)

§ 32-21. Territorial application.—(a) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

(b) This article applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this State in connection with the acquisition, disposition, assignment or transfer of a security by or to a fiduciary and of a person who guarantees in this State the signature of a fiduciary in connection with such a transaction. (1959, c. 1246, s. 8.)

§ 32-22. Tax obligations.—This article does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession or other taxes imposed by the laws of this State. (1959, c. 1246, s. 9.)

§ 32-23. Uniformity of interpretation. — This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1959, c. 1246, s. 10.)

§ 32-24. Short title.—This article may be cited as the Uniform Act for Simplification of Fiduciary Security Transfers. (1959, c. 1246, s. 11.)

ARTICLE 3.

Powers of Fiduciaries.

§ 32-25. Definition.—As used in this article, the term “fiduciary” means the one or more executors of the estate of a decedent, or the one or more trustees of a testamentary or inter vivos trust estate, whichever in a particular case shall be appropriate. (1965, c. 628, s. 1.)

§ 32-26. Incorporation by reference of powers enumerated in § 32-27; restriction on exercise of such powers.—(a) By an expressed intention of the testator or settlor so to do contained in a will, or in an instrument in writing whereby a trust estate is created inter vivos, any or all of the powers or any portion thereof enumerated in G.S. 32-27, as they exist at the time of the signing of the will by the testator or at the time of the signing by the first settlor who signs the trust instrument, may be, by appropriate reference made thereto, incorporated in such will or other written instrument, with the same effect as though such language were set forth verbatim in the instrument. Incorporation of one or more of the powers contained in G.S. 32-27 by reference to that section shall be in addition to and not in limitation of the common law or statutory powers of the fiduciary.

(b) No power of authority conferred upon a fiduciary as provided in this article shall be exercised by such fiduciary in such a manner as, in the aggregate, to deprive the trust or the estate involved of an otherwise available tax exemption, deduction or credit, expressly including the marital deduction, or operate to impose a tax upon a donor or testator or other person as owner of any portion of

the trust or estate involved. "Tax" includes, but is not limited to, any federal, state, or local income, gift, estate or inheritance tax.

(c) Nothing herein shall be construed to prevent the incorporation of the powers enumerated in G.S. 32-27 in any other kind of instrument or agreement. (1965, c. 628, s. 1.)

§ 32-27. Powers which may be incorporated by reference in trust instrument.—The following powers may be incorporated by reference as provided in G.S. 32-26:

- (1) Retain Original Property. — To retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.
- (2) Sell and Exchange Property.—To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.
- (3) Invest and Reinvest.—To invest and reinvest, as the fiduciary shall deem advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in such property as the fiduciary shall deem advisable, even though such investment shall not be of the character approved by applicable law but for this provision.
- (4) Invest Without Diversification.—To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.
- (5) Continue Business.—To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:
 - a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;
 - b. To dispose of any interest therein or acquire the interest of others therein;
 - c. To contribute or invest additional capital thereto or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;
 - d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

- e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.
- (6) Form Corporation or Other Entity.—To form a corporation or other entity and to transfer, assign, and convey to such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such stock and securities and obligations.
- (7) Operate Farm. — To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things deemed advisable by the fiduciary in the management and maintenance of such farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including but not limited to the following powers:
 - a. To operate the farm with hired labor, tenants or sharecroppers;
 - b. To lease or rent the farm for cash or for a share of the crops;
 - c. To purchase or otherwise acquire farm machinery and equipment and livestock;
 - d. To construct, repair, and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;
 - e. To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery or equipment or livestock;
 - f. To employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil;
 - g. To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;
 - h. To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;
 - i. To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such operations;
 - j. To market the products of the farm; and
 - k. In general, to employ good husbandry in the farming operation.
- (8) Manage Real Property.—
 - a. To improve, manage, protect, and subdivide any real property;
 - b. To dedicate or withdraw from dedication parks, streets, highways, or alleys;
 - c. To terminate any subdivision or part thereof;
 - d. To borrow money for the purposes authorized by this subdivision for such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber any such property or part thereof, whether in possession or reversion;

- e. To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary deems advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved;
 - f. To make gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which such property lies;
 - g. To manage and improve timber and forests on such property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;
 - h. To modify, renew or extend leases;
 - i. To employ agents to rent and collect rents;
 - j. To create easements and release, convey, or assign any right, title, or interest with respect to any easement on such property or part thereof;
 - k. To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement in whole or in part; and
 - l. To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (8).
- (9) Pay Taxes and Expenses.—To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.
- (10) Receive Additional Property.—To receive additional property from any source and administer such additional property as a portion of the appropriate trust or estate under the management of the fiduciary; provided the fiduciary shall not be required to receive such property without the fiduciary's consent.
- (11) Deal with Other Trusts.—In dealing with one or more fiduciaries:
- a. To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his spouse or any child of his shall have created, for such estates and upon such terms and conditions as to sale price, terms of payment, and security as to the fiduciary shall seem advisable; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and
 - b. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary shall deem advisable from any trust created by the decedent, his spouse, or any child of his, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.
- (12) Borrow Money.—To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes, or other charges against the estate

or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans; and to renew existing loans either as maker or endorser.

- (13) **Make Advances.**—To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary shall have a lien on the assets of the trust or estate as against a beneficiary.
- (14) **Vote Shares.**—To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited, or general proxy, with or without power of substitution.
- (15) **Register in Name of Nominee.**—To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary shall be liable for any act of the nominee in connection with the stock so held.
- (16) **Exercise Options, Rights, and Privileges.**—To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold such stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable.
- (17) **Participate in Reorganizations.**—To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to any such plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of such plan.
- (18) **Reduce Interest Rates.**—To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.
- (19) **Renew and Extend Obligations.**—To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of such continuance.
- (20) **Foreclose and Bid in.**—To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.
- (21) **Insure.**—To carry such insurance coverage, including public liability,

for such hazards and in such amounts, either in stock companies or in mutual companies, as the fiduciary shall deem advisable.

- (22) Collect.—To collect, receive, and receipt for rents, issues, profits, and income of an estate or trust.
- (23) Litigate, Compromise or Abandon.—To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by such persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries of the estate or trust.
- (24) Employ and Compensate Agents, etc.—To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys at law, attorneys in fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of such agent or representative provided he was selected and retained with due care on the part of the fiduciary.
- (25) Acquire and Hold Property of Two or More Trusts Undivided.—To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division shall become necessary in order to make distributions; to hold, manage, invest, re-invest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that the provisions of this subdivision shall not defer the vesting in possession of any share or part of share of the estate or trust.
- (26) Establish and Maintain Reserves.—To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries; provided, however, that the provisions of this subdivision shall not affect the ultimate interests of beneficiaries in such reserves.
- (27) Distribute in Cash or Kind.—To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there be more than one distributee thereof, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable; provided, however, that the fiduciary shall not exercise any power under this subdivision unless the fiduciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.
- (28) Pay to or for Minors or Incompetents.—To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

- a. Directly to such minor or incompetent;
- b. To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;
- c. To the legal or natural guardian of such minor or incompetent;
- d. To any other person, whether or not appointed guardian of the person by any court, who shall, in fact, have the care and custody of the person of such minor or incompetent.

The fiduciary shall not be under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom such payments were made; and the receipt of such person shall be full acquittance to the fiduciary.

- (29) Apportion and Allocate Receipts and Expenses.—To determine:
- a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;
 - b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and
 - c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.
- (30) Make Contracts and Execute Instruments.—To make contracts and to execute instruments, under seal or otherwise, as may be necessary in the exercise of the powers herein granted. (1965, c. 628, s. 1.)

Chapter 33.

Guardian and Ward.

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Article 12.**Gifts of Securities and Money to Minors.**

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ARTICLE 1.***Creation and Termination of Guardianship.***

§ 33-1. **Jurisdiction in clerk of superior court.**—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell School: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of

physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. (1762, c. 69, ss. 5, 7; R. C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C. S., s. 2150; 1935, c. 467; 1945, c. 902; 1953, c. 615; 1959, c. 1028, s. 5.)

Cross Reference.—As to guardianship of insane persons, see § 35-2 et seq.

Editor's Note. — For comment on the 1945 amendment, see 23 N.C.L. Rev. 340.

The powers which a court of equity formerly exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by this section and § 33-6. *Duffy v. Williams*, 133 N.C. 195, 45 S.E. 548 (1903).

Place of Appointment.—Under this section the appointment of a guardian in a county other than the one in which the ward's surviving parent resides or the ward's estate is situate is void. *Duke v. Johnston*, 211 N.C. 171, 189 S.E. 504 (1937).

Residence of Infant. — The word "reside" as used in this section relating to the appointment of guardians has been construed to mean the domicile of the infant. And a legitimate child, whose father is alive, takes at birth, and continues during minority, the domicile of his father—following it as it changes. Upon the death of the father his domicile at death continues to be the domicile of his minor child until the domicile of such child is legally changed. In *re Hall's Guardianship*, 235 N.C. 697, 71 S.E.2d 140 (1952).

Where both parents of an infant are dead and he is taken to the home of his paternal grandparents and resides with them, regardless of what theretofore may have been his domicile, the domicile of his grandparents then becomes his domicile. Hence, the clerk of superior court of the county in which the grandparents reside has jurisdiction of him. In *re Hall's Guardianship*, 235 N.C. 697, 71 S.E.2d 140 (1952).

Appointment by General Assembly. — An act of the General Assembly author-

izing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. *Henderson v. Bowd*, 116 N.C. 795, 21 S.E. 692 (1895).

The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewable by the Supreme Court. *Battle v. Vick*, 15 N.C. 294 (1833).

In early cases it was held that the court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in its discretion, would best perform the duty. *Wynne v. Always*, 5 N.C. 38 (1804); *Grant v. Whitaker*, 5 N.C. 231 (1809).

Person Related to Ward. — Courts are empowered to appoint as guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. *Mills v. McAllister*, 2 N.C. 303 (1796).

Custody of Child.—The jurisdiction of superior court clerks in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. In *re Lewis*, 88 N.C. 31 (1883).

Removal of Guardian.—A ward may not bring an action in the superior court by her next friend to remove her guardian appointed by the clerk under this section. *Moses v. Moses*, 204 N.C. 657, 169 S.E. 273 (1933).

Termination of Guardianship When Ward Reaches Majority.—When one is appointed as guardian for a minor, his right to act terminates when the ward reaches his majority. In *re Simmons*, 256 N.C. 184, 123 S.E.2d 614 (1962).

§ 33-1.1. Absence of natural guardian. — Where there is no natural guardian of a minor or where a minor has been abandoned, and in either event the minor requires service from the department of public welfare, until the appointment of a guardian of the person for said minor under this chapter, the director of public welfare of the county in which such minor resides shall be the guardian of the person of said minor: Provided, however, that nothing in this section shall be construed as changing or affecting the appointment or the duties or powers of any next friend of, or any guardian or trustee of the property or

estate of, any minor, or any existing laws relative to the handling or disposition of the property of any minor. (1947, c. 413, s. 3; 1961, c. 186.)

Editor's Note.—For brief comment on this section, see 25 N.C.L. Rev. 413.

§ 33-2. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and whether born at his death or in ventre sa mere for such time as the children may remain under twenty-one years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, or has wilfully abandoned his wife, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (1762, c. 69; R. C. c. 54; 1868-9, c. 201; 1881, c. 64; Code, ss. 1562, 1563, 1564; Rev., ss. 1762, 1763, 1764; 1911, c. 120; C. S., s. 2151; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2.)

Cross References. — As to habeas corpus for custody of children, see §§ 17-39 and 17-40. As to adoption of children, see § 48-1 et seq.

Editor's Note.—For comments on the 1941 and 1947 amendments, see 19 N.C.L. Rev. 480; 25 N.C.L. Rev. 413.

Section Controls Appointment.—A father cannot appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except, pursuant to this section. *Peyton v. Smith*, 22 N.C. 325 (1839). See *Long v. Rhymes*, 6 N.C. 122 (1812).

And Applies Only to Testator's Children.—A testator cannot appoint a testamentary guardian except for his own children. *Camp v. Pittman*, 90 N.C. 615 (1884). This section does not authorize a grandfather to appoint a guardian for his grandchildren. *Williamson v. Jordon*, 45 N.C. 46 (1852). See *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E.2d 327 (1950).

Bequest to Son as Trustee for Grandchildren. — Testatrix bequeathed certain property to her grandchildren with subsequent provisions that it was her will and desire that her son be appointed their guardian and that the guardian should hold and manage the property for the grandchildren with power to sell, convey or exchange the securities. It was held that since testatrix could not appoint a testamentary guardian for her grandchildren the provisions will be interpreted as bequeath-

ing the property to testatrix' son as trustee for testatrix' grandchildren, in order that each provision of the instrument be given effect consistent with testatrix' intention. *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E.2d 327 (1950).

Interpretation of Will.—Where it can clearly be collected from the will of a father that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. *Peyton v. Smith*, 22 N.C. 325 (1839).

Rights of Both Parents Are Recognized. — In this and other statutes, the legislature has recognized the human as well as the legal relation between parent and child, the paramount and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295 (1926).

Father Not Regarded as Wrongdoer When He Acts in Good Faith with Child's Money. — Since under this section the father is natural guardian for his minor children he should not be regarded as a trespasser or a wrongdoer when he acts

in good faith with his child's money and makes purchases for its benefit. *Lifsey v. Bullock*, 11 F. Supp. 728 (M.D.N.C. 1935). 20 S.E. 1012 (1895); *In re Warren*, 178 N.C. 43, 100 S.E. 76 (1919); *The Severance*, 152 F.2d 916 (4th Cir. 1945).
 Cited in *Latham v. Ellis*, 116 N.C. 30,

§ 33-3. Mother's guardianship on death of father.—In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and over the appointment of guardians. (1883, c. 364; Code, s. 1565; Rev., s. 1765; C. S., s. 2152.)

Quoted in *In re Hall's Guardianship*, 235 N.C. 697, 71 S.E.2d 140 (1952). Cited in *In re Warren*, 178 N.C. 43, 100 S.E. 76 (1919).

§ 33-4. Appointment on divorce of parents.—When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother. (1838, c. 16; R. C., c. 54, s. 4; 1868-9, c. 201, s. 9; Code, s. 1571; Rev., s. 1770; C. S., s. 2153.)

Cross Reference. — As to custody of children generally in case of divorce, see § 50-13.

§ 33-5. Appointment when father living. — The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor. (1806, c. 707; R. C., c. 54, ss. 4, 7; 1868-9, c. 201, s. 10; Code, s. 1572; Rev., s. 1771; C. S., s. 2154.)

Cross Reference.—As to appointment of guardian when welfare of child within jurisdiction of juvenile court is thereby promoted, see § 110-37.

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.—Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (1840, c. 31; R. C., c. 54,

s. 3; 1868-9, c. 201, ss. 6, 7; Code, ss. 1567, 1568, 1569; Rev., ss. 1767, 1768, 1769; C. S., s. 2155.)

Cross References. — As to expenses and disbursements credited to guardian, see § 33-42. As to commissions, see § 33-43.

Stated in *In re Hall's Guardianship*, 235 N.C. 697, 71 S.E.2d 140 (1952).

§ 33-6.1. Payment of debts and obligations of wards incurred prior to date of adjudication of incompetency.—The clerk of the superior court may in his discretion authorize the guardian or trustee of the estate of any incompetent, including an inebriate, for whom a guardian or trustee has been appointed, to pay debts and obligations of wards incurred prior to the date of adjudication of incompetency for necessary living expenses, taxes, and specific liens on real or personal property if the clerk is satisfied that the incompetent or inebriate has an equity in such property on which there is a specific lien. (1955, c. 290, s. 1.)

Editor's Note.—Section 2 of the act inserting this section validated all such disbursements made prior to March 23, 1955, by a guardian or trustee of an estate of an

incompetent or inebriate upon orders of or with the approval of a clerk of the superior court or a superior court judge.

§ 33-7. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell School, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School. (C. C. P., s. 474; Code, s. 1620; Rev., s. 1772; 1917, c. 41, s. 2; C. S., s. 2156; 1959, c. 1028, s. 5.)

In General. — When a guardian is appointed he must assert his right to the custody of his ward by a civil action against the persons in charge of him, while they in turn, if so advised, can take appropriate steps to set aside the guardianship. *In re Parker*, 144 N.C. 170, 56 S.E. 878 (1907).

Habeas Corpus Not Proper.—Except as between parents, under § 17-39, the right of the custody of a child cannot be determined under the writ of habeas corpus, the object of that writ being to remove an illegal restraint. *In re Parker*, 144 N.C. 170, 56 S.E. 878 (1907).

Application Should Be in Writing.—The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the next friend or guardian ad litem be appointed upon due consideration of an application in writing, and not upon a

simple suggestion. *Morris v. Gentry*, 89 N.C. 248 (1883).

Effect of Failure of Notice.—Failure to notify the relative in custody of the child of proceedings to appoint a guardian is an irregularity, under this section, which does not render the appointment of the guardian void, though it is not conclusive upon such relative. *In re Parker*, 144 N.C. 170, 56 S.E. 878 (1907).

While the failure to notify the relatives of an alleged incompetent of the hearing to determine her competency is an irregularity, such irregularity does not render the appointment of a guardian in the proceedings void, but gives the relatives an opportunity to attack such appointment, and where, upon such attack, the court finds upon supporting evidence that the guardian appointed is a fit and suitable person, the relatives are not entitled to the removal of the guardian. *In re Barker*, 210 N.C. 617, 188 S.E. 205 (1936).

§ **33-8. Letters of guardianship.**—The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office. (C. C. P., s. 475; Code, s. 1621; Rev., s. 1773; C. S., s. 2157.)

The appointment of a guardian can be shown only by the records in the office of the clerk of the superior court by whom the appointment was made, or by letters of appointment issued by the clerk as re-

quired by this section, and parol evidence tending to show appointment is incompetent. *Buncombe County v. Cain*, 210 N.C. 766, 188 S.E. 399 (1936).

§ **33-9. Removal by clerk.**—The clerks of the superior court have power and authority on information or complaint made to remove any fiduciaries appointed under the provisions of this chapter, and to appoint successors, to make and establish rules for the better ordering, managing, and securing estates for which fiduciaries have been appointed, and for the better education and maintenance of wards and their dependents; and it is their duty to do so in the following cases:

- (1) Where the fiduciary wastes or converts the money or the estate of the ward to his own use.
- (2) Where the fiduciary in any manner mismanages the estate.
- (3) Where the fiduciary neglects to educate or maintain the ward or his dependents in a manner suitable to their degree.
- (4) Where the fiduciary would be legally disqualified to be appointed administrator.
- (5) Where the fiduciary or his sureties are likely to become insolvent or are likely to become nonresidents of the State. (1762, c. 69; R. C., c. 54, ss. 2, 13; C. C. P., ss. 470, 476; 1868-9, c. 201, s. 20; Code, s. 1583; Rev., s. 1774; C. S., s. 2158; 1955, c. 970.)

Cross References. — As to disqualifications to act as administrator, see § 28-8. As to removal of an administrator, see § 28-32. As to criminal liability for embezzlement, see § 14-90. As to guardian removing from State without appointing process agent, see § 28-187.

Personal Use of Ward's Funds. — The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal. *Ury v. Brown*, 129 N.C. 270, 40 S.E. 4 (1901).

Funds in Jeopardy. — A testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement. *Sanderson v. Sanderson*, 79 N.C. 369 (1878).

Removal without Cause Is Error.—An

order by a superior court clerk in a cause pending before him for the removal of a testamentary guardian, where none of the statutory grounds are alleged or found as a fact by the clerk, is improperly made, and will be set aside upon proceedings properly instituted to that end. *Sanderson v. Sanderson*, 79 N.C. 369 (1878).

A ward may not bring action in superior court by next friend to remove guardian appointed by the clerk, and for the appointment of another guardian, the superior court in such instance being without jurisdiction. *Moses v. Moses*, 204 N.C. 657, 169 S.E. 273 (1933).

Under Former Law.—As to removal of guardian by county court, see *Bray v. Brumsey*, 5 N.C. 227 (1809); *Cooke v. Beale*, 33 N.C. 36 (1850).

§ **33-10. Interlocutory orders on revocation.**—In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation. (1868-9, c. 201, s. 44; Code, s. 1607; Rev., s. 1775; C. S., s. 2159.)

§ **33-11. Resignation; effect; accounting on resignation.** — Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the ap-

plication, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, or the clerk of the superior court may be appointed receiver of the estate of the ward, and if so appointed the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation. (1868-9, c. 201, s. 45; Code, s. 1608; Rev., s. 1776; C. S., s. 2160; 1921, c. 95.)

Cross References.—See §§ 36-9 to 36-18. As to final account by the resigning guardian, see § 33-41.

Liability Continues.—Where permission is given to a guardian by the judge of probate to file an ex parte final account and turn over his guardianship to another, he is not thereby discharged from liabilities

connected with his trust and arising before such resignation. He is still bound to account with the ward, or the succeeding guardian, when so required. *Luton v. Wilcox*, 83 N.C. 21 (1880).

Cited in *Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).

ARTICLE 2.

Guardian's Bond.

§ 33-12. **Bond to be given before receiving property.**—No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court. (C. C. P., s. 355; Code, s. 1573; Rev., s. 1777; C. S., s. 2161.)

Cross References.—As to giving bond in surety company, see § 109-17. As to giving mortgage in lieu of bond, see § 109-24 et seq.

Presumption of Giving of Bond.—When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. *Kello v. Maget*, 18 N.C. 414 (1835).

When Denial of Guardianship Not Permissible.—Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. *Latham v. Wilcox*, 99 N.C. 367, 6 S.E. 711 (1888).

The surety on a guardianship bond is estopped to deny the validity of the appointment of a guardian when the bond signed by the surety recites that the

guardian has been duly appointed. *Phipps v. Royal Indem. Co.*, 201 N.C. 561, 161 S.E. 69 (1931).

Omission by the clerk to take the bond required on the appointment of a guardian does not destroy the efficacy of the appointment. *Howerton v. Sexton*, 104 N.C. 75, 10 S.E. 148 (1889).

Liability on Bond.—A guardian and his bondsmen are liable for all moneys due his wards which he has collected or ought to have collected. *Loftin v. Cobb*, 126 N.C. 58, 35 S.E. 230 (1900).

Where the administrator of a former guardian himself becomes guardian, he and his guardian bondsmen become liable for any balance due from the solvent estate of the former guardian. *Loftin v. Cobb*, 126 N.C. 58, 35 S.E. 230 (1900).

Quoted in *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956).

§ 33-13. **Terms and conditions of bond; increased on sale of realty.**—Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such

bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward: Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten percent of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale to be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; R. C., c. 54, s. 5; 1868-9, c. 201, s. 11; 1874-5, c. 214; Code, s. 1574; Rev., ss. 323, 1778; C. S., s. 2162; 1925, c. 131; 1935, c. 385.)

Local Modification.—Craven: 1935, c. 147.

Cross References.—As to statute of limitations on bond, see §§ 1-50, 1-52. As to renewal of bond, see § 33-16. As to action on bond, see § 33-14 and note. As to reduction of penalty of bond, see §§ 33-13.1, 36-4. As to liability of clerk for taking insufficient bond, see § 33-18.

This section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. *Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935).

And Acceptance without Guardian's Signature Is an Irregularity.—The acceptance and approval of the bond by the clerk of the superior court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties. *Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935).

Not Strictly a Record.—A guardian's bond is not strictly a record of the court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. *Harrell v. Hare*, 70 N.C. 658 (1874).

Failure to Insert Penalty.—A guardian's bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize anyone to insert the amount. *Rollins v. Ebbs*, 137 N.C. 355, 49 S.E. 341 (1904).

Failure to Collect Money.—Where a guardian ought to receive a certain amount of money and does not, but takes

something else, his own bond for instance, in place of the money, he and his sureties are liable. *Avent v. Womack*, 72 N.C. 397 (1875).

Bank Intermingling Trust Funds.—A bank, as guardian, in not investing the funds of its ward, but intermingling them with other funds of the bank, was faithless to the trust reposed in it; and, under the terms of this section, its bondsman must suffer the loss for such faithlessness. *Roebuck v. National Sur. Co.*, 200 N.C. 196, 156 S.E. 531 (1931).

Responsible for Laches.—A guardian is responsible on his bond for any loss resulting from his laches in failing to sue. *Cross v. Craven*, 120 N.C. 331, 26 S.E. 940 (1897).

Limit of Liability for Realty.—The guardian's bond is not responsible in any way for the realty beyond the rents and profits. *Cross v. Craven*, 120 N.C. 331, 26 S.E. 940 (1897).

Liability on Note for Ward's Board.—The sureties on a guardian's bond are not responsible for the nonpayment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward. *McKinnon v. McKinnon*, 81 N.C. 201 (1879).

Surety as a Party in Interest.—When a guardian fails to "faithfully execute the trust reposed in him as such," upon which his bond is conditioned, the surety thereon is subjected to liability, and as a party in interest is entitled to have the wrong remedied. *Maryland Cas. Co. v. Lawing*, 223 N.C. 8, 25 S.E.2d 183 (1943).

Cited in *Pierce v. Pierce*, 197 N.C. 348, 148 S.E. 438 (1929).

§ 33-13.1. Clerk may reduce penalty of bond of guardian or trustee.

—The clerks of the superior court within their respective counties shall have full power and authority from time to time to order that the penalty of a bond of a guardian or trustee be reduced to a stated sum under the following circumstances:

When a guardian or trustee has disbursed either income or income and principal of the estate according to law, either for the purchase of real estate, or the support and maintenance of the ward or the ward and his dependents, or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian or trustee have been so diminished, the penalty of the bond of such guardian or trustee may be reduced in the discretion of the clerk to an amount not less than the amount which would be required if the guardian or trustee were first qualifying to administer such personal assets and annual income. (1947, c. 667.)

Cross Reference.—See § 36-4.

§ 33-14. Bond to be recorded in clerk's office; action on.—The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions. (R. C., c. 54, s. 5; 1868-9, c. 201, s. 12; Code, s. 1575; Rev., s. 1779; C. S., s. 2163.)

Jurisdiction of Action.—The clerk has no jurisdiction of a suit on a guardian's bond. Such suit must be brought in the superior court. Rowland v. Thompson, 65 N.C. 110 (1871).

Action in Name of State.—An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. Carmichael v. Moore, 88 N.C. 29 (1883); Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887); Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

Unnecessary Parties.—In an action against the surety on a guardian's bond, when the guardian has defaulted and his whereabouts is unknown, and the defendant is the sole surety, and claims that the guardian, who was assistant clerk of the superior court, had given to the clerk a bond for the faithful performance of his duties as assistant clerk, neither the clerk nor the bonding company on the assistant clerk's bond is a necessary or proper party to said action. Phipps v. Royal Indem. Co., 201 N.C. 561, 161 S.E. 69 (1931).

Proper Relator.—When the share of an infant in an estate in the hands of his guardian is assigned, the assignee, and not the infant, is the proper relator in an action on the guardian's bond. Petty v. Rousseau, 94 N.C. 355 (1886).

A creditor of a guardian is not the proper relator in an action upon his bond. McKinnon v. McKinnon, 81 N.C. 201 (1879).

Condition Set Out in Complaint.—In an action on a guardian's bond, it is necessary that conditions of the bond which are

alleged to have been broken should be set forth in the complaint. McKinnon v. McKinnon, 81 N.C. 201 (1879).

Evidence.—Evidence of a balance in the hands of a guardian as shown of his annual account was admissible against a surety under the Laws of 1884. Loftin v. Cobb, 126 N.C. 58, 35 S.E. 230 (1900).

Same — Bond Must Be Proved.—A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. Butler v. Durham, 38 N.C. 589 (1845).

Defenses.—The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. State ex rel. Clark v. Cordon, 30 N.C. 179 (1847).

Same—Settlement.—A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. Dean v. Ragsdale, 80 N.C. 215 (1879).

Where in a suit on a guardian's bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt, this was a sufficient defense to the suit on the bond. State ex rel. Clark v. Cordon, 30 N.C. 179 (1847).

Same—Statute of Limitations.—An ac-

tion by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. *Self v. Shugart*, 135 N.C. 185, 47 S.E. 484 (1904).

Amount of Recovery.—In an action upon a guardian's bond the recovery against either the principal or the surety cannot exceed the penalty thereof, but should be for the penal sum of the bond, and to be

discharged on payment of the damages sustained. *Anthony v. Estes*, 101 N.C. 541, 8 S.E. 347 (1888).

Same — Measure of Damages. — The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age. *Topping v. Windley*, 99 N.C. 4, 5 S.E. 14 (1888).

Cited in *Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935).

§ 33-15. Where several wards with estate in common, one bond sufficient. — When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (1822, c. 1161; R. C., c. 54, s. 8; 1868-9, c. 201, s. 13; Code, s. 1576; Rev., s. 1780; C. S., s. 2164.)

§ 33-16. Renewal of bond every three years; enforcing renewal.—Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor: Provided, that this section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (1762, c. 69, s. 15; R. C., c. 54, s. 10; 1868-9, c. 201, ss. 18, 19; Code, ss. 1581, 1582; Rev., ss. 324, 1781, 1782; C. S., s. 2165; 1943, c. 167.)

An ordinary guardian has no fixed term of office. While the statute requires a renewal of the bond every three years there is no requirement for a new appointment. *Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).

Liability for Failure to Enforce Re-

newal.—A clerk and his sureties are not liable upon his official bond for his failure to issue a citation requiring a guardian to renew his bond. *Jones v. Biggs*, 46 N.C. 364 (1854); *Sullivan v. Lowe*, 64 N.C. 500 (1870).

§ 33-17. Relief of endangered sureties. — Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fails to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (1762, c. 69, ss. 21, 22; R. C., c. 54, s. 35; 1868-9, c. 201, s. 43; Code, s. 1606; Rev., s. 1783; C. S., s. 2166.)

A surety is not discharged from liability by the guardian giving a new bond with other sureties. *Jones v. Blanton*, 41 N.C. 115 (1848).

New Bond Is Additional Security. — When, under this section, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to

the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. *Bell v. Jasper*, 37 N.C. 597 (1843).

And where a guardian gives several successive bonds, the sureties on each stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. *Jones v. Hays*, 38 N.C. 502 (1845); *Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).

Where Counter-Security Given.—Where the sureties of a guardian obtained an order for counter-security, and at that time

the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed; and the sureties on the first bond were liable for it, though the order for counter-security expressly released them. *Foye v. Bell*, 18 N.C. 475 (1836).

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, especially at a time when the principal is in default. This section provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated. *Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).

§ 33-18. Liability of clerk for taking insufficient bond.—If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (1762, c. 69, ss. 5, 6; R. C., c. 54, s. 2; 1868-9, c. 201, s. 51; Code, s. 1614; Rev., s. 1784; C. S., s. 2167.)

A clerk and sureties on his official bond are liable for loss resulting from a failure to take a good guardian's bond, and the record of the appointment of the guardian is sufficient evidence of such appointment. *Topping v. Windley*, 99 N.C. 4, 5 S.E. 14 (1888).

The giving of the bond required of a guardian is not essential to the validity of the appointment itself. The failure to take the bond, however, subjects the clerk

to the consequences of such omission. *Howerton v. Sexton*, 104 N.C. 75, 10 S.E. 148 (1889).

When Action Lies.—No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there have been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. *Jones v. Briggs*, 46 N.C. 364 (1854).

§ 33-19. Liability of clerk for other defaults.—If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in § 33-18. (1868-9, c. 201, s. 52; Code, s. 1615; Rev., s. 1785; C. S., s. 2168.)

ARTICLE 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.—Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor. (1762, c. 69, s. 3; R. C., c. 54, s. 21; 1868-9, c. 201, s. 25; Code, s. 1588; Rev., s. 1786; C. S., s. 2169.)

Cross References. — As to power of guardians to lend portions of estates of wards, see § 24-4. As to personal liability of guardian for stock held for ward, see § 53-40. As to corporation treating guardian as holder of record of shares, see § 55-59.

As to income taxes, see §§ 105-139, 105-153, 105-154. As to payment of taxes, see § 105-412. As to investment and deposit of funds generally, see § 36-1 et seq. As to authority to invest in federal farm loans, see § 53-60; in bonds guaranteed by United

States, see § 53-44; in mortgages of federal housing administration, etc., see § 53-45.

A guardian in managing his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. *Luton v. Wilcox*, 83 N.C. 21 (1880).

The guardian can select the forum, under this section, as there is no statute to the contrary. *Lawson v. Langley*, 211 N.C. 526, 191 S.E. 229 (1937).

Recovery of Realty. — A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of realty. *Cross v. Craven*, 120 N.C. 331, 26 S.E. 940 (1897).

Payment of funds to guardian under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence, the deposit of the funds in a bank duly appointed guardian, and which later became insolvent, does not entitle the surety on the guardianship bond to a preference for the amount of the deposit. *In re Home*

Sav. Bank, 204 N.C. 454, 168 S.E. 688 (1933).

Miscellaneous Matters.—As to exchange of security for debt due ward, see *Christman v. Wright*, 38 N.C. 549 (1845). As to compromise of claim for personal injury to ward, see *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 93 S.E. 374 (1917). As to statute of limitations upon discovery of fraud, see *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

Court had jurisdiction under this section to determine guardian's petition relative to acceptance of settlement of ward's interest in partnership under contemplated organization of corporation to take over assets of partnership, since matter involved was not a sale, lease or mortgage of ward's property cognizable under §§ 35-10 and 35-11. *In re Edwards*, 243 N.C. 70, 89 S.E.2d 746 (1955).

Stated in *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964).

Cited in *The Severance*, 152 F.2d 916 (4th Cir. 1915).

§ 33-21. How rentals made.—All rentings by guardians shall be publicly made, between the hours of ten o'clock a.m. and four o'clock p.m., after twenty days' notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. The proceeds [of all] rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security. (1793, c. 391; R. C., c. 54, s. 26; Code, s. 1590; 1891, c. 83; 1901, c. 97; Rev., s. 1788; C. S., s. 2171; 1949, c. 719, s. 2.)

Editor's Note. — Prior to the 1949 amendment this section applied to sales as well as to rentings. The amendment struck out the words "sales and" formerly appearing after the word "All" at the beginning of the section. It also directed the deletion of the words "of all sales of personal estate and" formerly following the word "proceeds" near the beginning of the last sentence. The words "of all" in the quoted deletion were apparently directed to be stricken by inadvertence on the part of the legislature. Therefore, they have been retained in brackets to show that, while they are not part of the present section, they are thought to express the apparent intent of the legislature.

Effect of Violation.—Where a lease by the guardian of his ward's lands was not publicly made, as required by this section, nor approved by the clerk of the superior court, as required by § 33-22, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. *Coxe v. Whitmire Motor Sales Co.*, 190 N.C. 838, 130 S.E. 841 (1925).

Applied in *Pate v. Kennedy*, 104 N.C. 234, 10 S.E. 188 (1889); *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896); *Duffy v. Williams*, 133 N.C. 195, 45 S.E. 548 (1903).

§ 33-22. When lands may be leased.—The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the

infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land. (1762, c. 69, s. 13; 1794, c. 413, s. 2; R. C., c. 54, s. 25; Code, s. 1591; Rev., s. 1789; C. S., s. 2172.)

Section Not a Limitation on Power of Court.—This section is a restriction upon the power of guardians but not a limitation on the power of the court; and guardians may lease the real property of their infant wards for a period extending beyond the guardianship or the minority of the wards with the approval of a court of general equity jurisdiction. *Coxe v. Charles Stores Co.*, 215 N.C. 380, 1 S.E.2d 848, 121 A.L.R. 959 (1939).

Effect of Violation. — Where a lease by

the guardian of his ward's lands was not publicly made as required by § 33-21, nor approved by the clerk of the superior court as required by this section, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. *Coxe v. Whitmire Motor Sales Co.*, 190 N.C. 833, 130 S.E. 841 (1925).

§ 33-23. When guardians to cultivate lands of wards. — Where any parent of a minor child or any person standing in loco parentis or any member of the family of such child with whom such child resides qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 57; C. S., s. 2173; 1951, c. 424.)

Cross Reference.—As to compensation of commissioners in partition of real estate, see § 1-408.

§ 33-24. Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business. — In addition to the powers given to guardians under the general laws of the State, all guardians may, upon presentation of satisfactory evidence, with approval of the clerk of superior court, which approval must be concurred in by the resident judge or other regular or special judge holding courts in the district, cause lands to be cultivated and make such contracts with reference thereto as said guardian may deem to be the best interest of his ward's estate, and under the direction of the clerk of superior court, with the approval of the resident judge or other regular or special judge holding courts in the district, continue to operate any business or business enterprise of his ward and make such contract, agreements, and settlements with reference thereto as the clerk of superior court, with the approval of said resident judge or other regular or special judge holding courts in the district, may determine necessary or find to be to the best interest of the estate. (1935, c. 24.)

Cited in *First-Citizens Bank & Trust Co. v. Parker*, 225 N.C. 480, 35 S.E.2d 489, 163 A.L.R. 1003 (1945).

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.—On application of the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the repayment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over twenty-one years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156.)

§ 33-26. Plate and jewelry to be kept.—All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity. (1868-9, c. 201, s. 34; Code, s. 1597; 1895, c. 74; Rev., s. 1791; C. S., s. 2175.)

§ 33-27. Personal representative of guardian to pay over to clerk.—In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (1881, c. 301, s. 2; Code, s. 1622; Rev., s. 1794; C. S., s. 2176.)

Cross Reference.—As to a mortgage to guardian, see § 45-19.

Action between Administrators. — The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guard-

ian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. *Allison v. Robinson*, 78 N.C. 222 (1878).

§ 33-28. Collection of claims; duty and liability. — Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same. (1762, c. 69, s. 10; R. C., c. 54, s. 23; 1868-9, c. 201, s. 30; Code, s. 1593; Rev., s. 1795; C. S., s. 2177.)

Cross References.—As to compound interest on obligations due to guardians, see § 24-4. As to criminal liability of guardian for embezzlement of funds, see § 14-90.

A guardian is liable for what he ought to receive, as well as for what he does receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his

sureties are liable. *Avent v. Womack*, 72 N.C. 397 (1875).

By Exercise of Diligence and Good Faith. — A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. *Armfield v. Brown*, 73 N.C. 81 (1875).

Where a guardian carelessly and without deliberation accepts for his wards

from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. *Culp v. Stanford*, 112 N.C. 664, 16 S.E. 761 (1893), distinguishing *Luton v. Wilcox*, 83 N.C. 21 (1880).

But He Need Not Resort to Extraordinary Remedies. — Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. *White v. Robinson*, 64 N.C. 698 (1870).

Accepting Unsecured Note.—A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. *Covington v. Leak*, 65 N.C. 594 (1871).

Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. *Alexander v. Alexander*, 120 N.C. 472, 27 S.E. 121 (1897).

Failure to Collect Note During Civil

War. — A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the Civil War, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. *Love v. Logan*, 69 N.C. 70 (1873).

Failure to Sue before Insolvency of Debtor. — Where a guardian negligently fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. *Coggins v. Flythe*, 113 N.C. 102, 18 S.E. 96 (1893).

Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having an opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. *Williamson v. Williams*, 59 N.C. 62 (1860), distinguishing *Deberry v. Ivey*, 55 N.C. 370 (1856); *Davis v. Marcum*, 57 N.C. 189 (1858).

§ 33-29. Liability for lands sold for taxes.—If any guardian suffer his ward's lands to lapse or become forfeited or to be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; Code, s. 1595; Rev., s. 1796; C. S., s. 2178.)

§ 33-30. Liability for costs.—All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default. (1868-9, c. 201, s. 48; Code, s. 1611; Rev., s. 1797; C. S., s. 2179.)

Cross Reference.—As to owelty to be paid by guardian, see § 46-12.

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.—On application of the guardian or ancillary guardian appointed pursuant to G.S. 33-31.2, by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the superior court of the county in which any or all of such personal estate is situated;

no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. The procedure for a sale pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (1827, c. 33; R. C., c. 54, ss. 32, 33; 1868-9, c. 201, s. 39; Code, s. 1602; Rev., s. 1798; 1917, c. 258, s. 1; C. S., s. 2180; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2; 1951, c. 366, s. 2.)

Cross References. — As to procedure when real estate lies in county in which guardian does not reside, see § 33-31.1. As to sale of estate of an idiot, inebriate, or lunatic, see §§ 35-10 and 35-11. As to release of land condemned under eminent domain, see § 40-22.

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 458.

For act validating proceedings instituted by guardian relating to estate of ward under provisions of this chapter, see Session Laws 1945, c. 426, s. 8.

Not Applicable to Settlement or Partition.—This section does not apply either to the settlement of estates or to partition. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E. 20 (1925).

Jurisdiction.—The superior courts have authority in all proper cases to direct a sale of the property of infants, both real and personal, for their benefit and advantage. *Williams v. Harrington*, 33 N.C. 616 (1850); *Ex parte Dodd*, 62 N.C. 97 (1867); *Sutton v. Schonwald*, 86 N.C. 198 (1882); *Morris v. Gentry*, 89 N.C. 248 (1883); *Tate v. Mott*, 96 N.C. 19, 2 S.E. 176 (1887).

As to sale of contingent interests, see *Smith v. Witter*, 174 N.C. 616, 94 S.E. 402 (1917). As to procedure for sale of such interests, see § 41-11.

Same—Clerk.—By this section the clerk and court in term have concurrent jurisdiction in the manner of ordering a sale of infants' lands upon petition of their guardian. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

Compliance with Statutory Requirements. — Although this section must be strictly complied with, where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. *Quick v. Federal Land Bank*, 208 N.C. 562, 181 S.E. 746 (1935).

Order of Sale Must Be Approved. —

The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. *Morton v. Pine Lumber Co.*, 178 N.C. 163, 100 S.E. 322 (1919).

Approval of Order by Emergency Judge. —

An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county. *Ipock v. North Carolina Joint Stock Land Bank*, 206 N.C. 791, 175 S.E. 127 (1934).

Approval of Order Nunc Pro Tunc. —

Where a guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge, and the judge later approved the order nunc pro tunc, the defect was cured so as to come within this section. *Powell v. Armour Fertilizer Works*, 205 N.C. 311, 170 S.E. 916 (1933); *Ipock v. North Carolina Joint Stock Land Bank*, 206 N.C. 791, 175 S.E. 127 (1934).

Proof Required.—This section contemplates that, in addition to the verified petition of the guardian, there shall be required other satisfactory proof of the truth of the matter alleged. *In re Propst*, 144 N.C. 562, 57 S.E. 342 (1907).

Sale May Be Private.—The sale by order of the court may be either public or private. Section 33-21 does not apply when the sale is by order of court. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

The court may sell the land of minors for better investment, when they are properly represented before the court. *Hutchinson v. Hutchinson*, 126 N.C. 671, 36 S.E. 149 (1900).

When Foreign Guardian May Sell. —

Where a foreign guardian has complied with the provisions of §§ 33-48 and 33-49

which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of this section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. *Cilley v. Geitner*, 183 N.C. 528, 11 S.E. 866 (1922).

Confirmation of Sale.—While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. In *re Dickerson*, 111 N.C. 108, 15 S.E. 1025 (1892).

When Sale May Be Set Aside.—Where the court, without taking any means to ascertain the necessity for a sale, directed it to be made, and that it should be “first advertised at the courthouse and three other public places,” and no bid be received less than \$125, and that the guardian should make conveyance, it was held that it was not error to set aside the sale and direct another. In *re Dickerson*, 111 N.C. 108, 15 S.E. 1025 (1892).

Guardian Cannot Purchase.—It is well settled that a guardian cannot purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. But this does not apply to a sale made by a master. *Patton v. Thompson*, 55 N.C. 285 (1855); *Lee v. Howell*, 69 N.C. 200 (1873). As to power of guardians to purchase at foreclosure of mortgages executed to them, see § 33-25.

When Guardian Liable.—Where a guardian obtains a decree for the sale of his ward's land, it must appear, in order to make him liable for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. *Harrison v. Bradley*, 40 N.C. 136 (1847).

Petition Signed by Person Not a Qualified Guardian Confers No Jurisdiction on Clerk.—A clerk of the superior court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no juris-

diction on the clerk. *Buncombe County v. Cain*, 210 N.C. 766, 188 S.E. 399 (1936).

And in Such Case the Purchaser at Sale Acquires No Title Adverse to Infant.—A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquires no right, title, interest, or estate in said property, adverse to the infant. *Buncombe County v. Cain*, 210 N.C. 766, 188 S.E. 399 (1936).

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund notes executed by the life tenant representing a part of the moneys expended by the life tenant in making permanent improvements upon the land, since the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. *Hall v. Hall*, 219 N.C. 805, 15 S.E.2d 273 (1941).

Mortgage Valid in Part.—Under the presumption that the provisions of this section were followed, mortgage executed by guardian was held valid as to funds used for permanent improvements on land, but void as to funds used to purchase livestock. *Quick v. Federal Land Bank*, 208 N.C. 562, 181 S.E. 746 (1935).

Court May Authorize Lease Extending Beyond Period of Minority.—Since the superior courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdiction of courts of equity over the estates of infants, give courts of equity plenary jurisdiction to order and empower a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship or the minority of the wards, upon its findings that such would be to the best interest of the infant wards. *Coxe v. Charles Stores Co.*, 215 N.C. 380, 1 S.E.2d 848, 121 A.L.R. 959 (1939).

Title Not Affected by Reversal of Decree.—Where land of an infant was sold under a decree of the court upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the proceeding of which the purchaser had no

notice. *Sutton v. Schonwald*, 86 N.C. 198 (1882).

Title at Unauthorized Private Sale.—A guardian, having offered at public sale the land of his wards in accordance with an order of the court, and having failed to sell for want of a bid at a fair price, subsequently sold the land at private sale upon terms approved by the court. It was held that the purchaser at such private sale obtained a good title. *Rowland v. Thompson*, 73 N.C. 504 (1875).

Where an order confirming a sale of

lands for partition does not provide for the disbursement of the funds, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, under § 2-53, the sale was not void. *Ex parte Huffstetler*, 203 N.C. 796, 167 S. E. 65 (1933).

Cited in *Ex parte Quick*, 206 N.C. 627, 175 S.E. 119 (1934); *Brown v. Cowper*, 247 N.C. 1, 100 S.E.2d 305 (1957).

§ 33-31.1. Procedure when real estate lies in county in which guardian does not reside.—In all cases where a guardian is appointed under the authority of chapter thirty-three and chapter thirty-five of the General Statutes of North Carolina, and such guardian applies to the court for an order to sell or mortgage all or some part of his ward's real estate, and such real estate is situated in a county other than the county in which the guardian is appointed and qualified, it shall be the duty of the guardian to first apply to the clerk of the court of the county in which he was appointed and qualified for an order showing that the sale or mortgage of his ward's real estate is necessary, or that the interest of his ward would be materially promoted thereby. The clerk of the superior court to whom such application is made shall hear and pass upon the same and enter his findings and order as to whether or not said sale or mortgage of the ward's real estate is necessary, or would materially promote the interest of the ward, and said order and findings shall be certified to the clerk of the superior court of the county in which the ward's land, or some part of same, is located and before whom any petition or application is filed for the sale of said land. Such findings and orders so certified shall be considered by the court or the clerk of the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale of said land. Before such findings and orders shall become effective the same shall be approved by the judge holding the courts of the district or by the resident judge. (1945, c. 426, s. 7; 1949, c. 724, ss. 1-3.)

§ 33-31.2. Ancillary guardian for nonresident infant having real property in State.—Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

- (1) There is real property situated in the county of said clerk in which a non-resident of the State of North Carolina has an interest or estate;
- (2) That said nonresident is an infant and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and
- (3) That such nonresident infant has no guardian in the State of North Carolina:

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said infant in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said infant.

Upon the appointment of an ancillary guardian in this State under this article, the clerk of the superior court shall forthwith notify the clerk of the superior, or

other corresponding court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1951, c. 366, s. 1.)

§ 33-32. Fund from sale has character of estate sold and subject to same trusts.—Whenever, in consequence of any sale under § 33-31, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (1827, c. 33, s. 2; R. C., c. 54, s. 33; 1868-9, c. 201, s. 40; Code, s. 1603; Rev., s. 1799; C. S., s. 2181.)

In General.—Although it is the duty of the court, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet the husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted. *Harrison v. Bradley*, 40 N.C. 136 (1847).

Application. — Where a female infant's land was sold for the benefit of the infant and she married and died before becoming of age, it was held that the money retained the character of real property. *Wood v. Reeves*, 58 N.C. 271 (1859).

Proceeds of Sale of Land Retain Character of Real Estate.—When an undivided interest of an insane person in land was sold by his guardian under court order, the proceeds of sale retained the character of real estate for the purpose of devolution on his death intestate while still insane, and would go as his interest in the land would had it not been sold. *Brown v. Cowper*, 247 N.C. 1, 100 S.E.2d 305 (1957).

Purchase Back of Identical Real Property Sold.—In view of the general rule as to the sale of an insane person's real

property under a court order, and in view of this section, a conveyance of real property by the guardian of an insane person and the purchase back of the identical real property at a foreclosure sale by the use of unpaid purchase money notes would not break the line of descent. *Brown v. Cowper*, 247 N.C. 1, 100 S.E.2d 305 (1957).

Exchange of Real Property for Real Property.—This section does not in explicit words refer to the case where real property is substituted for real property. However, considering the general rule as to the sale of an insane person's real property under a court order, and the purpose and intent of this section, an undivided interest in land conveyed to an insane person in exchange for his interest in other tracts of land transmitted to him by descent from his mother would, upon his death intestate and continuously insane since before the appointment of his guardian until his death, nothing else appearing, descend as by law his undivided interest in the other tracts would descend, if his undivided interest in the other tracts of land had not been sold, conveyed and exchanged. *Brown v. Cowper*, 247 N.C. 1, 100 S.E.2d 305 (1957).

§ 33-33. Sale of ward's estate to make assets. — When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts, to the clerk of the superior court, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of the sale; the procedure shall be as provided by article 29A of chapter 1 of the General Statutes; all petitions filed under the authority of this section wherein an order is sought for the sale of a ward's real estate or both real and personal property shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale of the ward's personal estate, the petition shall be filed in the office of the clerk of superior court of the county in which all or any of said personal estate is situ-

ated. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1789, c. 311, s. 5; R. C., c. 54, s. 34; 1868-9, c. 201, ss. 41, 42; Code, ss. 1604, 1605; Rev., ss. 1800, 1801; C. S., s. 2182; 1945, c. 426, s. 2; c. 1084, s. 2; 1949, c. 719, s. 2.)

Cross Reference.—See § 33-31.1.

Ascertaining Debts Due and Specifying Property to Be Sold.—Under the former wording of the statute, giving the county court the power now possessed by the clerk of the superior court, it was held that the statute did not confer a general power to make orders of sale, but conferred a limited power to make orders to sell designated parts of the ward's estate to pay ascertained debts against such estate. *Leary v. Fletcher*, 23 N.C. 259 (1840).

The court should first ascertain that there are debts due from the ward, which render the sale of his property expedient, and should also select the part or parts of the property which can be disposed of with least injury to the ward. *Leary v. Fletcher*, 23 N.C. 259 (1840).

Same—Sufficiency of Order.—An order authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was ascertained that there were debts due from the ward, and then specify what particular land is to be sold for their payment. *Spruill v. Davenport*, 48 N.C. 42 (1855).

Insufficient Specification of Land. — An order that the guardian sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale. *Leary v. Fletcher*, 23 N.C. 259 (1840); *Ducket v. Skinner*, 33 N.C. 431 (1850).

Sufficient Specification of Land. — An

order "to sell the land of the ward named in the petition, adjoining the lands of A., B., and others, containing about 110 acres," it not appearing that the ward had other land, was held a sufficient specification of the land under the statute. *Pendleton v. Trueblood*, 48 N.C. 96 (1855).

Sale Void Where Debts Not Shown.—A sale of a ward's land on petition of the guardian to pay debts is void where it is not made to appear that the court passed on and ascertained the fact that there were debts against the ward's estate. *Coffield v. McLean*, 49 N.C. 15 (1856).

But the amount of the debts, or to whom due, need not be set forth in the order. *Spruill v. Davenport*, 48 N.C. 42 (1855); *Pendleton v. Trueblood*, 48 N.C. 96 (1855).

Proceeds Subject to Attachment. — Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. *Leroy v. Jacobosky*, 136 N.C. 443, 48 S.E. 796 (1904).

Priority in Payment of Debts.—When a guardian of an infant, under an order of court, sells his ward's land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. *Merchant v. Sanderlin*, 25 N.C. 501 (1843).

Sale of Lunatic's Property.—See § 35-10 et seq. And see *Howard v. Thompson*, 30 N.C. 367 (1848).

§ 33-34. To sell perishable goods on order of clerk.—Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. The procedure for the sale shall be as provided by article 29A of chapter 1 of the General Statutes. (1762, c. 69, s. 10; R. C., c. 54, s. 22; 1868-9, c. 201, s. 26; Code, s. 1589; Rev., s. 1787; C. S., s. 2170; 1949, c. 719, s. 2.)

§ 33-35. When timber may be sold.—In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. (1762, c. 69, s.

14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 33; Code, s. 1596; Rev., s. 1790; C. S., s. 2174.)

Sale without Authority. — Where a guardian sold timber on the land of his ward without an order of the court (now consent of superior court clerk), and took a note for the purchase money, the maker

of such note cannot set up the failure of the guardian to observe the statutory mandate. *Evans v. Williamson*, 79 N.C. 86 (1878).

ARTICLE 4A.

Guardians' Deeds Validated When Seal Omitted.

§ 33-35.1. **Deeds by guardians omitting seal, prior to Jan. 1, 1944, validated.**—All deeds executed prior to the first day of January, 1944, by any guardian, acting under authority obtained by him from the superior court as required by law, in which the guardian has omitted to affix his seal after his signature and/or has omitted to affix the seal after the signature of his ward shall be good and valid, and shall pass the title to the land which the guardian was authorized to convey: Provided, however, this section shall not apply to any pending litigation. (1947, c. 531.)

ARTICLE 5.

Returns and Accounting.

§ 33-36. **Return within three months.**—Every guardian, within three months after his appointment, shall exhibit and account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months. (1762, c. 69, s. 9; R. C., c. 54, s. 11; 1868-9, c. 201, s. 14; Code, s. 1577; Rev., s. 1802; C. S., s. 2183.)

In the administration of the estate of a lunatic, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by this and following sections to account.

Read v. Turner, 200 N.C. 773, 158 S.E. 475 (1931).

Cited in *Norman v. Walker*, 101 N.C. 24, 7 S.E. 468 (1888).

§ 33-37. **Procedure to compel return.**—In cases of default to exhibit the return required by § 33-36, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return. (1762, c. 69, s. 15; R. C., c. 54, s. 12; 1868-9, c. 201, s. 15; Code, s. 1578; Rev., s. 1803; C. S., s. 2184.)

Cross Reference.—As to suits for accounting at term, see § 28-147.

§ 33-38. **Additional assets to be returned.** — Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in § 33-37. (1868-9, c. 201, s. 16; Code, s. 1579; Rev., s. 1804; C. S., s. 2185.)

§ 33-39. **Annual accounts.**—Every guardian shall, within thirty days after the expiration of one year from the date of his qualification or appointment, and

annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness. (1762, c. 69, ss. 9, 15; R. C., c. 54, ss. 11, 12; 1871-2, c. 46; Code, s. 1617; Rev., s. 1805; C. S., s. 2186; 1965, c. 802.)

Cross References.—As to clerk's power to audit the account of guardian, see § 2-16. As to vouchers being evidence of disbursement, see § 28-119.

Editor's Note.—The 1965 amendment substituted "thirty days after the expiration of one year" for "twelve months" near the beginning of the first sentence.

Definition of "Account".—An "account" is used in this section in the sense of a statement in writing of debits and credits, or of receipts and payments. And when not only an account, but payment or settlement is intended, additional words are used to express that idea. *State v. Dunn*, 134 N.C. 663, 46 S.E. 949 (1904).

Ward Can Demand Annual Statement.—A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate. *Moore v. Askew*, 85 N.C. 199 (1881).

What to Be Set Out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian.

§ 33-40. Procedure to compel accounting.—If any guardian omits to account, as directed in § 33-39, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office. And in all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceeding, including the costs of service of all notices or writs incidental to, or thereby acquiring, or the amount of the costs of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for said corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of said corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Pro-

State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

The annual account of a guardian is competent evidence against him, and presumptive evidence against his sureties. *Loflin v. Cobb*, 126 N.C. 58, 35 S.E. 230 (1900).

Of Good Faith.—No higher evidence can be offered of that good faith required of a guardian than perfect candor, full information, and minute, detailed accounts. *Moore v. Askew*, 85 N.C. 199 (1881).

And Is Prima Facie Correct When Accepted by the Court.—The ex parte settlement made by a guardian with the court having jurisdiction of such matters, is, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking such settlement to establish, by a preponderance of testimony, its incorrectness. *State ex rel. Turner v. Turner*, 104 N.C. 566, 10 S.E. 606 (1889).

vided further, the corporation itself may also be fined and/or removed as such guardian for such failure or omission. (C. C. P., s. 479; Code, s. 1618; Rev., s. 1806; C. S., s. 2187; 1929, c. 9, s. 2; 1933, c. 317.)

Editor's Note.—See 11 N.C.L. Rev. 232. 369 (1878); In re Dixon, 156 N.C. 26, 72

Applied, as to removal for failure to account, in Sanderson v. Sanderson, 79 N.C. S.E. 71 (1911).

§ 33-41. **Final account.** — A guardian may be required to file such account at any time after sixty days from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court. (C. C. P., s. 481; Code, s. 1619; Rev., s. 1807; C. S., s. 2188; 1965, c. 411.)

Cross References.—As to accounting for compound interest in final settlement, see § 24-4. As to necessity for payment of taxes before final accounting, see § 105-240. As to fees for auditing final account, see § 2-35.

Editor's Note. — The 1965 amendment substituted "sixty days" for "six months."

In General.—This section is not intended to bestow upon the guardian the ward's moneys and properties for six months [now sixty days] after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months [now sixty days], and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement, to complete the record in his office, for the section states that such return shall be "audited and recorded." Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

"Audit" Explained. — When the section directs that the clerk shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Rowland v. Thompson, 64 N.C. 714 (1870).

Jurisdiction.—The clerk of the superior court has jurisdiction of settlements between guardian and ward, and, of course, between the guardian and the ward's personal representative. McNeill v. Hodges, 105 N.C. 52, 11 S.E. 265 (1890); McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893).

Action Barred Ten Years after Ward Comes of Age.—Ten years after the ward comes of age bars an action by him against his guardian for settlement. Dunn v. Beaman, 126 N.C. 766, 36 S.E. 172 (1900).

When Action Barred as to Sureties. —

An action for breach of the guardianship bond based upon this section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933). See Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938).

Judgment Is an Estoppel.—The clerk of the superior court, having jurisdiction of proceedings against a guardian for a settlement, a judgment rendered therein is an estoppel to an action in the superior court between the same parties and upon the same question, and cannot be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. Donnelly v. Wilcox, 113 N.C. 408, 18 S.E. 339 (1893).

Distributees May Have Accounting. — The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may have letters of administration taken out and call for an accounting. Lowder v. Hathcock, 150 N.C. 438, 64 S.E. 194 (1909).

Effect of Wrongful Settlement.—Where a guardian surrendered his office in March to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith, it was held that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. Jennings v. Copeland, 90 N.C. 572 (1884).

§ 33-42. **Expenses and disbursements credited to guardian.**—Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in

one year that the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (1762, c. 69, ss. 18, 19; 1799, c. 536, s. 2; R. C., c. 54, s. 28; 1868-9, c. 201, s. 49; Code, s. 1612; Rev., s. 1808; C. S., s. 2189.)

Cross References.—As to payments allowed in accounting, see § 33-6. As to expense of bond being lawful expense, see § 109-23.

A guardian should be charged with what he receives and credited with what he pays out, when it does not appear that he collected anything prematurely or kept on hand any unreasonable sum. *Freeman v. Wilson*, 74 N.C. 368 (1876).

Paying Debts Due.—When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respects. *Adams v. Thomas*, 83 N.C. 521 (1880); *McLean v. Breece*, 113 N.C. 390, 18 S.E. 694 (1893).

Where, in the settlement of the guardian's account, the lunatic is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts without prejudice to the estate, the disbursement would be allowed. *McLean v. Breece*, 113 N.C. 390, 18 S.E. 694 (1893).

Payments to Mother for Board of Wards after Majority.—A guardian is not chargeable with moneys paid to the mother of his wards for their board after their arrival at full age, no objection being urged against the propriety or justness of the claim, or of the price paid. *McNeill v. Hodges*, 83 N.C. 505 (1880).

Counsel Fees.—A guardian should be allowed reasonable attorney's fees paid in good faith. *Burke v. Turner*, 85 N.C. 500 (1881), citing *Whitford v. Foy*, 65 N.C. 265 (1871).

The employment of counsel for legal advice and assistance in connection with the administration of the wards' estate is a proper expense to be charged in the guardian's account, if in reasonable amount, and for the benefit of the wards. *Maryland Cas. Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).

But fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, cannot be allowed the latter in his settlement. *Johnston v. Haynes*, 68 N.C. 509 (1873).

And where the interests of the guardian and wards are antagonistic and the services

rendered by the attorney are in the interest of the former rather than the latter the obligation to pay therefor is the individual liability of the guardian. *Maryland Cas. Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945), citing *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942).

Exceeding Income of Estate.—In paying the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. *Caffey v. McMichael*, 64 N.C. 507 (1870); *Johnston v. Haynes*, 68 N.C. 514 (1873).

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity. *Tharington v. Tharington*, 99 N.C. 118, 5 S.E. 414 (1888).

Same—Clerk May Allow.—The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk. *Duffy v. Williams*, 133 N.C. 195, 45 S.E. 548 (1903).

Same—Setting Ward up in Business.—A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the court for leave, is not entitled to charge the ward with it. *Shaw v. Coble*, 63 N.C. 377 (1869).

Father as Guardian.—A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education. *Walker v. Crowder*, 37 N.C. 478 (1843).

A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. *Burke v. Turner*, 85 N.C. 500 (1881).

Stepfather as Guardian.—Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and

other necessities furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. *Barnes v. Ward*, 45 N.C. 93 (1852).

§ 33-42.1. Guardian to exhibit investments and bank statements.—At the time the accounts required by this article and other provisions of law are filed, the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk of the superior court shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk of the superior court of the county in which such guardian resides or the county in which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk of the superior court of the county in which such bank or trust company has its principal office or in which such securities are located; the certificate of the clerk of the superior court of such county shall be accepted by the clerk of the superior court of any county in which such guardian is required to file an account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit is exhibited to the clerk of the superior court and when said certificate shows that the securities held by the fiduciary have been examined within one year. (1947, c. 596; 1961, cc. 292, 1066.)

§ 33-43. Commissions.—The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors. (1762, c. 69, ss. 18, 19; R. C., c. 54, s. 28; 1868-9, c. 201, s. 50; Code, s. 1613; Rev., s. 1809; C. S., s. 2190.)

Cross Reference.—As to commissions of executors and administrators, see § 28-170.

Commissions are only a compensation to the guardian for his time and trouble in managing his ward's estate. *Walton v. Erwin*, 36 N.C. 136 (1840).

And the time spent in the management of his ward's estate may be considered in fixing his commissions, but cannot be separately charged. *Shutt v. Carlross*, 36 N.C. 232 (1840).

Failure to Keep Accounts.—A guardian is entitled to commissions, although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect. *McNeill v. Hodges*, 83 N.C. 505 (1880). But where he is grossly negligent, it is otherwise. *Topping v. Windley*, 99 N.C. 4, 5 S.E. 14 (1888).

Payments to Guardian's Firm.—A guardian is entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member. *Williamson v. Williams*, 59 N.C. 62 (1860).

When Ward Boards with Guardian.—A guardian is not entitled to commissions on charges for board while the ward lived

with the guardian's family. *Williamson v. Williams*, 59 N.C. 62 (1860).

Securities Delivered at Majority.—Commissions should be allowed a guardian on the amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. *Whitford v. Foy*, 65 N.C. 265 (1871).

Disbursement after Ward's Majority.—A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age. *McNeill v. Hodges*, 83 N.C. 505 (1880).

Bank as Administrator and Guardian of Distributee.—Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. *Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).

Using Ward's Money in Own Business.—A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward. *Carr v. Askew*, 94 N.C. 85 (1886), distinguishing *Burke v. Turner*, 85

N.C. 500 (1881). See *Fisher v. Brown*, 135 N.C. 198, 47 S.E. 398 (1904).

Same—Gross Negligence. — A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in not making his returns. *Burke v. Turner*, 85 N.C. 500 (1881).

Rate of Commissions.—Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. *Whitford v. Foy*, 65 N.C. 265 (1871).

Same—Two and One Half Percent.—Two and one half percent was ample commission to a guardian receiving most of the ward's property, without litigation or difficulty, in the shape of notes payable to himself, which he retained six years collecting but little interest, when he voluntarily resigned and delivered the notes to his successor. *Walton v. Erwin*, 36 N.C. 136 (1840).

Same—Five Percent. — Five percent was not an unreasonable allowance to a guardian as commissions on his receipts and disbursements, when these were numerous, and extended over a period of fourteen years. *Covington v. Leak*, 65 N.C. 594 (1871).

Same—Ten Percent. — A commission of ten percent, the highest allowed by the statute, will be allowed to a guardian only in a case of the greatest merit, as where his duties have been troublesome and of long continuance. *Walton v. Erwin*, 36 N.C. 136 (1840).

Referee's Decision Adopted. — The amount of allowance of commissions to a guardian by a referee is usually adopted by the court, unless it is shown to be excessive. *Johnston v. Haynes*, 68 N.C. 514 (1873); *Whitford v. Foy*, 71 N.C. 527 (1874).

An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. *Whitford v. Foy*, 71 N.C. 527 (1874).

ARTICLE 6.

Public Guardians.

§ 33-44. **Appointment; term; oath.**—There may be in every county a public guardian, to be appointed by the clerk of the superior court for a term of eight years. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court. (1874-5, c. 221, ss. 1, 5; Code, ss. 1556, 1560; Rev., ss. 1758, 1759; C. S., s. 2191.)

§ 33-45. **Bond of public guardian; increasing bond.** — The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the State of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (1874-5, c. 221, ss. 2, 3; Code, ss. 1557, 1558; Rev., ss. 321, 322; C. S., s. 2192.)

§ 33-46. **Powers, duties, liabilities, compensation.**—The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1761; C. S., s. 2193.)

Cross Reference. — As to payment to minor, etc., insurance beneficiary, see § 2-52.

§ 33-47. When letters issue to public guardian.—The public guardian shall apply for and obtain letters of guardianship in the following cases:

- (1) When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.
- (2) When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1760; C. S., s. 2194.)

ARTICLE 7.

Foreign Guardians.

§ 33-48. Right to removal of infant's or ward's personalty from State.—Where any infant, ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the infant, ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian or trustee of the infant, ward, idiot, lunatic or insane person, duly appointed at the place where such infant, ward, idiot, lunatic or insane person resides, or in the event no guardian or trustee has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any infants, idiots, lunatics or insane persons when no guardian or trustee has been appointed for such person, may apply to have such estate removed to the residence of the infant, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated which shall be proceeded with as in other cases of special proceedings. (1820, c. 1044; 1842, c. 38; R. C., c. 54, s. 29; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; Code, ss. 1598, 1601; Rev., s. 1816; 1913, c. 86, s. 1; C. S., s. 2195; 1937, c. 307; 1963, c. 999, s. 1.)

Cross Reference. — As to removal of trust funds of nonresidents from State, see § 36-6 et seq.

Editor's Note. — The 1963 amendment inserted "infant" and "or trustee" several times in this section.

Local Guardian Not Necessary.—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with this section and § 33-49, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is

properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. *Cilley v. Geitner*, 183 N.C. 528, 111 S.E. 865 (1922).

When Guardian Must Be Resident. — Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under this section and § 33-49; and the law of this State governs the interpretation of the will when the testator died domiciled here. *Cilley v. Geitner*, 182 N.C. 714, 110 S.E. 61 (1921).

Proper Refusal to Order Removal. —

Where it appeared that the property in this State of a ward residing in another state consisted of good bonds at interest in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. *Douglas v. Caldwell*, 59 N.C. 20 (1860).

Foreign Guardian as Next Friend. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. *Tate v. Mott*, 96 N.C. 19, 2 S.E. 176 (1887).

§ 33-49. Contents of petition; parties defendant. — The petitioner must show to the court a copy of his appointment as guardian or trustee and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the infant or ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian or trustee of any person or infant and such banking institution is not required to execute a bond to qualify as guardian or trustee under the laws of the state wherein said guardian or trustee qualified and was appointed guardian or trustee of such infant, or infants, and no sureties are or were required by the state in which said banking institution qualified as guardian or trustee, and this fact affirmatively appears to the court, then the personal property and estate of such infant or other person, may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the infant or ward is filed may order the transfer and removal of the property of the infant or ward, and the payment and delivery of the same to the nonresident guardian or trustee of said infant or ward without regard to whether a nonresident guardian or trustee has filed a bond with sureties; and the finding of the court that the said guardian or trustee is a banking institution and has duly qualified and been appointed guardian or trustee of said infant or ward under the laws of the state where said infant or ward, or wards, is or are residents, shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (1820, c. 1044, s. 2; 1842, c. 38; R. C., c. 54, s. 30; 1868-9, c. 201, ss. 36, 37; Code, ss. 1599, 1600; Rev., ss. 1817, 1818; C. S., s. 2196; 1949, c. 253; 1963, c. 999, s. 2.)

Cross Reference. — As to who may be defendants, see § 1-69.

Editor's Note.—For brief account of the 1949 amendment, see 27 N.C.L. Rev. 458.

A guardian in another state of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of this section; and § 36-7, relating to property in the hands of a trustee residing in this State, is not applicable. *Fidelity Trust Co. v. Walton*, 198 N.C. 790, 153 S.E. 401 (1930).

The petition and proceeding prescribed by this section are jurisdictional, in order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state; and an order, by the judge of the superior court or clerk, for its transfer otherwise is void. *State ex rel. Page v. Sawyer*, 223 N.C. 102, 25 S.E.2d 443 (1943).

Cited in *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E.2d 327 (1950).

The 1963 amendment inserted "infant or" and "or trustee" several times in this section.

§ 33-49.1. Transfer of guardianship.—When any ward, mental defective, mentally disordered person, or cestui que trust, for whom a guardian or trustee has been appointed, lives in a county in this State other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of

the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward, mental defective, mentally disordered person, or cestui que trust. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194; 1961, c. 973.)

ARTICLE 8.

Estates without Guardian.

§ 33-50. Duty of grand jury as to orphans and guardians. — The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him. (1762, c. 69, s. 17; R. C., c. 54, s. 18; 1868-9, c. 201, s. 46; Code, s. 1609; Rev., s. 1810; C. S., s. 2197.)

§ 33-51. Solicitor to apply for receiver for orphans' estates. — Whenever the name of an orphan, having any estate and for whom no suitable person will become guardian, is presented by a grand jury, the clerk of the superior court must give notice thereof forthwith to the solicitor of the State for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed. (1846, c. 43; R. C., c. 54, s. 19; 1868-9, c. 201, s. 47; Code, s. 1610; Rev., s. 1811; C. S., s. 2198.)

§ 33-52. Solicitor to prosecute bond of guardian removed without a successor. — Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward. (1844, c. 41; R. C., c. 54, s. 14; 1868-9, c. 201, s. 21; Code, s. 1584; Rev., s. 1812; C. S., s. 2199.)

Infant Not Necessary Party. — The action required by this section to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward when the guardian has been removed, and the ward is not a necessary, perhaps not a proper, party to it. *Becton v. Becton*, 56 N.C. 419 (1857); *Temple v. Williams*, 91 N.C. 82 (1884).

Allowance Pendente Lite. — During the pendency of an action under this section against a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in

possession of the court, the superior court has no power to order the guardian and his sureties to pay a certain sum into court for the ward's maintenance and support pendente lite, and a further sum for her attorney. *State ex rel. Harris v. Harrison*, 75 N.C. 432 (1876).

Same—Contempt. — If it is made to appear to the court, pending an action under this section, that a fund belonging to the ward is in possession of the guardian removed, the judge may, by process of contempt, compel its payment into court, where it, will be subject to such orders and disposition as the necessities of the ward may require. *State ex rel. Harris v. Harrison*, 75 N.C. 432 (1876).

§ 33-53. Judge to appoint receiver; his rights and duties. — The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship. (1844, c. 41, s. 2; R. C., c. 54, s. 15; 1868-9, c. 201, s. 22; Code, s. 1585; Rev., s. 1813; C. S., s. 2200.)

Cross Reference.—As to receivers, see § 1-501 et seq.

Appointment of Clerk.—Under this section the court has authority to appoint a clerk of the superior court receiver of the infants' estate. *Waters v. Melson*, 112 N.C. 89, 16 S.E. 918 (1893).

Same—Sufficiency of Order.—Where, in an order of court appointing "J. A. M. clerk of the superior court," receiver of the infants' estate, the word "as" was omitted before the words "clerk of the superior court." It was held that the intention of the court to appoint M. as receiver in his official capacity was sufficiently indicated. *Waters v. Melson*, 112 N.C. 89, 16 S.E. 918 (1893).

The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. *In re Hybart*, 119 N.C. 359, 25 S.E. 963 (1896).

The receiver does not have the powers of a guardian, but acts under the control of the court until another guardian is appointed. *Temple v. Williams*, 91 N.C. 82 (1884).

Liability of Receiver. — As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith. *State ex rel. Collins v. Gooch*, 97 N.C. 186, 1 S.E. 653 (1887).

Is Similar to Guardian's. — When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. *State ex rel. Collins v. Gooch*, 97 N.C. 186, 1 S.E. 653 (1887).

Liability for Failure of Bank. — A receiver may keep money in a bank as a safe place of deposit, or may use the bank

as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. *State ex rel. Collins v. Gooch*, 97 N.C. 186, 1 S.E. 653 (1887).

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. *State ex rel. Collins v. Gooch*, 97 N.C. 186, 1 S.E. 653 (1887).

Liability on Official Bond of Clerk. — When the clerk of the superior court is appointed receiver of a minor's estate under this section, he takes and holds the funds by virtue of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. *State ex rel. Boothe v. Upchurch*, 110 N.C. 62, 14 S.E. 642 (1892). See *State ex rel. Rogers v. Odom*, 86 N.C. 432 (1882).

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. *Waters v. Melson*, 112 N.C. 89, 16 S.E. 918 (1893).

Action against Receiver. — It is not necessary to obtain leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed receiver under this section. *State ex rel. Boothe v. Upchurch*, 110 N.C. 62, 14 S.E. 642 (1892).

Same—Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. *Waters v. Melson*, 112 N.C. 89, 16 S.E. 918 (1893).

Settlement Not Conclusive. — A settle-

ment made with a receiver appointed under this section, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that

the account and settlement are correct. Such presumption may be disproved. *Temple v. Williams*, 91 N.C. 82 (1884).

§ 33-54. When receiver to pay over estate.—When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator, or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver. (1844, c. 41, s. 4; R. C., s. 54, s. 17; 1868-9, c. 201, s. 24; Code, s. 1587; Rev., s. 1814; C. S., s. 2201.)

§ 33-55. Duties of solicitor.—The solicitor shall prosecute the action and take all necessary orders therein. (1884, c. 41, s. 3; R. C., c. 54, s. 16; 1868-9, c. 201, s. 23; Code, s. 1586; 1895, c. 14; Rev., s. 1815; C. S., s. 2202.)

ARTICLE 9.

Guardians of Estates of Missing Persons.

§§ 33-56 to 33-62: Repealed by Session Laws 1965, c. 815, s. 4.

ARTICLE 10.

Conservators of Estates of Missing Persons.

§§ 33-63 to 33-66: Repealed by Session Laws 1965, c. 815, s. 4.

ARTICLE 11.

Guardians of Children of Servicemen.

§ 33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.—In all cases where a citizen of this State is serving in the armed forces of the United States and has made an allotment or allowance to his child, children or other minor dependents as provided by the war time allowances to Service Men's Dependents Act or any other act of Congress, and the mother of said child, children or other minor dependents or other person of lawful age designated in said allowance or allotment to receive such moneys and disburse them for the benefit of said minor dependents shall die or become mentally incompetent, and such person so serving in the armed forces of the United States shall be reported as missing in action or as a prisoner of war and shall be unable to designate another person to receive and disburse said allotment or allowance to said minor dependents; then and in such event the clerk of the superior court of the county of the legal residence of said serviceman or person serving in the armed forces of the United States, is hereby authorized and empowered to act as temporary guardian of such minor dependents for the purpose of receiving and disbursing such allotments and allowance funds for the benefit of such minor dependents. (1945, c. 735.)

Cross References. — As to Veterans' Guardianship Act, see chapter 34 of General Statutes. As to veterans generally, see chapter 165 of General Statutes.

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.—In this article, unless the context otherwise requires:

- (1) An "adult" is a person who has attained the age of twenty-one years.
- (2) A "bank" is a bank, savings and loan association, building and loan association, federal savings and loan association, trust company, national banking association, savings bank, industrial bank.
- (3) A "broker" is a person lawfully engaged in the business of effecting transactions in securities for the account of others. The term includes a bank which effects such transactions. The term also includes a person lawfully engaged in buying and selling securities for his own account, through a broker or otherwise, as a part of a regular business.
- (4) "Court" means the superior court of the several counties of the State.
- (5) "The custodial property" includes:
 - a. All securities, money and life insurance under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this article.
 - b. The income from the custodial property; and
 - c. The proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment or other disposition of such securities, money and income.
- (6) A "custodian" is a person so designated in a manner prescribed in this article.
- (7) A "guardian" of a minor includes the general guardian, guardian, tutor or curator of his property, estate or person.
- (8) An "issuer" is a person who places or authorizes the placing of his name on a security (other than as a transfer agent) to evidence that it represents a share, participation or other interest in his property or in an enterprise or to evidence his duty or undertaking to perform an obligation evidenced by the security, or who becomes responsible for or in place of any such person.
- (9) A "legal representative" of a person is his executor or the administrator, general guardian, guardian, committee, conservator, tutor or curator of his property or estate.
- (10) "Life insurance" shall be deemed to include only insurance on the life of a minor or a member of the minor's family as herein defined.
- (11) A "member" of a "minor's family" means any of the minor's parents, grandparents, great-grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption.
- (12) A "minor" is a person who has not attained the age of twenty-one years.
- (13) A "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. The term does not include a security of which the donor is the issuer. A security is in "registered form" when it specifies a person entitled to it or to the rights it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.
- (14) A "transfer agent" is a person who acts as authenticating trustee, transfer agent, registrar or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities.

- (15) A "trust company" is a bank authorized to exercise trust powers in the State of North Carolina. (1955, c. 1061; 1959, c. 1166, s. 1.)

Editor's Note. — This article, originally containing seven sections, was rewritten by the 1959 amendment to contain ten sections.

Section 2 of the amendatory act provides that the rewriting of this article does not affect gifts made in a manner prescribed in the original article nor the powers, duties and immunities conferred by gifts in such manner upon custodians

and persons dealing with custodians. The provisions of this act henceforth apply, however, to all gifts made in a manner and form prescribed in the original article hereby rewritten except insofar as such application impairs constitutionally vested rights. The sections of this act shall be construed as a continuation of the provisions of the original article hereby rewritten.

§ 33-69. Manner of making gift.—(a) An adult person may, during his lifetime, make a gift of a security, money, or life insurance, to a person who is a minor on the date of the gift.

- (1) If the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person, an adult member of the minor's family, a guardian of the minor, or a trust company, followed, in substance, by the words: "as custodian for under the North Carolina Uniform Gifts to Minors Act";
- (2) If the subject of the gift is a security not in registered form, by delivering it to an adult person other than the donor, an adult member, other than the donor, of the minor's family, a guardian of the minor, or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFT UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT"

I,, hereby deliver to
 (name of donor) (name of custodian)
 as custodian for under the North Carolina
 (name of minor)

Uniform Gifts to Minors Act, the following security(ies): (insert an appropriate description of the security or securities delivered sufficient to identify it or them).

.....
 (signature of donor)
 hereby acknowledges receipt of the above
 (name of custodian)
 described security(ies) as custodian for the above minor under the North Carolina Uniform Gifts to Minors Act.

Dated:
 (signature of custodian)"

- (3) If the subject of the gift is money, by paying or delivering it to a broker or a bank for credit to an account in the name of the donor, another adult person, an adult member of the minor's family, a guardian of the minor or a bank with trust powers, followed, in substance, by the words: "as custodian for (name of minor) under the North Carolina Uniform Gifts to Minors Act."
- (4) If the subject of the gift is life insurance, the ownership of the policy of life insurance shall be registered by the donor of such policy in his own name or in the name of an adult member of the minor's

family or in the name of any guardian of the minor, followed by the words: "as custodian for under the North
(name of minor)

Carolina Uniform Gifts to Minors Act," and such policy of life insurance shall be delivered to the person in whose name it is thus registered as custodian. If the policy is registered in the name of the donor, as custodian, such registration shall of itself constitute the delivery required by this section.

(b) Any gift made in a manner prescribed in subsection (a) may be made to only one minor and only one person may be the custodian.

(c) A donor who makes a gift to a minor in a manner prescribed in subsection (a) shall promptly do all things within his power to put the subject of the gift in the possession and control of the custodian, but neither the donor's failure to comply with this subsection, nor his designation of an ineligible person as custodian, nor renunciation by the person designated as custodian affects the consummation of the gift. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-70. Effect of gift.—(a) A gift made in a manner prescribed in this article is irrevocable and conveys to the minor indefeasibly vested legal title to the security, money, or life insurance given, but no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in this article.

(b) By making a gift in a manner prescribed in this article, the donor incorporates in his gift all the provisions of this article and grants to the custodian, and to any issuer, transfer agent, bank, broker or third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in this article. (1959, c. 1166, s. 1.)

§ 33-71. Duties and powers of custodian.—(a) The custodian shall collect, hold, manage, invest and reinvest the custodial property.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, without or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(c) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

(d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, he shall thereupon deliver or pay it over to the estate of the minor.

(e) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor in a manner prescribed in this article. The custodian may also use funds in his custody to purchase a policy or policies of life insurance on the life of the minor and to pay premiums thereon, and to retain and use funds in his custody to pay premiums on a policy or policies

of life insurance given to the minor in accordance with the provisions of G.S. 33-69 (a) (4).

(f) The custodian may sell, exchange, convert or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices and upon the terms he deems advisable. He may vote in person or by general or limited proxy a security which is custodial property. He may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of an issuer, a security which is custodial property, and to the sale, lease, pledge or mortgage of any property by or to such an issuer, and to any other action by such an issuer. He may execute and deliver any and all instruments in writing which he deems advisable to carry out any of his powers as custodian.

(g) The custodian shall register each security which is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: "as custodian for under the North
(name of minor)

Carolina Uniform Gifts to Minors Act." The custodian shall hold all money which is custodial property in an account with a broker or in a bank in the name of the custodian, followed, in substance, by the words: "as custodian for under the North Carolina Uniform Gifts to
(name of minor)

Minors Act." The custodian shall keep all other custodial property separate and distinct from his own property in a manner to identify it clearly as custodial property.

(h) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if he has attained the age of fourteen years.

(i) A custodian has and holds as powers in trust with respect to the custodial property, in addition to the rights and powers provided in this article, all the rights and powers which a guardian has with respect to property not held as custodial property.

(j) All life insurance policies held by the custodian whether acquired under G.S. 33-69 (a) (4) or G.S. 33-71 (e) shall be registered in the name of the custodian as owner "as custodian for under the
(name of minor)

North Carolina Uniform Gifts to Minors Act." The custodian shall have and may exercise as custodian all of the incidents of ownership in such life insurance policies to the same extent as if he were the owner thereof personally, including, but not limited to, the right to borrow on such policies for the payment of premiums. If a life insurance policy is issued on the life of the minor, the designated beneficiary shall be the minor's estate. If a life insurance policy is issued on the life of a person other than the minor, the beneficiary shall be the custodian, or, if the custodianship has ceased, the minor, or, in the event of the minor's death, the minor's estate. (1955, c. 1061; 1959, c. 1166, s. 1; 1961, c. 477; 1965, c. 992.)

Editor's Note.—The 1965 amendment present first sentence therein and rewrote rewrote that portion of subsection (e) subsection (j). which follows "article" at the end of the

§ 33-72. Custodian's expenses, compensation, bond and liabilities.

—(a) A custodian is entitled to reimbursement from the custodial property for his reasonable expenses incurred in the performance of his duties.

(b) A custodian may act without compensation for his services.

(c) Unless he is a donor, a custodian may receive from the custodial property reasonable compensation for his services determined by one of the following standards in the order stated:

- (1) A direction by the donor when the gift is made;
- (2) A statute of this State applicable to custodian;
- (3) The statute of this State applicable to guardians;
- (4) An order of the court.

(d) Except as otherwise provided in this article, a custodian shall not be required to give a bond for the performance of his duties.

(e) A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this article. (1959, c. 1166, s. 1.)

§ 33-73. Exemption of third persons from liability.—No issuer, transfer agent, bank, broker or other person acting on the instructions of or otherwise dealing with any person purporting to act as a donor or in the capacity of a custodian is responsible for determining whether the person designated by the purported donor or purporting to act as a custodian has been duly designated or whether any purchase, sale or transfer to or by or any other act of any person purporting to act in the capacity of custodian is in accordance with or authorized by this article, or is obliged to inquire into the validity or propriety under this article of any instrument or instructions executed or given by a person purporting to act as a donor or in the capacity of a custodian, or is bound to see to the application by any person purporting to act in the capacity of a custodian of any money or other property paid or delivered to him. (1959, c. 1166, s. 1.)

§ 33-74. Resignation, death or removal of custodian; bond; appointment of successor custodian.—(a) Only an adult member of the minor's family, a guardian of the minor or a trust company is eligible to become successor custodian. A successor custodian has all the rights, powers, duties and immunities of a custodian designated in a manner prescribed by this article.

(b) A custodian, other than the donor, may resign and designate his successor by:

- (1) Executing an instrument of resignation designating the successor custodian; and
- (2) Causing each security which is custodial property and in registered form to be registered in the name of the successor custodian followed, in substance, by the words: "as custodian for
(name of minor)

- under the North Carolina Uniform Gifts to Minors Act"; and
- (3) Delivering to the successor custodian the instrument of resignation, each security registered in the name of the successor custodian and all other custodial property, together with any additional instruments required for the transfer thereof.

(c) A custodian, whether or not a donor, may petition the court for permission to resign and for the designation of a successor custodian.

(d) If the person designated as custodian is not eligible, renounces or dies before the minor attains the age of twenty-one years, the guardian of the minor shall be successor custodian. If the minor has no guardian, a donor, his legal representative, the legal representative of the custodian, an adult member of the minor's family, or the minor, if he has attained the age of fourteen years, may petition the court for the designation of a successor custodian.

(e) A donor, the legal representative of a donor, an adult member of the minor's family, a guardian of the minor or the minor, if he has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the

alternative, that the custodian be required to give bond for the performance of his duties.

(f) Upon the filing of a petition as provided in this section, the court shall grant an order, directed to the persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant such relief as the court finds to be in the best interests of the minor. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-75. **Accounting by custodian.** — (a) The minor, if he has attained the age of fourteen years, or the legal representative of the minor, an adult member of the minor's family, or a donor or his legal representative may petition the court for an accounting by the custodian or his legal representative.

(b) The court, in a proceeding under this article or otherwise, may require or permit the custodian or his legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-76. **Construction.** — (a) This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(b) This article shall not be construed as providing an exclusive method for making gifts to minors. (1959, c. 1166, s. 1.)

§ 33-77. **Short title.**—This article may be cited as the "North Carolina Uniform Gifts to Minors Act." (1955, c. 1061; 1959, c. 1166, s. 1.)

Chapter 34.

Veterans' Guardianship Act.

Sec.	Sec.
34-1. Title.	34-9. Qualifications of guardian; surety bond.
34-2. Definitions.	34-10. Guardian's accounts to be filed; hearing on accounts.
34-2.1. Guardian's powers as to property; validation of prior acts.	34-11. Failure to file account cause for removal.
34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.	34-12. Compensation at 5 percent; additional compensation; premiums on bonds.
34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.	34-13. Investment of funds.
34-5. Petition for appointment of guardian.	34-14. Application of ward's estate.
34-6. Certificate of Director prima facie evidence of necessity for appointment.	34-14.1. Payment of veterans' benefits to relatives.
34-7. Same in regard to guardianship of mentally incompetent wards.	34-15. Certified copy of record required by Bureau to be furnished without charge.
34-8. Notice of filing of petition.	34-16. Commitment to Veterans Administration, etc., for care or treatment.
	34-17. Discharge of guardian.
	34-18. Construction of chapter.

§ 34-1. **Title.**—This chapter shall be known as "The Veterans' Guardianship Act." (1929, c. 33, s. 1.)

§ 34-2. **Definitions.**—In this chapter:

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

"Estate" means income on hand and assets acquired partially or wholly with "income."

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward.

"Income" means moneys received from the Veterans Administration and revenue or profit from any property wholly or partially acquired therewith.

The term "person" includes a partnership, corporation or an association.

The term "ward" means a beneficiary of the Bureau. (1929, c. 33, s. 2; 1945, c. 723, s. 2; 1961, c. 396, s. 1.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration, referred to in § 34-16.

§ 34-2.1. **Guardian's powers as to property; validation of prior acts.**—Any guardian appointed under the provisions of this chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of chapter 33 or chapter 35 of the General Statutes of North Carolina, as the case may be, and the provisions of such chapters concerning the custody, management and disposal of property shall apply in any case not provided for by this chapter. All acts heretofore performed by guardians appointed under the provisions of this chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this chapter, if such acts were performed under and in conformity with the provisions of chapter

33 or chapter 35 of the General Statutes of North Carolina, as the case may be. (1955, c. 1272, s. 1.)

§ 34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (1929, c. 33, s. 3.)

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.—Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. If any case, upon presentation of a petition by an attorney of the Bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be guardian of more than five wards if they are all members of the same family. (1929, c. 33, s. 4.)

§ 34-5. Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

§ 34-6. Certificate of Director prima facie evidence of necessity for appointment.—Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity of such appointment. (1929, c. 33, s. 6.)

§ 34-7. Same in regard to guardianship of mentally incompetent wards.—Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of

any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

§ 34-8. Notice of filing of petition.—Upon the filing of a petition for the appointment of a guardian, under the provisions of this chapter, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 34-9. Qualifications of guardian; surety bond.—Before making an appointment under the provisions of this chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this State. The court shall have power from time to time to require the guardian to file an additional bond.

No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

Cross Reference.—As to bond required of general guardians, see § 33-12 et seq.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.—Every guardian, who shall receive on account of his ward any moneys from the Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirement of exhibiting such investments and bank statements, and the clerk of the superior court shall not be required to so certify as to the accounts of such banks, except that in addition to the officers verifying the account, there shall be added a certificate of other officers of the bank certifying that all assets referred to in the account are held by the guardian. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the North Carolina Veterans Commission by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1; 1945, c. 723, s. 2; 1961, c. 396, s. 2.)

Editor's Note.—See 11 N.C.L. Rev. 232 as to 1933 amendment.

§ 34-11. Failure to file account cause for removal.—If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within thirty days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts

as required by this chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

§ 34-12. Compensation at 5 percent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed five percent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2.)

Additional Compensation.—Where the clerk entered an order allowing a guardian additional compensation for extraordinary services and the Veterans Administration failed to perfect its appeal from the clerk's order, and thereafter applied to the judge

of the superior court for a writ of certiorari, the petition for certiorari was denied upon the court's finding of laches and demerit. In re Snelgrove, 208 N.C. 670, 182 S.E. 335 (1935).

§ 34-13. Investment of funds.—Every guardian shall invest the funds of the estate in any of the following securities:

- (1) United States government bonds.
- (2) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.
- (3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court.
- (4) By investing the funds of the estate in a savings account, or savings share account, or optional savings share account, or stock of any federal savings and loan association organized under the laws of the United States and located in the State of North Carolina or of any building or savings and loan association organized and licensed under the laws of this State, to the extent that such investment is insured by the Federal Savings and Loan Insurance Corporation.
- (5) By depositing the funds either in a savings account in any federally insured bank in North Carolina or by purchasing a certificate of deposit issued by any federally insured bank in North Carolina.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension

shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1.)

As to purchase of home for use of dependent sister, see *Patrick v. Branch Banking & Trust Co.*, 216 N.C. 525, 5 S.E.2d 724 (1939).

Applied in *First-Citizens Bank & Trust Co. v. Parker*, 225 N.C. 480, 35 S.E.2d 489 (1945).

§ 34-14. Application of ward's estate.—A guardian may apply any income received from the Veterans Administration for the benefit of the ward in the same manner and to the same extent as other income of the estate without the necessity of securing an order of court. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3.)

Cross Reference.—For subsequent statute affecting this section, see § 34-14.1.

§ 34-14.1. Payment of veterans' benefits to relatives.—(a) It shall be lawful for a guardian or trustee of a mentally disordered or incompetent Veterans Administration beneficiary to pay to or for

- (1) The spouse or children or mother or father of the ward, whether or not said spouse or children or mother or father received any part of their maintenance from the ward prior to the appointment of said guardian or trustee, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over such guardian or trustee;
- (2) A brother, sister, nephew, niece, uncle, aunt, or any other relative of the ward, who, prior to the appointment of said guardian or trustee, received some part of his or her maintenance from said ward, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over said guardian or trustee and by a superior court judge.

(b) Such approval may be granted upon a duly verified petition filed before the clerk of the superior court having jurisdiction of such guardian or trustees setting forth

- (1) The amount of benefits received by the guardian or trustee on behalf of the ward from the Veterans Administration;
- (2) The amount of periodic disbursements, if any, made by such guardian or trustee for the maintenance and support of the ward;
- (3) The person for whose maintenance and support payment is to be made and the relationship of such person to the ward;
- (4) If the person for whose maintenance and support payment is to be made is one described in subsection (a) (2) above, facts showing that prior to the appointment of said guardian or trustee such person received some part of his or her maintenance from said ward;
- (5) The amount to be paid and the period when such payments are to be made.

Notice of hearing upon such petition shall be as provided by G.S. 34-14, and no person or persons, other than the guardian or trustees and petitioner, need to be made parties to any such proceeding. If the guardian or trustee is the petitioner, no other parties shall be necessary. (1945, c. 479, ss. 1, 2; 1953, c. 122, s. 1; 1955, c. 1272, s. 2.)

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or the North Carolina Veterans Commission to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or the North Carolina Veterans Commission with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2.)

§ 34-16. Commitment to Veterans Administration, etc., for care or treatment.—(a) Whenever, in any proceeding under the laws of this State for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this State; and nothing in this section shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this State shall be subject to the rules and regulations of the Veterans Administration or other agency. The chief officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall, with respect to such person, be vested with the same powers as superintendents of State hospitals for mental diseases within this State with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this State at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this section are so conditioned.

(b) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans Administration, or other agency of the United States government for care or treatment shall have the same force and effect as to the committed person while in this State as in the jurisdiction in which is situated the court entering the judgment or making the order; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (a) of this section with respect to persons committed by the courts of this State. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this State by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

(c) Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the

committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans Administration or other agency of the United States pursuant to the original commitment. (1929, c. 33, s. 16; 1943, c. 424.)

Cross Reference.—As to rules and regulations for State hospitals and powers exercised by superintendents thereof, see chapter 35 of the General Statutes.

§ 34-17. Discharge of guardian.—When a minor ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this State shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. The certificate of the Director, or his representative, setting forth the fact that an incompetent ward has been rated competent by the Bureau on examination in accordance with the laws and regulations governing such Bureau shall be prima facie evidence upon which the court may declare such ward competent. (1929, c. 33, s. 17; 1955, c. 1272, s. 3.)

§ 34-18. Construction of chapter.—This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

Chapter 35.

Persons with Mental Diseases and Incompetents.

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35-61 to 35-63. [Transferred.]

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- 35-70. Creation of Council; membership; terms; vacancies.
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ARTICLE 1.*Definitions.*

§ 35-1. **Inebriates defined.** — Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to per-

son or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing. (1879, c. 329; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; Rev., s. 1892; C. S., s. 2284.)

This chapter deals only with inebriates and mental incompetents in matters of a civil nature. There is no provision therein for the commitment or discharge of a person who stands indicted, charged with the commission of a felony, who pleads

that he is incapable for the want of understanding to plead to the bill of indictment or prepare his defense. In re Tate, 239 N.C. 94, 79 S.E.2d 259 (1953).

Cited in In re Anderson, 132 N.C. 243, 43 S.E. 649 (1903).

§ 35-1.1. Definitions of mental disease, mental defective, etc.—The words “mental disease,” “mental disorder” and “mental illness” shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include “lunacy,” “unsoundness of mind,” and “insanity.”

A “mental defective” shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable. The term shall be construed to include “feeble-minded,” “idiot,” and “imbecile.” (1945, c. 952, s. 2.)

A cerebral hemorrhage is a mental illness within the meaning of this section, and in an inquisition of lunacy in which there is no evidence of mental incapacity other than that resulting from a cerebral

hemorrhage, a charge defining mental incapacity in the language of this section is without error. In re Humphrey, 236 N.C. 141, 71 S.E.2d 915 (1952).

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardian.—Any person, in behalf of one who is deemed a mental defective, inebriate, or mentally disordered, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed mental defective, inebriate or mentally disordered person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed mental defective, inebriate or mentally disordered person, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed mental defective, inebriate or mentally disordered person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed mental defective, inebriate, mentally disordered, or incompetent person may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed mental defective, inebriate,

mentally disordered, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered or incompetent person by inquisition of a jury as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of § 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State Hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777.)

Local Modification. — Guilford: 1965, c. 444, amending 1945, c. 102.

Cross References.—As to appointment, duties, etc., of guardian generally, see § 33-1 et seq. As to power of guardian of insane or minor wife to dissent from husband's will, see § 30-1. As to guardian's power to claim benefits under Workmen's Compensation Act, see § 97-49. As to bond required of guardian, see § 33-12 et seq. As to commitment of insane person to State hospital, see § 122-36 et seq. As to proceedings in case of insanity of a citizen of another state, see § 122-38 et seq.; of an alien, see § 122-40.1. As to service of summons upon an insane person, see § 1-97. As to right of alleged incompetent to examine his will left in a sealed envelope with the clerk, see note to § 31-11.

Section Provides Procedure.—The effect of this section is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice therein provided being served upon the alleged incompetent, thereby dispensing with the

necessity of issuing a summons. The notice to an incompetent to appear at a time and place named to present evidence and show cause, if any, why he should not be declared incompetent serves every function of a summons. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

Nature of Proceeding. — An inquisition of lunacy as regards the person whose sanity is in question is a proceeding in personam; as it affects his property is a proceeding in rem. Such an inquisition is certainly not a criminal action as contemplated by G.S. 1-5. It is not a civil action as defined in G.S. 1-2. And by G.S. 1-3 "every other remedy is a special proceeding." Certainly such an inquisition is of a civil nature, though it would seem it is not a special proceeding under G.S. 1-3. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Presence of Party.—The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. Bethea v. McLennon, 23 N.C. 523 (1841).

Erroneous Instruction.—In a proceeding

for the appointment of a guardian for respondent on the ground that he was incompetent for "want of understanding to manage his own affairs," respondent was held entitled to a new trial for the reason that the court, although giving the respective contentions of the parties upon the issue, failed to define the legal meaning of the term or instruct the jury as to the standard of mental capacity recognized by the law. *In re Worsley*, 212 N.C. 320, 193 S.E. 666 (1937).

Mental incapacity is only cause for appointment of a guardian under this section. This section does not make physical incapacity alone, however complete, grounds for such appointment. *Goodson v. Lehmon*, 224 N.C. 616, 31 S.E.2d 756 (1944).

A finding of the jury that a person is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, whatever the cause may be. And this is true even where the jury finds that the defendant is not a lunatic or idiot, or that he was not wholly deprived of reason. *In re Denny*, 150 N.C. 423, 64 S.E. 187 (1909). See *In re Anderson*, 132 N.C. 243, 43 S.E. 649 (1903).

And Ward Is Presumed to Lack Capacity after Guardian Appointed.—Where a person has been adjudged incompetent for want of understanding to manage his own affairs, under this section, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his own affairs, insofar as parties and privies to the proceeding are concerned; and, while not conclusive as to others, it is presumptive, and the presumption continues unless rebutted in a proper proceeding. *Sutton v. Sutton*, 222 N.C. 274, 22 S.E.2d 553 (1942).

§ 35-2.1. **Guardian appointed when issues answered by jury in any case.**—When a jury in the trial of any civil or criminal case shall find, in answer to appropriate issues, that a person is insane or without sufficient mental capacity to conduct business, it shall have the same effect as an adjudication before the clerk of the superior court and the clerk may forthwith appoint a guardian or trustee for the person so adjudged insane or incompetent. (1945, c. 96.)

§ 35-3. **Guardian appointed on certificate from hospital for insane or training school.**—If any person is confined in any State, territorial or governmental asylum or hospital for the insane in this State or State training school or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital or training school declaring such person to be of insane mind and memory or mentally retarded, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital or training school is situated and certified under the seal of court, shall be suffi-

Confirmation of Finding.—The report of the jury need not be formally "confirmed" by the clerk as the statute only requires it to be "filed and recorded." *Sims v. Sims*, 121 N.C. 297, 28 S.E. 407 (1897).

Conclusiveness of Adjudication.—An inquisition of lunacy, finding a person a lunatic, is only prima facie evidence of the fact, and may be rebutted by proof. *Christmas v. Mitchell*, 38 N.C. 535 (1845).

An adjudication of insanity is conclusive as to the parties to the proceeding and their privies, but as to others it is evidence of incompetency and raises a mere presumption to that effect which is not conclusive but may be rebutted. *Medical College of Virginia v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952).

An adjudication of mental incompetency raises no presumption of mental incapacity antedating the adjudication. At most it is merely evidence to be considered by the jury on the issue of mental incapacity and it must not be unreasonably remote in time. *In re Knight's Will*, 250 N.C. 634, 109 S.E.2d 470 (1959).

Applied in *Dowell v. Jacks*, 58 N.C. 417 (1860); *In re Dewey*, 206 N.C. 714, 175 S.E. 161 (1934); *In re Humphrey*, 236 N.C. 141, 71 S.E.2d 915 (1952); *In re Gamble*, 244 N.C. 149, 93 S.E.2d 66 (1956).

Quoted in *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E.2d 645 (1954); *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

Cited in *In re Sylivant*, 212 N.C. 343, 193 S.E. 422 (1937); *In re Cook*, 218 N.C. 384, 11 S.E.2d 142 (1940); *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943); *In re Jeffress*, 223 N.C. 273, 25 S.E.2d 845 (1943).

cient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of nineteen hundred and twenty-four, as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatics, and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section on certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (1860-1, c. 22; Code, s. 1673; Rev., ss. 1891, 4609; 1907, c. 232; C. S., s. 2286; 1927, c. 160, s. 1; 1939, c. 330; 1953, c. 675, s. 31; 1959, c. 1001; 1963, c. 1184, s. 37.)

Editor's Note. — The 1963 amendment inserted "or mentally retarded" after the word "memory" near the middle of the first sentence.

Certificate Must Be from Superintendent of Hospital under Governmental Control.—The certificates of the superintendents of hospitals for the insane, which are to be received as sufficient evidence for the clerk to appoint a guardian for an insane person, relate to the superintendents of such hospitals under govern-

mental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians ad litem on their certificates is void. *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921).

Applied in *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954); *In re Wilson*, 257 N.C. 593, 126 S.E.2d 489 (1962).

Cited in *Somers v. Board of Comm'rs*, 123 N.C. 582, 31 S.E. 873 (1898).

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.—Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

- (1) There is real property situate in the county of said clerk in which a non-resident of the State of North Carolina has an interest or estate;
- (2) That said nonresident is insane or incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and
- (3) That such incompetent or insane nonresident has no guardian in the State of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said insane person, or incompetent, in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said insane person, or incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive proof of the fact of incompetency or insanity and of the appointment of such guardian of the residence of the insane person or incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this State under this article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1949, c. 986.)

Editor's Note.—For brief comment on this section, see 27 N.C.L. Rev. 457.

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal.—When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence; provided, however, that in all cases where a guardian has been appointed the cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner (the petition may be filed by the person formerly adjudged to be insane, lunatic, inebriate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. The petitioner may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1879, c. 324, s. 4; Code, s. 1672; 1901, c. 191; 1903, c. 80; Rev., s. 1893; C. S., s. 2287; 1937, c. 311; 1941, c. 145; 1949, c. 124; 1955, c. 691.)

Local Modification.—Guilford: 1965, c. 444, amending 1945, c. 102.

Editor's Note.—For comment on the 1941 amendment, see 19 N.C.L. Rev. 486.

For note on guardianship and restoration to sanity, see 41 N.C.L. Rev. 279 (1963).

Constitutionality of Section.—This section, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional. *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921).

Section May Not Be Invoked by Person Committed to State Mental Institution.—A person committed to a State mental institution under article 3, chapter 122, of the General Statutes, may not invoke the provisions of this section for restoration of sanity by jury trial. The remedy is by habeas corpus. *In re Harris*, 241 N.C. 179, 84 S.E.2d 808 (1954).

Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. *Sims v. Sims*, 121 N.C. 297, 28 S.E. 407, 40 L.R.A. 737, 61 Am. St. Rep. 665 (1897).

Appeal and Review.—Prior to the 1949 amendment no right of appeal was given by this section. *In re Sylvant*, 212 N.C. 343, 193 S.E. 422 (1937); *In re Dry*, 216 N.C. 427, 5 S.E.2d 142 (1939); *In re Jeffress*, 223 N.C. 273, 25 S.E.2d 845 (1943).

And prior to the amendment it was held that the proper method of review was by application for certiorari. *In re Jeffress*, 223 N.C. 273, 25 S.E.2d 845 (1943). See *In re Sylvant*, 212 N.C. 343, 193 S.E. 422 (1937).

Where an incompetent party was found competent under this section prior to the 1949 amendment, it was held that the superior court had power to review the matter, on application of the trustee or guardian, and it would seem that the procedure provided in § 35-2 on appeal might appropriately be followed, although certiorari would ordinarily be proper. *In re Jeffress*, 223 N.C. 273, 25 S.E.2d 845 (1943).

Applied in *In re Wilson*, 257 N.C. 593, 126 S.E.2d 489 (1962), commented on in 41 N.C.L. Rev. 279 (1963).

§ 35-4.1. Discharge of guardian by clerk on testimony of one or more practicing physicians.—When any person for whom a guardian has been appointed by reason of his commitment to and confinement in a State hospital or private hospital for mental cases or State school for the feeble-minded shall have been discharged from that commitment by the hospital or school, he may petition, or in his behalf his natural or legal guardian or any interested responsible person may petition, the clerk of superior court of the county of his residence or the clerk of superior court of the county in which the guardian was appointed for the discharge of such guardian. The guardian shall be notified thereupon and made a party to such action, which shall be held in, or transferred to, if requested by the guardian, the county in which the guardian was appointed.

The clerk shall hold a hearing, which at the option of the petitioner may be without jury, and shall appoint one or more licensed physicians to examine the person in question and to make an affidavit as to his mental state and competency to conduct his business, make contracts and sell property. If the hearing is before a jury and the jury determines that such person is competent, or if the hearing is without a jury and the clerk determines that such person is competent on the basis of evidence presented by the interested parties and the medical affidavits, the clerk shall discharge the guardian, and the person shall be able to conduct his affairs and business, make contracts, and transfer property as if he never had been committed or declared incompetent. When any such determination by the jury or the clerk, in the absence of a jury, is adverse to the person in whose behalf such petition has been presented, such petitioner may appeal from the finding of said jury or clerk to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1947, c. 537, s. 22; 1949, c. 124.)

Applied in *In re Wilson*, 257 N.C. 593,
126 S.E.2d 489 (1962), commented on in
41 N.C.L. Rev. 279 (1963).

§ 35-4.2. Restoration of rights of mentally disordered persons where no guardian had been appointed.—When any person who shall have been committed to a State hospital or State school for the feeble-minded or to a private hospital for mental cases and for whom no guardian has been appointed shall have been discharged from that commitment, he may petition or in his behalf any interested person may petition the clerk of the superior court of the county in which such person has residence for the restoration of any rights of which he may have been deprived by his commitment.

The clerk shall then hold a hearing, which at the option of the petitioner may be without jury, and shall appoint one or more licensed physicians to examine the person in question, and to make an affidavit as to his mental state and competency to conduct his business, make contracts, and sell property. On the basis of evidence presented by the person and the medical affidavit or affidavits the clerk shall determine the competency of the person and may if it is deemed proper issue an order restoring any rights of which the person may have been deprived by his commitment. (1947, c. 537, s. 23.)

§ 35-5. Legal rights restored upon certificate of sanity by superintendent of hospital.—Any person who has been declared of unsound mind and memory under § 35-3, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or a notary public for the county in which the hospital wherein such person had been confined is located. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of

service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights. (1909, c. 176; C. S., s. 2288; 1953, c. 256, s. 10.)

§ 35-6. Estates without guardian managed by clerk.—When any person is declared to be of nonsane mind or inebriate and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (1846, c. 43, s. 1; R. C., c. 57, s. 6; Code, s. 1676; Rev., s. 1894; C. S., s. 2289.)

Cross References.—As to estates of orphans whose guardians have been removed, see § 33-50 et seq. As to defenses deemed pleaded by insane party, see § 1-16. As to the appointment of a guardian ad litem, see § 1-65.

How Receiver Appointed.—The appointment of a receiver for an insane person's estate should be made only on the

motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N.C. 359, 25 S.E. 963 (1896).

Cited in Smith v. Smith, 106 N.C. 498, 11 S.E. 188 (1890).

§ 35-7. Allowance to abandoned insane wife.—When any insane wife is abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband. (1858-9, c. 52, s. 1; Code, s. 1686; Rev., s. 1895; C. S., s. 2290.)

Cross Reference.—As to alimony, see § 50-16.

§ 35-8. Renewal of obligations by guardians.—In all cases where a guardian has been appointed for a person who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drink or other causes, and said person is the maker or one of the makers, a surety or one of the sureties, an indorser or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated, for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed by such guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1.)

§ 35-9. Guardian not liable.—The execution of any note, bond or other obligation for the payment of money mentioned in § 35-8 by the guardian of the inebriate, lunatic, or incompetent, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2.)

ARTICLE 3.

Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage.—When it appears to any clerk of the superior court by report of the guardian of any mental defective, inebriate or mentally disordered person, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. The procedure for any sale made pursuant to this section shall be as provided by article 29A of chapter 1 of the General Statutes. Any order made under the authority of this section for the sale, mortgage or renting of real estate, or both real and personal property, shall be made by and all proceedings shall be had before the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order applied for is for the sale, mortgage or renting of personal property, then said order may be made and the proceedings may be had before the clerk of the superior court of the county in which all or any part of the personal property is situated; such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by a commissioner to be appointed by the clerk; or the clerk may direct the guardian to file his petition for such purpose. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1801, c. 589; R. C., c. 57, s. 4; Code, s. 1674; Rev., s. 1896; C. S., s. 2291; 1931, c. 184, s. 1; 1945, c. 426, s. 3; c. 952, s. 4; c. 1084, s. 3; 1949, c. 719, s. 2.)

Cross References.—See note to § 35-11. As to manner in which sales and rentals shall be made, see §§ 33-21 et seq., 33-31 and 33-31.1.

Editor's Note.—For law prior to 1931 amendment, see 9 N.C.L. Rev. 392.

For act validating proceedings instituted by guardian relating to estate of ward under provisions of this chapter, see Session Laws 1945, c. 426, s. 8.

Judicial Character of Sales. — Sales of real property of a lunatic in proceedings before the clerk of the superior court acting as a probate court are judicial sales. *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462 (4th Cir. 1910).

Cited in *In re Edwards*, 243 N.C. 70, 89 S.E.2d 746 (1955).

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.—When it appears to the clerk, upon the petition of the guardian of any mental defective, inebriate or mentally disordered person, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the mental defective, inebriate or mentally disordered person would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such person with mental disorder or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed

to include deeds in trust. All petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of real estate, both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale sought in the petition is for the sale or mortgage of personal property, the petition shall be filed in the office of the clerk of the superior court of the county in which any or all of such personal property is situated. The procedure for any sale made pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (R. C., c. 57, s. 5; Code, s. 1675; Rev., s. 1897; C. S., s. 2292; 1931, c. 184, s. 2; 1945, c. 426, s. 4; c. 952, s. 5; c. 1084, s. 4; 1949, c. 719, s. 2.)

Cross References.—As to sale of estates of wards generally, see § 33-31 et seq. As to release of lands condemned under power of eminent domain, see § 40-22.

Prior Debts of Mentally Disordered Person.—As to debts of lunatic contracted prior to inquisition of lunacy, see *Blake v. Respass*, 77 N.C. 193 (1877); *Adams v. Thomas*, 81 N.C. 296 (1879); *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462 (4th Cir. 1910).

As to sale of contingent interest of lunatic, see *Smith v. Witter*, 174 N.C. 616, 94 S.E. 402 (1917).

Title of Purchaser.—As to purchaser at sale of lunatic's real property not being chargeable with errors or irregularities in the proceedings, see *Rexford v. Brunswick-Balke-Collender Co.*, 181 Fed. 462 (4th Cir. 1910).

Judgment against Lunatic.—As to satisfaction of judgment against lunatic, see *Blake v. Respass*, 77 N.C. 193 (1877).

Cited in *In re Edwards*, 243 N.C. 70, 89 S.E.2d 746 (1955).

§ 35-12: Repealed by Session Laws 1965, c. 854.

§ 35-13. Wife of insane person entitled to special proceeding for sale of his property.—Every woman whose husband is a lunatic or insane and is confined in an asylum in this State, and who was living with her husband at the time he was committed to such asylum, if she be in needy circumstances, shall have the right to bring a special proceeding before the clerk of the superior court to sell the property of her insane husband, or so much thereof as is deemed expedient, and have the proceeds applied to her support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the insane husband is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2; C. S., s. 2294.)

ARTICLE 4.

Mortgage or Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.—In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall ap-

pear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. All petitions filed under the authority of this section shall be filed in the office of the clerk of the superior court of the county where the real estate or any part of same is situated. (1935, c. 59, s. 1; 1945, c. 426, s. 5; c. 1084, s. 5.)

Editor's Note.—For analysis of article, see 13 N.C.L. Rev. 376. **Stated in** Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956).

§ 35-15. General law applicable; approved by judge.—The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or the judge holding the courts in the judicial district wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6.)

Cross Reference.—As to general law on special proceedings, see § 1-393 et seq.

Sale May Be Authorized.—This section does not limit the court's power to authorizing a mortgage. The court may authorize a sale. Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963).

And Transfers Right of Survivorship to Fund.—A sale does not destroy or separate the interests of the tenants by entireties if one of the parties is incompetent. The right of survivorship is transferred to the fund. Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963).

§ 35-16. Proceeding valid in passing title. — Any mortgage, deed, or deed of trust executed under authority of this article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3.)

§ 35-17. Clerk may direct application of funds; purchasers and mortgagees protected.—In all cases conducted under this article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4.)

The discretion given the court by this section is limited to the protection of the incompetent's interests. Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963).

vivorship incident to the entireties estate is not within the court's discretion. Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963).

The power to dissolve the rights of sur-

§ 35-18. Prior sales and mortgages validated. — Any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to March 5, 1935, under circumstances contemplated in this article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5.)

ARTICLE 5.

Surplus Income and Advancements.

§ 35-19. Income of insane widowed mother used for children's support.—When a father dies leaving him surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane

mother shall in such cases as are provided for in § 35-20 be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder. (1905, c. 546; Rev., s. 1899; C. S., s. 2295.)

§ 35-20. Advancement of surplus income to certain relatives.—When any nonsane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessities and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any nonsane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part. (R. C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C. S., s. 2296; Ex. Sess. 1924, c. 93.)

Cross Reference.—As to payment of pension funds to dependent relatives of incompetent veterans, see § 34-14.1.

History of §§ 35-20 to 35-27.—See *Ford v. Security Nat'l Bank*, 249 N.C. 141, 105 S.E.2d 421 (1958).

Evidence.—The evidence tended to show that petitioner was the sister of an insane veteran, that prior to and after entering the army he assisted in her support, that he was unmarried and had no other dependents, that his guardian had on hand more than enough to amply provide for his support, and that petitioner was

destitute and without means of support. It was held that the clerk of the superior court, with the approval of the resident judge or presiding judge, had the power, upon proper findings from the evidence, to order guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support. *Patrick v. Branch Banking & Trust Co.*, 216 N.C. 525, 5 S.E.2d 724 (1939).

Cited in *In re Jones*, 211 N.C. 704, 191 S.E. 511 (1937).

§ 35-21. Advancement to adult child or grandchild.—When such nonsane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessities and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1.)

Findings Sufficient to Support Order for Advancements.—Finding to the effect that an incompetent was incurably insane, that his estate was greatly in excess of any needs for his support, hospitalization and maintenance, that his adult children were in dire financial need, and that advancements to them from their father's

estate under this section would operate for the better promotion and advancement in life of the children, support an order directing advancements to be made to the children out of the surplus estate of the incompetent. *Ford v. Security Nat'l Bank*, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35-22. For what purpose and to whom advanced.—Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (R. C., c. 57, s. 10; Code, s. 1678; Rev., s. 1901; C. S., s. 2297.)

Evidence Showing Need and Proper Purpose for Advancements.—Where the impoverished condition of an incompetent's adult children and the adequacy of his estate were not challenged, and while the order for advancements did not restrict the use of the funds to the purchase

of a home, the applicants had requested advancements for that purpose, it was held that the evidence demonstrated a need and a proper purpose for advancements, and was sufficient to support the findings and the judgment. *Ford v. Security Nat'l Bank*, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35-23. Distributees to be parties to proceeding for advancements.—In every application for such advancements, the guardian of the nonsane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R. C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C. S., s. 2298.)

In a proceeding requesting an increase in the allowance to the dependent of a permanently insane veteran, all persons who would be entitled to a distributive

share of the estate in case of death are necessary parties under this section. *Patrick v. Branch Banking & Trust Co.*, 241 N.C. 76, 84 S.E.2d 277 (1954).

§ 35-24. Advancements to be equal; accounted for on death.—The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R. C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C. S., s. 2299.)

§ 35-25. Advancements to those most in need.—When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (R. C., c. 57, s. 13; Code, s. 1681; Rev., s. 1904; C. S., s. 2300; 1925, c. 136, s. 2.)

§ 35-26. Advancements to be secured against waste.—It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (R. C., c. 57, s. 14; Code, s. 1682; Rev., s. 1905; C. S., s. 2301.)

Order Not Reversed Because Advancements Not Secured Against Waste.—An order under § 35-21 would not be held erroneous for want of direction in the order securing the advancements from being wasted, where the finding that the ad-

vancements would operate for the better promotion in life of the children was supported by evidence, even though it might later turn out that the advancements were wasted. *Ford v. Security Nat'l Bank*, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35-27. Appeal; removal to superior court.—Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (R. C., c. 57, s. 15; Code, s. 1683; Rev., s. 1906; C. S., s. 2302.)

Cited in *In re Cook*, 218 N.C. 384, 11 S.E.2d 142 (1940).

§ 35-28. **Advancements only when insanity permanent.**—No such application shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (R. C., c. 57, s. 16; Code, s. 1684; Rev., s. 1907; C. S., s. 2303.)

Veterans Administration Is Proper Party to Proceeding.—In a proceeding requesting an increase in the allowance of a permanently insane veteran, the Veterans

Administration is a proper party under this section and § 35-29. *Patrick v. Branch Banking & Trust Co.*, 241 N.C. 76, 84 S.E.2d 277 (1954).

§ 35-29. **Decrees suspended upon restoration of sanity.**—Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (R. C., c. 57, s. 17; Code, s. 1685; Rev., s. 1908; C. S., s. 2304.)

Cross Reference.—See note to § 35-28.

ARTICLE 5A.

Gifts from Income for Certain Purposes.

§ 35-29.1. **Gifts authorized with approval of judge of superior court.**—With the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition the guardian or trustee of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 111, s. 1.)

Editor's Note.—For comment on gifts by guardian from estate of incompetent ward, see 43 N.C.L. Rev. 616 (1965).

Article Limits Power of Trustee or Guardian to Make Gifts.—This and the following two articles limit the power of a guardian or a trustee to make gifts of the character enumerated therein. He may do so only with the approval of the resident judge of the superior court of the county in which the guardian or trustee was appointed. To secure approval, the guardian or trustee must file a verified petition setting out what authority he wishes and the reasons justifying his request. In re *Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts.—A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by §§ 35-29.1, 35-29.4, 39-29.5, 39-29.10, 39-29.11 and 39-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re *Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

Thus, Court May Not Authorize Gift Because It Believes Gift Should Be Made.—To authorize a gift from an incompe-

tent's estate "if the court under all of the circumstances believes that such gift should be made," would permit the court to do that which the lunatic had not done and would not do if sane. Such an order would amount to a taking of property in derogation of lunatic's constitutional rights. In re *Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

But Proposed Act by Trustee Need Not Enhance Ward's Estate.—No court should authorize a guardian, or trustee, of an estate of an incompetent to act in a manner which will prove detrimental to the estate of his ward; but it does not follow that the proposed action must be one which benefits or enhances the estate of the ward. In re *Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

And Gifts of Income or Principal May Be Authorized.—While an incompetent's property may not, either with legislative sanction or court order, be taken for charitable purposes notwithstanding the part not taken is ample for incompetent's needs, it is nonetheless true that courts of equity have authorized the gift of a part of incompetent's income or principal. In re *Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

On Finding Incompetent Would Probably Have Made Gift If Sane.—A court may authorize a fiduciary to make a gift

of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964); In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

What it is necessary to establish is that the act proposed by the trustee of an incompetent is "that which it is probable the lunatic would himself have done," or "as it is probable he would have acted for himself, if he were of sound mind." In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35-29.2. **Prerequisites to approval by judge.** — The judge shall not approve such gifts unless it appears to his satisfaction that:

- (1) After the making of such gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gifts, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws;
- (4) The aggregate of such gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for such gifts in computing federal income tax liability. (1963, c. 111, s. 2.)

Cited in In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35-29.3. **Fact that incompetent had not previously made similar gifts.**—The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 111, s. 3.)

§ 35-29.4. **Validity of gift.**—A gift made with the approval of the judge under the provisions of this article shall be deemed a gift by the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 111, s. 4.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 5B.

Gifts from Principal for Certain Purposes.

§ 35-29.5. **Gifts authorized with approval of judge of superior court.**—With the approval of the resident judge of the superior court of the district in which the guardian or trustee was appointed upon a duly verified petition, the guardian or trustee of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 112, s. 1.)

Article Limits Power of Guardian or Trustee to Make Gifts.—See note to § 35-29.1. **When Gift May Be Authorized.**—See note to § 35-29.1.

§ 35-29.6. **Prerequisites to approval by judge.**—The judge shall not approve such gifts unless it appears to his satisfaction that:

- (1) The making of such gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life;
- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (3) Each donee is a donee qualified to receive tax-deductible gifts under federal and State income tax laws;
- (4) The making of such gifts will not jeopardize the rights of any creditor of the incompetent; and
- (5) It is improbable that the incompetent will recover competency during his or her lifetime;
- (6) Either:
 - a.
 1. The incompetent, prior to being declared incompetent, executed a paper-writing, with the formalities required by the laws of North Carolina for the execution of a valid will;
 2. Specific legacies, bequests or devices of specific amounts of money, income or property included in such paper-writing will not be jeopardized by making such gifts;
 3. All residuary legatees and devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian or trustee was appointed, within the ten-day period;
 - b.
 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
 2. All persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the ten-day period. (1963, c. 112, s. 2.)

The proceeding under this article is in personam. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And the incompetent and her guardian are the only necessary parties. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death.—This section makes a condition precedent

to the judge's approval "at least ten (10) days written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompe-

tent died intestate contemporaneously with the filing of the petition. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court. — This section recognizes the contingent or potential interest of those who would probably benefit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then competent, would probably not act as the

trustee proposes to act. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding. — Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and this section does not purport to make them parties, to a proceeding initiated by the trustee. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice outside State. — See In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Cited in In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35-29.7. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.6.—For purposes of § 35-29.6 (6) a of this article, if such paper-writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific legatees and devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary legatees and devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee and devisee. (1963, c. 112, s. 3.)

§ 35-29.8. Notice to minors and incompetents under § 35-29.6.—If any person, to whom notice must be given under the provisions of § 35-29.6 (6) of this article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 112, s. 4.)

§ 35-29.9. Objections to proposed gift; fact that incompetent had previously made similar gifts.—If any objection is filed by one to whom notice has been given under the terms of this article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 112, s. 5.)

§ 35-29.10. Validity of gift.—A gift made with the approval of the judge under the provisions of this article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person. (1963, c. 112, s. 6.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§ 35-29.11. Declaration and gift for certain purposes authorized with approval of judge of superior court.—When a person has created a re-

vocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the incompetent to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 113, s. 1.)

Article Limits Power of Guardian or Trustee to Make Gifts. — See note to § 35-29.1.

When Gift May Be Authorized.—See note to § 35-29.1.

Modification of Trust Does Not Rewrite Contract.—Modification of a trust by making it irrevocable and donating the income

for the life of the incompetent trustor to certain designated charities does not rewrite the contract so as to affect the rights of the ultimate beneficiaries, but merely authorizes the trustees to do those things which the trustor, if competent, would probably have done. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35-29.12. Prerequisites to approval of gift.—The judge shall not approve the gift unless it appears to his satisfaction that:

- (1) It is improbable that the incompetent will recover competency during his or her lifetime;
- (2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (3) Each donee of any part of the life interest is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (4) Each donee of any part of the life interest is a donee qualified to receive tax-deductible gifts under federal and State income tax laws.
- (5) Either:
 - a. 1. The incompetent, prior to being declared incompetent, executed a paper-writing, with the formalities required by the laws of North Carolina for the execution of a valid will;
 2. Specific legacies, bequests or devises of specific amounts of money, income or property included in such paper-writing, will not be jeopardized by making such gifts;
 3. All residuary legatees and devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court, of the county in which the guardian or trustee was appointed, within the ten-day period;

- b. 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
2. All persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the ten-day period. (1963, c. 113, s. 2.)

The proceeding under this article is in personam. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And the incompetent and her guardian are the only necessary parties. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death.—This section makes a condition precedent to the judge's approval "at least ten (10) days written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court.—This section recognizes the contingent or potential interest of those who would probably bene-

fit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then competent, would probably not act as the trustee proposes to act. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding.—Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and this section does not purport to make them parties, to a proceeding initiated by the trustee. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice outside State.—See In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35-29.13. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.12.—For purposes of § 35-29.12 (5) a of this article, if such paper-writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific legatees and devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary legatees or devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee or devisee. (1963, c. 113, s. 3.)

§ 35-29.14. Notice to minors and incompetents under § 35-29.12.—If any person, to whom notice must be given under the provisions of § 35-29.12 (5) of this article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 113, s. 4.)

§ 35-29.15. **Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.**—If any objection is filed by one to whom notice has been given under the terms of this article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 113, s. 5.)

§ 35-29.16. **Validity of declaration and gift.** — Such declaration and gift, when made with the approval of the judge and under the provisions of this article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 113, s. 6.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 6.

Detention, Treatment, and Cure of Inebriates.

§§ 35-30 to 35-35.2: Repealed by Session Laws 1963, c. 1184, s. 35.

ARTICLE 7.

Sterilization of Persons Mentally Defective.

§ 35-36. **State institutions authorized to sterilize mental defectives.**—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased, feeble-minded or epileptic inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1.)

Editor's Note.—See 11 N.C.L. Rev. 254, for discussion of this article.

Former Law Unconstitutional. — The Act of 1929, ch. 34, relating to the same subject matter as the present article, was held unconstitutional, there being no pro-

vision giving a person ordered to be sterilized notice and hearing or affording him the right to appeal to the courts. *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933).

§ 35-37. **Operations on mental defectives not in institutions.**—It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased, feeble-minded or epileptic resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2; 1961, c. 186.)

§ 35-38. **Restrictions on such operations.** — No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible

executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded, mentally defective or epileptic inmate, patient or noninstitutional individual. (1933, c. 224, s. 3; 1961, c. 186.)

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded, epileptic, or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

- (1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.
- (2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.
- (3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.
- (4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.
- (5) In all cases as provided for in § 35-55. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186.)

Cross Reference. — As to necessity of sterilization of one adjudged insane before issuance of marriage license, see § 51-12.

§ 35-40. Eugenics Board created; membership, etc.—There is hereby created the Eugenics Board of North Carolina. All proceedings under this article shall be begun before the said Eugenics Board. This Board shall consist of five members and shall be composed of:

- (1) The Commissioner of Public Welfare of North Carolina,
- (2) The State Health Director,
- (3) The chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina,
- (4) The chief medical officer of the State Department of Mental Health,
- (5) The Attorney General of the State of North Carolina.

Any one of those officials may for the purpose of a single hearing delegate his power to act as a member of said Board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said

case. The said Board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said Board designated above as the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina. (1933, c. 224, s. 5; 1957, c. 1357, s. 16; 1959, c. 1019; 1963, c. 1166, s. 10.)

Editor's Note. — Pursuant to Session Laws 1963, c. 1166, s. 10, "State Department of Mental Health" has been substituted for "State Hospitals Board of Control."

§ 35-40.1. **Eugenics Board authorized to accept gifts.**—The Eugenics Board of North Carolina is hereby authorized and empowered to accept gifts from any source to be used by the Board for the furtherance of the purposes for which said Board was created. (1945, c. 784.)

§ 35-41. **Quarterly meetings.**—The Board of Eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services. (1933, c. 224, s. 6.)

§ 35-42. **Secretary of Board and duties.**—The Board shall appoint a secretary not a member of the Board who shall conduct the business of the Board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said Board in such matters as may be delegated to him by said Board. (1933, c. 224, s. 7.)

§ 35-43. **Proceedings before Board.**—Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in § 35-36 may be a member of the medical staff of said institution. The Eugenics Board may require that the petitioner submit additional social and medical history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said Board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in § 35-36 which shall be best suited to the interests of the said inmate or patient or to the public good. (1933, c. 224, s. 8; 1935, c. 463, s. 2.)

§ 35-44. **Copy of petition served on patient.**—(a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass and upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice

must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a term of superior court of the county in which the inmate, patient or individual resident resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this article, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in term or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least twenty days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93; 1961, c. 186.)

§ 35-45. Consideration of matter by Board. — The said Board at the time and place named in said notice, with such reasonable continuances from time to time and from place to place as the said Board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said Board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said Board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said Board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or

next of kin, or the solicitor, shall be made and preserved as part of the records of the case. (1933, c. 224, s. 10.)

§ 35-46. Board may deny or approve petition.—The said Board may deny the prayer of the said petition or if, in the judgment of the Board, the case falls within the intent and meaning of one or more of the circumstances mentioned in § 35-39, and an operation of asexualization or sterilization seems to said Board to be for the best interest of the mental, moral or physical improvement of the said patient, inmate or individual resident or for the public good, it shall be the duty of the Board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the Board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the Board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the Board to interfere in any manner with the right of the patient, inmate, or individual resident, or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense. (1933, c. 224, s. 11.)

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by the Board, such operation shall take place at such time as the said prosecutor petitioning shall designate. (1933, c. 224, s. 12.)

§ 35-48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit

or oral evidence and in determining such an appeal may consider the record of the proceedings before the Eugenics Board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Board appealed from and may enter such order as it deems just and right and which it shall certify to the said Board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Board, then, if no notice of appeal to the Supreme Court is filed within ten days after such decision, said Board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant. (1933, c. 224, s. 13; 1935, c. 463, s. 4.)

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county. (1933, c. 224, s. 14; 1935, c. 463, s. 5.)

§ 35-50. Appeal to Supreme Court.—Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the Supreme Court, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the Supreme Court shall operate as a stay of proceedings under any orders of the said Board and the superior court until the appeal be determined by the said Supreme Court. (1933, c. 224, s. 15.)

§ 35-51. Civil or criminal liability of parties limited.—Neither the said petitioner nor any other person legally participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation. (1933, c. 224, s. 16.)

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed in this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions. (1933, c. 224, s. 17.)

§ 35-53. Permanent records of proceedings before Board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said Eugenics Board. Such records shall not be open to public inspection except for such purposes as the court may from time to time approve. (1933, c. 224, s. 18.)

§ 35-54. **Construction of terms.**—Where the inmates, patients, or non-institutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean noninstitutional individual. (1933, c. 224, s. 19.)

§ 35-55. **Discharge of patient from institution.** — Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to the date of said parole or discharge. Upon the receipt of the signed approval of the Eugenics Board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient. (1933, c. 224, s. 20.)

§ 35-56. **Existing rights of surgeons unaffected.**—Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient. (1935, c. 463, s. 7.)

§ 35-57. **Temporary admission to State hospitals for sterilization.**—Any feeble-minded, epileptic, or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital. (1937, c. 221.)

ARTICLE 8.

Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§§ 35-58 to 35-60: Repealed by Session Laws 1963, c. 1184, s. 36.

ARTICLE 9.

Mental Health Council.

§§ 35-61 to 35-63: Transferred to §§ 122-105 to 122-107 by Session Laws 1963, c. 1184, s. 13.

ARTICLE 10.

Interstate Compact on Mental Health.

§§ 35-64 to 35-69: Transferred to §§ 122-99 to 122-104 by Session Laws 1963, c. 1184, s. 12.

ARTICLE 11.

Medical Advisory Council to State Board of Mental Health.

§ 35-70. **Creation of Council; membership; terms; vacancies.**—There is hereby created an advisory council to be known as the “Medical Advisory Council to the State Board of Mental Health,” composed of fifteen members to be appointed by the Governor for terms beginning July 1, 1963. For the initial terms of the members of the Council, five shall be appointed for terms of one (1) year each, five shall be appointed for terms of two (2) years each, and five shall be appointed for terms of three (3) years each. Upon the expiration of their respective terms, the successor of each member shall be appointed for a term of three (3) years each, and until his successor is appointed and qualified. Vacancies on the Council shall be filled by the Governor for unexpired terms. (1963, c. 668, s. 1.)

§ 35-71. **Per diem and allowances of members.**—Members of the Council shall be paid, from funds appropriated to the State Board of Mental Health, the same per diem, assistance and travel allowances as is now or may hereafter be prescribed for State boards and commissions generally. (1963, c. 668, s. 2.)

§ 35-72. **Duties.**—It shall be the duty of the Council to make periodic reviews and studies of the operation, maintenance and administration of the facilities and programs of the State Board of Mental Health and to make reports and recommendations from time to time to the State Board of Mental Health. (1963, c. 668, s. 3.)

ARTICLE 12.

Council on Mental Retardation.

§ 35-73. **Creation of Council; membership; terms; chairman.**—There is hereby created a Council on Mental Retardation to be appointed by the Governor and composed of the following members: Two persons who at the time of their appointment are members of the House of Representatives; two persons who at the time of their appointment are members of the Senate; a representative of the State Board of Health; a representative of the Department of Mental Health; a representative of the State Board of Public Welfare; a representative of the State Board of Education; a representative of the State Board of Correction and Training; a representative of the North Carolina Association for Retarded Children; and eight other persons who shall be selected without regard to employment or professional association. Of the members appointed from the General Assembly, the initial appointments of one member from the House of Representatives and of one member from the Senate shall be for a term of two (2) years. The remaining member from the House of Representatives and the remaining member from the Senate shall serve for a term of four (4) years. The member from the North Carolina Association of Retarded Children shall serve for a term of four (4) years. The members appointed from among the State boards and departments shall serve at the pleasure of the Governor. Of the remaining eight members, the initial appointments shall be as follows: Two members shall serve for a term of one (1) year; two members shall serve for a term of two (2) years; two members shall serve for a term of three (3) years; and two members shall serve for a term of four (4) years. Thereafter, the appoint-

ments of all members, with the exception of those from the State boards and departments, shall be for terms of four (4) years.

The Council on Mental Retardation shall choose its own chairman. (1963, c. 669, s. 1.)

§ 35-74. Function of Council; meetings; annual report to Governor.—The function of the Council on Mental Retardation shall be to study ways and means of promoting public understanding of mental retardation problems in North Carolina; to consider the need for new State programs and laws in the field of mental retardation; and to make recommendations to and advise the Governor on matters relating to mental retardation. The Council shall meet at least four times a year and shall file an annual report with the Governor. (1963, c. 669, s. 2.)

§ 35-75. Per diem and allowances of members.—The members of the Council on Mental Retardation shall receive for their services the same per diem and allowances as are granted members of State boards and commissions generally. (1963, c. 669, s. 3.)

§ 35-76. Members of Council as State officials.—The members of the Council on Mental Retardation shall not be considered State officials within the meaning of Article XIV, § 7 of the North Carolina Constitution. (1963, c. 669, s. 4.)

§ 35-77. Payment of operating expenses.—All operating expenses of the Commission [Council] not provided for by legislative appropriation shall be paid from the Contingency and Emergency Fund upon application in the manner prescribed in G.S. 43-12. (1963, c. 669, s. 5.)

Chapter 36.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

Sec.

- 36-1. Certain investments deemed cash.
- 36-2. Investment of trust funds in county, city, town, or school district bonds.
- 36-3. Investment in building and loan and federal savings and loan associations.
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- 36-35. Contracts of trustee.
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- 36-39. Unenforceable oral trust created by deed.
- 36-40. Power of settlor.
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- 36-43. Liabilities for violations of article.
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Article 6.

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- 36-47. Establishment of common trust funds.
- 36-48. Court accountings.
- 36-49. Supervision by State Banking Commission.
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Article 7.**Life Insurance Trusts.**

Sec.

36-53. Interest of trustee as beneficiary of policy sufficient to support inter vivos trust.

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Article 8.**Mutual Trust Investment Companies.**

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Sec.

36-56. Definition.

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36-60. Purchase of stock by fiduciaries; authority and restrictions.

36-61. Powers of Commissioner of Banks.

ARTICLE 1.*Investment and Deposit of Trust Funds.*

§ 36-1. **Certain investments deemed cash.** — Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by federal land banks, bonds, debentures, consolidated bonds or other obligations of any federal home loan bank or banks, or in bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the State of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Guardians, executors, administrators and others acting in a fiduciary capacity may invest surplus funds belonging to their wards in a savings account or accounts in any federally insured bank in North Carolina or in a certificate or certificates of deposit issued by any federally insured bank in North Carolina. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; Rev., s. 1792; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., s. 4018; 1959, c. 364, s. 2; c. 1015, s. 2.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

Cross References. — As to authority to invest in federal farm loan bonds, see § 53-60. As to further provisions as to investment by guardians and interest thereon, see § 24-4. As to authority of fiduciaries to buy real estate foreclosed under mortgages

executed by them, see § 33-25. As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

Cited in Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

§ 36-2. **Investment of trust funds in county, city, town, or school district bonds.**—Guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, are authorized to invest funds in their hands as such fiduciaries in bonds issued by any county, city, town or school district, of the State of North Carolina subsequent to January first, one thousand nine hundred and fifteen, provided that the net debt of such county, city, town or school district does not exceed ten (10%) percent of the assessed valuation of the property therein subject to taxation for the payment of such bonds, in the same manner, to the same extent and with the same legal consequence as fiduciaries are now authorized to invest such funds in bonds of the State of North Carolina un-

der the provisions of § 36-1. (Ex. Sess. 1921, c. 63; C. S., s. 4018(a); 1931, c. 257.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 36-3. Investment in building and loan and federal savings and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this State: Provided, that no such funds may be so invested unless and until authorized by the Insurance Commissioner. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations. The authorization of the Commissioner of Insurance or an officer of the Home Loan Bank at Winston-Salem or other government agency having supervision will not be required to the extent that such funds are insured by the Federal Savings and Loan Insurance Corporation. (1933, c. 549, s. 1; 1937, c. 14; 1953, c. 620.)

Local Modification.—Forsyth: 1945, c. 876, s. 4.

§ 36-4. Investment in registered securities.—Any guardian or trustee having in hand surplus funds belonging to a minor ward, incompetent person, or persons non compos mentis, may, if he so elects, invest the same in registered securities within the classes designated by §§ 36-1 and 36-2, the registration of said securities as to principal only to be in the name of said minor ward, incompetent person, or persons non compos mentis.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward, incompetent person, or persons non compos mentis, is being administered, said clerk of the superior court shall give said guardian or trustee a receipt for the same and said clerk of the superior court shall thereafter hold said securities for said ward, incompetent person, or persons non compos mentis, subject only to final disposition thereof to be approved by the resident judge or presiding judge of the superior court: Provided, however, all income accruing therefrom shall be paid to said guardian or trustee in the same manner and for the same purposes as any other income of said estate derived from other sources.

Whenever any guardian or trustee shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian or trustee for the amount actually expended for such securities, and his bond as such guardian or trustee shall thereupon be reduced in an amount equal in proportion to the total amount of the bond as the funds expended for the securities are to the total amount of the estate covered by such bond. (1935, c. 449; 1943, c. 96; 1945, c. 713.)

Local Modification. — Craven: 1935, c. 449. **Editor's Note.**—As to effect of section, see 13 N.C.L. Rev. 386.

§ 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.—(a) Executors, administrators c.t.a., trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others may, upon petition filed with the clerk of the superior court of the county in which said fiduciary has qualified, be authorized by an order of such clerk of the superior court and approved by either the resident judge or a judge of the superior court at term time, to invest such funds or assets, or part thereof, in single premium life, endowment or annuity

contracts; any such fiduciaries may be authorized by order of the clerk of the superior court, upon approval by the judge as above provided, to invest the earnings, or part thereof, of such trust funds or assets, without encroaching upon the principal, in any annual premium life, endowment or annuity contracts of legal reserve life insurance companies duly licensed and qualified to transact business within the State: Provided, that where any such annual premium contract has been purchased as herein authorized any such fiduciary may, upon authorization of the clerk of the superior court and approval of the judge as above specified, encroach upon and use the principal of such trust funds or assets in order to pay subsequent premiums and thereby prevent a lapsation or forfeiture of any such insurance contract purchased pursuant to the provisions of this section.

(b) Such contracts may be issued on the life, or lives, of a ward, or wards, and beneficiary, or beneficiaries of a trust fund, or upon the life of any person in whose life the said ward or beneficiary has an insurable interest, and shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person or persons whose funds are invested therein. Such contracts may not be purchased from any such company for which such executor, administrator c.t.a., guardian or trustee is acting as agent, or receives any commission, or part of any commission, directly or indirectly paid by such company to its agent soliciting and/or selling such contract.

(c) Notwithstanding anything contained in this section no insurance contracts as specified in subsection (a) may be purchased by any executor, administrator c.t.a., trustee, or guardian if the trust agreement or other instrument, if any, under which such fiduciary has qualified and is acting provides otherwise. (1943, c. 473, ss. 1-3.)

§ 36-5. Trust funds deposited at trustee's risk.—No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds. (1889, c. 470; Rev., s. 1793; C. S., s. 4019.)

Cross Reference.—As to deposit of trust funds, see §§ 32-8 to 32-11.

§ 36-5.1. Employee trusts.—Pension, profit sharing, stock bonus, annuity or other employee trusts established by employers for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities or restraints on the power of alienation of title to property; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purposes for which they are established. (1945, c. 8.)

ARTICLE 2.

Removal of Trust Funds from State.

§ 36-6. Proceeding to remove trust funds of nonresidents. — When any personal estate in this State is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this State, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the State in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until

approved by the resident judge of said judicial district, or the judge holding court in such district. (1911, c. 161, s. 1; C. S., s. 4020.)

Cross Reference.—As to guardian's right to remove ward's personalty from State, see § 33-48. Cited in *Fidelity Trust Co. v. Walton*, 198 N.C. 790, 153 S.E. 401 (1930).

§ 36-7. Removal ordered on notice; bond of nonresident trustee.—No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the State will not prejudice the right of any person interested or to become interested therein. (1911, c. 161, s. 2; C. S., s. 4021.)

Cross Reference.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-8. Order of removal discharges resident trustee.—When any guardian or committee, trustee or other person in this State, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S., s. 4022.)

ARTICLE 3.

Resignation of Trustee.

§ 36-9. Clerk's power to accept resignations.—The clerks of the superior courts of this State have power and jurisdiction to accept the resignation of executors, administrators, guardians, trustees, and other fiduciaries and to appoint their successors in the manner provided by this article. (1911, c. 39, s. 1; C. S., s. 4023.)

Cross References.—As to resignation of guardian, see § 33-11. As to authority of executor to renounce his office, see § 28-13.

Special Proceeding to Resign.—A proceeding by a trustee for the purpose of resigning his trust is denominated a special proceeding. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

Order Accepting Resignation Is Interlocutory Order.—The order of the clerk of the superior court accepting the resignation of a trustee in a special proceeding pursuant to this section is an interlocutory order regardless of whether an appeal is taken therefrom or not, since even in the absence of an appeal § 36-12 requires that such order be approved by the judge of the superior court before it becomes effective. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

The clerk has power to set aside his prior order accepting the resignation of a trustee and appointing a successor when no appeal has been taken and the order has not been approved by the judge of the

superior court. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

Subsequent Valid Order Affirmed on Appeal.—Where the clerk of the court in the exercise of his valid discretionary power, has set aside his order accepting the resignation of a trustee, his subsequent valid order entered in proceedings consonant with statutory requirements and approved by the judge of the superior court in the exercise of judgment and discretion, will be affirmed on appeal. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

Appointment by Clerk.—Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appointed under the provisions of this section. *Ladies Benevolent Soc'y v. Orrell*, 195 N.C. 405, 142 S.E. 493 (1928).

Where the trustee appointed by will to administer an active trust dies, the clerk

of the superior court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and this section authorizes the clerk to appoint a successor trustee only when the former trustee resigns. *Cheshire v. First Presbyterian Church*, 221 N.C. 205, 19 S.E.2d 855 (1942).

Section Not Extended to Give Jurisdiction. — The equitable jurisdiction of the superior courts does not extend to the clerks of court unless expressly given by

statute, and this and following sections giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. In *re Smith*, 200 N.C. 272, 156 S.E. 494 (1931).

Cited in *Cheshire v. Presbyterian Church*, 222 N.C. 280, 22 S.E.2d 566 (1942); *Mast v. Blackburn*, 248 N.C. 231, 102 S.E.2d 812 (1958); In *re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

§ 36-10. Petition; contents and verification. — When any executor, administrator, guardian, trustee, or other fiduciary desires to resign his trust, he shall file his petition in the office of the clerk of the superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualification of the applicant as such fiduciary, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the cestuis que trustent and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the fiduciary and due the estate, together with a full statement of the reasons why the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2; C. S., s. 4024.)

Authority of Court to Revoke Letters Testamentary. — The fact that a fiduciary appointed by a court does not tender his resignation pursuant to this section does not deprive the court which appoints him of authority to act and to revoke the letters

testamentary when cause for removal exists. In *re Covington's Will*, 252 N.C. 551, 114 S.E.2d 261 (1960).

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-11. Parties; hearing; successor appointed.—Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the cestuis que trustent as defendants, and shall issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The cestuis que trustent, creditors, or any other person interested in the trust estate, have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the cestuis que trustent demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the cestuis que trustent, the clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article. (1911, c. 39, s. 3; C. S., s. 4025.)

Quoted in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-12. Resignation allowed; costs; judge's approval.—In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just.

If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective. (1911, c. 39, s. 3; C. S., s. 4026.)

Cross Reference. — See note under § 36-9.

"Approve" as used in this section implies the exercise of discretion and judgment. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

Loss of Unrecorded Order.—A finding by the court that, upon due consideration

of the evidence and the available records in the office of the clerk, the order appointing a successor trustee had been approved by the court was sufficient to meet the requirements of this section though the order of approval had been lost without being recorded. *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956).

§ 36-13. Appeal; stay effected by appeal.—Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S., s. 4027.)

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-14. On appeal judge determines facts. — Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the Supreme Court. (1911, c. 39, s. 5; C. S., s. 4028.)

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-15. Final accounting before resignation.—No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S., s. 4029.)

Cross References.—As to vouchers being presumptive evidence, see § 28-119. As to fee for auditing final accounts, see § 2-35.

36, 59 S.E.2d 351 (1950); *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Stated in *Russ v. Woodard*, 232 N.C.

§ 36-16. Resignation effective on settlement with successor. — In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate. (1911, c. 39, s. 6; C. S., s. 4030.)

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-17. Court to appoint successor; when bond required.—If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands when the bond is executed by a personal surety and in a sum one and one-fourth ($1\frac{1}{4}$) times the value of the property to come into his hands when

the bond is executed by an indemnity or guaranty company authorized to do business in this State, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands; provided, that where by the terms of the will or trust agreement the trustee who has resigned was not required to give bond and did not give bond and an intent therein is expressed by the testator or settlor that a successor trustee shall serve without bond, the clerk, with the approval of the judge, upon the petition of any party in interest, may waive the requirement of a bond for the successor trustee and permit said successor trustee to serve without bond. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7; C. S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

Editor's Note. — The 1965 amendment added the proviso in the first sentence.

Laches in Objecting to Lack of Bond.— Failure of order appointing successor trustee to include provision for the giving

of a bond could not be raised by beneficiaries of the trust 16 years after the order was entered. *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956).

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950); *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

§ 36-18. Rights and duties devolve on successor. — Upon the acceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by the court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee. (1911, c. 39, s. 8; C. S., s. 4032.)

Applied in *Childers v. Parker's, Inc.*, 259 N.C. 237, 130 S.E.2d 323 (1963).

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

§ 36-18.1. Appointment of successors to deceased or incapacitated trustees.—Upon the death or incapacity of a trustee, a new trustee may be appointed on application by any beneficiary, or other interested persons, by petition to the clerk of the superior court of the county in which the instrument under which the deceased or incapacitated trustee claimed is registered, making all necessary parties defendants. The clerk shall docket the cause as a special proceeding and issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed. The cestui que trust, creditor or any other person interested in the trust estate shall have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. After hearing the matter, the clerk may appoint the person so named in the petition, or he may appoint some other fit and suitable person or corporation to act as the successor of the deceased or incapacitated trustee; and the clerk shall require the person so appointed to give bond as required in G.S. 36-17; provided, that where by the terms of the instrument upon which the deceased or incapacitated trustee claimed, said trustee was not required to give bond and did not give bond and an intent therein is expressed by the testator or settlor that a successor trustee shall serve without bond, the requirement of a bond for the successor trustee may be waived as provided in G.S. 36-17. Any party in interest may appeal from the decision of the clerk as provided in G.S. 36-13 and 36-14. (1953, c. 1255; 1965, c. 1177, s. 2.)

Editor's Note. — The 1965 amendment added the proviso in the fifth sentence.

Appointment Prior to Effective Date of Section. — Prior to the enactment of this

section a clerk of the superior court had no power to appoint successor trustees of a charitable trust, such authority being vested solely in the superior court under § 36-21 and not in the respective clerks thereof. *Mast v. Blackburn*, 248 N.C. 231, 102 S.E.2d 812 (1958).

The appointment by the clerk of successor trustees of a charitable trust in *ex parte* proceeding prior to the effective

date of this section is void, and such appointees may not maintain an action to restrain others from interfering with their asserted rights as trustees, but successor trustees may be appointed by the judge of the superior court *nunc pro tunc* under § 36-21 or by the clerk under this section. *Mast v. Blackburn*, 248 N.C. 231, 102 S.E.2d 812 (1958).

ARTICLE 4.

Charitable Trusts.

§ 36-19. Trustees to file accounts; exceptions.—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts.

This section shall not apply to real or personal property granted by deed, will or otherwise in trust or any other manner for the use and benefit of churches, hospitals, educational institutions and organizations or other incorporated or unincorporated religious and charitable institutions; provided, however, all trusts for the benefit of churches, hospitals and charitable institutions may be required to file such account upon the request of the clerk of the superior court or the verified written request of an interested citizen when in the opinion of the clerk of the superior court such request is bona fide and the interest of the public would be promoted by the filing of such report. (43 Eliz., c. 4; 1832, c. 14, s. 1; R. C., c. 18, s. 1; Code, s. 2342; Rev., s. 3922; C. S., s. 4033; 1951, c. 1008, s. 1.)

Cited in *Humphrey v. Board of Trustees*, 203 N.C. 201, 165 S.E. 547 (1932); *Woodcock v. Wachovia Bank & Trust Co.*, 214 N.C. 224, 199 S.E. 20 (1938).

§ 36-20. Action for account; court to enforce trust. — If § 36-19 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the Attorney General or solicitor who represents the State in the superior court for that county; and it shall be his duty to bring an action in the name of the State against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The Attorney General or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust. (1832, c. 14, ss. 2, 3; R. C., c. 18, ss. 2, 3; Code, ss. 2343, 2344; Rev., s. 3923; C. S., s. 4034.)

The trustees of a charitable trust who violate its provisions are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in favor of a

residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. *Humphrey v. Board of Trustees*, 203 N.C. 201, 165 S.E. 547 (1932).

§ 36-21. Not void for indefiniteness; title in trustee; vacancies.—No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be in-

valid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the superior court of the proper county shall appoint a trustee or trustees, pursuant to § 36-9, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

Cross References. — See note to § 36-18.1. For subsequent statute covering same subject matter, see § 36-23.1.

Editor's Note.—See 16 N.C.L. Rev. 22.

The rule against perpetuities does not apply to charitable trusts. *Penick v. Bank of Wadesboro*, 218 N.C. 686, 12 S.E.2d 253 (1940); *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948).

Charitable trusts are not subject to the rule against perpetuities, this section being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities. *Williams v. Williams*, 215 N.C. 739, 3 S.E.2d 334 (1939).

Appointment of Trustee upon Occurrence of Vacancy. — Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application. *Lassiter v. Jones*, 215 N.C. 298, 1 S.E.2d 845 (1939).

Trusts Held Valid. — A devise to "the authorities in control of Deaf, Dumb and Blind Asylum of the State of North Carolina for the use and benefit of the indigent children therein, born blind, of the Caucasian race," constitutes a valid charitable trust. *Hass v. Hass*, 195 N.C. 734, 143 S.E. 541 (1928).

A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust

contemplated by the instrument, and to vest in them the title and right of possession for its purposes. *Ladies Benevolent Soc'y v. Orrell*, 195 N.C. 405, 142 S.E. 493 (1928).

Devise establishing trust for the advancement of a religious denomination held not void for indefiniteness. *Williams v. Williams*, 215 N.C. 739, 3 S.E.2d 334 (1939).

A gift to the trustees of a named church, in trust for the home and foreign missions and benevolent causes of that church, was held valid under this section and good as against the contention that no cause was named capable of enforcing a lawful claim, as each benevolent cause supported by that church had an interest in the devise. *King v. Richardson*, 46 F. Supp. 510 (M.D.N.C. 1942).

Trust Held Invalid.—Bequest of a certain sum to be held in trust, and paid out in twenty years "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville," held void for uncertainty. *Woodcock v. Wachovia Bank & Trust Co.*, 214 N.C. 224, 199 S.E. 20 (1938).

Devise Giving Trustees Power to Convey.—A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated, gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale. *Hall v. Wardwell*, 228 N.C. 562, 46 S.E.2d 556 (1948).

Details of Administration May Be Left to Trustee.—A charity in its legal sense is a gift to be applied consistently with exist-

ing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details

of its administration to duly appointed trustees. *Whitsett v. Clapp*, 200 N.C. 647, 158 S.E. 183 (1931).

Cited in *Johnson v. Wagner*, 219 N.C. 235, 13 S.E.2d 419 (1941); *Farnan v. First Union Nat'l Bank*, 263 N.C. 106, 139 S.E.2d 14 (1964).

§ 36-22. **Trusts created in other states valid.**—Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

§ 36-23. **Application of § 36-22.**—Section 36-22 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)

§ 36-23.1. **Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.**—(a) **Declaration of Policy.**—It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to effect the policy herein declared.

(b) **No Gift, Transfer, etc., Invalid for Indefiniteness.**—No gift, transfer, grant, bequest, or devise of property or income, or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of effecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: To prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

(c) **Enforcement.**—Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the Attorney General of the State of North Carolina in any court

of the State having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the General Assembly.

(d) Construction with Other Acts.—This section is in addition to any prior act or acts of the General Assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4.)

Cross Reference. — For former statute relating to same subject matter, see § 36-21.

Editor's Note. — For discussion of this section, see 25 N.C.L. Rev. 476. As to the doctrine of cy pres in North Carolina, see 27 N.C.L. Rev. 591.

Funds Turned Over to National Charity by County Chapter. — Where a county chapter of a national charity was required to turn over surplus funds to the national office, such funds were not impressed with a trust restricting use of the money to care

of persons in the county, since the county chapter agreed to be governed by national regulations and the national organization did not mislead the county chapter into a belief that a certain percentage of funds would be retained within the county. *National Foundation v. First Nat'l Bank*, 288 F.2d 831 (4th Cir. 1961).

Quoted in *Bennett v. Attorney General*, 245 N.C. 312, 96 S.E.2d 46 (1957).

Cited in *Farnan v. First Union Nat'l Bank*, 263 N.C. 106, 139 S.E.2d 14 (1964).

ARTICLE 5.

Uniform Trusts Act.

§ 36-24. **Definitions.**—As used in this article unless the context or subject matter otherwise requires:

- (1) "Affiliate" means any person directly or indirectly controlling or controlled by another person, as herein defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.
- (2) "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.
- (3) "Relative" means a spouse, ancestor, descendant, brother or sister.
- (4) "Trust" means an express trust only.
- (5) "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee. (1939, c. 197, s. 1.)

Editor's Note. — For comment on this article, see 17 N.C.L. Rev. 396.

§ 36-25. **Bank account to pay special debts.**—(a) Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power or revocation as the depositor may have reserved by agreement with the bank.

(b) If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2.)

§ 36-26. Loan of trust funds.—Except as provided in § 36-27, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate. (1939, c. 197, s. 3.)

§ 36-27. Funds held by bank for investment or distribution.—Funds received or held by a bank as fiduciary awaiting investment or distribution shall be promptly invested, distributed or deposited to the credit of the trust department as a demand deposit in the commercial department of the bank or another bank or in savings accounts in the bank or another bank: Provided, that the bank or the commercial department shall first deliver to the trust department, as collateral security, securities eligible for the investment of the sinking funds of the State of North Carolina equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited; and such collateral security shall be held by the trust department in trust and for the special benefit of the estate or fund for which the deposit was made, or, in case the deposit consists of uninvested or undistributed funds belonging to several estates or trust funds, then in trust for the special benefit of said estates or funds in proportion to their respective interest in such deposits. The said securities shall at all times be kept separate and apart from the other assets of the trust department and proper records shall be kept by the proper officer in connection therewith. If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2.)

Editor's Note. — The 1963 amendment inserted "or in savings accounts in the bank or another bank" immediately preceding the colon in the first sentence. It also deleted the former last sentence, which

read "Investment and/or invested shall not be construed to include savings accounts or certificates or deposits in any bank."

§ 36-28. Trustee buying from or selling to self.—No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5.)

Cited in *Miller v. First Nat'l Bank*, 234 N.C. 309, 67 S.E.2d 362 (1951).

§ 36-29. Trustee selling from one trust to another trust.—No trustee shall as trustee of one trust sell property to itself as trustee of another trust: Provided, assets of trust held by any bank or trust company under the supervision of the State Banking Commission may be sold or transferred from one trust to another trust if such transfer is expressly authorized by the instrument creating the trust to which the transfer is made, or if such transfer is approved by the board of directors by unanimous vote at a regular meeting, such action being recorded in the minutes. (1939, c. 197, s. 6; 1945, c. 127, s. 3; c. 743, s. 3.)

§ 36-30. Corporate trustee buying its own stock. — No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate. (1939, c. 197, s. 7.)

§ 36-31. **Voting stock.**—A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it. (1939, c. 197, s. 8.)

Cross References.—As to trustee's power to vote stock, see § 55-69. As to liability as stockholder, see § 60-17.

§ 36-32. **Banks holding stock or bonds in name of nominee.**—A bank holding stock or bonds as fiduciary may hold it in the name of a nominee, without mention of the trust in the stock or bonds certificate or stock or bonds registration book. Provided, that

- (1) The trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the stock or bonds by the fiduciary and the facts regarding its holdings;
- (2) The nominee shall not have possession of the stock or bonds certificate or access thereto except under the immediate supervision of the fiduciary.

The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such stock or bonds so held. (1939, c. 197, s. 9; 1945, c. 292.)

§ 36-33. **Powers attached to office.** — Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10.)

§ 36-34. **Powers exercisable by majority.**—(a) Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

(b) Nothing in this section shall excuse a cotrustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust. (1939, c. 197, s. 11.)

Cross Reference. — As to right of trustee where only a naked trust is created, see § 41-3.

§ 36-35. **Contracts of trustee.**—(a) Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(b) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice

shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

(c) The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12.)

Cross Reference. — As to costs when trustee party to action, see § 6-31.

§ 36-36. Exoneration or reimbursement for torts.—(a) A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if

- (1) The tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust or,
- (2) Although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

(b) If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

(c) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13.)

§ 36-37. Tort liability of trust estate.—(a) Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that

- (1) The tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or
- (2) That, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or
- (3) That, although the tort did not fall within subdivision (1) or (2) above, it increased the value of the trust property.

If the tort is within subdivision (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within subdivision (3) above, collection may be had only to the extent of the increase in the value of the trust property.

(b) In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(c) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within

such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustees shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

(d) The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in § 36-36.

(e) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14.)

§ 36-38. Withdrawals from mingled trust funds.—Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15.)

§ 36-39. Unenforceable oral trust created by deed.—(a) When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

(b) Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable. (1939, c. 197, s. 16.)

Editor's Note.—For note on construction between persons in confidential relationship, see 31 N.C.L. Rev. 242 (1953).

§ 36-40. Power of settlor. — The settlor of any trust affected by this article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by §§ 36-26, 36-27 and 36-28. (1939, c. 197, s. 17.)

§ 36-41. **Power of beneficiary.**—Any beneficiary of a trust affected by this article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this article, except as to the duties, restrictions, and liabilities imposed by §§ 36-26, 36-27 and 36-28. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this article. (1939, c. 197, s. 18.)

Applied in *Keesler v. North Carolina Nat'l Bank*, 256 N.C. 12, 122 S.E.2d 807 (1961).

§ 36-42. **Power of the court.**—A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this article. (1939, c. 197, s. 19.)

§ 36-43. **Liabilities for violations of article.**—If a trustee violates any of the provisions of this article, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20.)

§ 36-44. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 197, s. 21.)

§ 36-45. **Short title.**—This article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22.)

§ 36-46. **Time of taking effect.**—This article shall take effect the first day of July, one thousand nine hundred and thirty-nine and shall apply in the construction of and operation under

- (1) All agreements containing trust provisions entered into subsequent to March fifteenth, one thousand nine hundred and forty-one;
- (2) All wills made by testators who shall die subsequent to March fifteenth, one thousand nine hundred and forty-one; and
- (3) All other wills and trust agreements and trust relations insofar as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 25; 1941, c. 269.)

Editor's Note. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 544.

ARTICLE 6.

Uniform Common Trust Fund Act.

§ 36-47. **Establishment of common trust funds.**—Any bank or trust company qualified to act as fiduciary in this State may establish one or more common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and another or others, as cofiduciaries; and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust fund or funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship or by an amendment thereof, and if, in the case of cofiduciaries, the bank or trust company procures

the consent of its cofiduciary or cofiduciaries to such investment. (1939, c. 200, s. 1.)

Editor's Note. — For comment on this article, see 17 N.C.L. Rev. 394.

§ 36-48. **Court accountings.**—Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trusts fund to render accounts of their several trusts. (1939, c. 200, s. 2.)

§ 36-49. **Supervision by State Banking Commission.**—All common trust funds established under the provisions of this article shall be subject to the rules and regulations of the State Banking Commission. (1939, c. 200, s. 3.)

§ 36-50. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4.)

§ 36-51. **Short title.**—This article may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5.)

§ 36-52. **Time of taking effect.**—This article shall be in full force and effect on and after July first, one thousand nine hundred thirty-nine and shall apply to fiduciary relationships then in existence or thereafter established. (1939, c. 200, s. 8.)

ARTICLE 7.

Life Insurance Trusts.

§ 36-53. **Interest of trustee as beneficiary of policy sufficient to support inter vivos trust.**—The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos trust notwithstanding the fact that the insured or any other person or persons reserves or has the right or power to exercise any one or more of the following rights or powers:

- (1) To change the beneficiary,
- (2) To surrender the policy and receive the cash surrender value,
- (3) To borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security,
- (4) To assign the said policy, or
- (5) To exercise any other right in connection with the said policy commonly known as an incident of ownership thereof. (1957, c. 1444, s. 1.)

Editor's Note. — For comment on this section, see 36 N.C.L. Rev. 59 (1957).

§ 36-54. **Applicability and construction of article.**—Section 36-53 shall be applicable to all life insurance trusts whether created before or after the effective date of this article; provided, however that this article shall not apply to pending litigation. The enactment of this article shall not be construed as a legislative determination that the provisions of § 36-53 are different from the law in effect on the date of its enactment. (1957, c. 1444, s. 2.)

Editor's Note.—This article was enacted and became effective on June 12, 1957.

ARTICLE 8.

Mutual Trust Investment Companies.

§ 36-55. **Short title.**—This article may be cited as the “Mutual Trust Investment Company Act.” (1961, c. 964, s. 7.)

§ 36-56. **Definition.**—As used in this article, the term “mutual trust investment company” means a corporation which is:

- (1) An investment company as defined by an Act of Congress entitled “Investment Company Act of 1940” approved August 22, 1940, as amended.
- (2) Incorporated in compliance with the provisions of this article to constitute a medium for the common investment of trust funds held in a fiduciary capacity, either alone or with one or more cofiduciaries, by state banks with trust powers, trust companies and national banks with trust powers which are located in this State. (1961, c. 964, s. 1.)

§ 36-57. **Authority to incorporate.**—Any five or more state banks with trust powers, trust companies and national banks with trust powers located in this State, are authorized, subject to the approval of the Commissioner of Banks and subject to such regulations as he may from time to time prescribe, to cause a mutual trust investment company to be organized and incorporated. (1961, c. 964, s. 2.)

§ 36-58. **Application of general corporation law; articles of incorporation.**—Such a mutual trust investment company shall be incorporated under and be subject to the general corporation laws of this State except as herein otherwise provided. The incorporators subscribing and acknowledging the articles of incorporation shall consist of five or more persons who are officers or directors of the banks and trust companies causing such mutual trust investment company to be incorporated, and the articles of incorporation shall set forth, in addition to the facts specified in the general corporation laws, the name of each bank and trust company causing such corporation to be incorporated and the amount of stock subscribed for by each. (1961, c. 964, s. 3.)

§ 36-59. **Corporate requirements and restrictions.**—(a) The stock of a mutual trust investment company shall be owned only by state banks with trust powers, trust companies and national banks with trust powers located in this State, acting as fiduciaries, and their individual cofiduciaries, if any, but may be registered in the name of their nominee or nominees.

(b) A mutual trust investment company shall have not less than five directors. Such directors need not be stockholders but shall be officers or directors of banks or trust companies which are stockholders.

(c) A mutual trust investment company shall make no investment of its assets in:

- (1) Shares of stock of any one corporation which would cause the total number of such shares held by the mutual trust investment company to exceed 10% of the number of such shares outstanding.
- (2) Stock of any bank or trust company authorized to do business in North Carolina.

(d) A mutual trust investment company may acquire, purchase or redeem its own stock and may, by means of contract, or of its bylaws, bind itself to acquire, purchase or redeem its own stock, but it shall not vote shares of its own stock held by it in any manner.

(e) A mutual trust investment company shall not be responsible for ascertaining the investment powers of any fiduciary who may purchase its stock and shall not be liable for accepting funds from a fiduciary in violation of the restrictions

of the will, trust indenture or other instrument under which such fiduciary is acting in the absence of actual knowledge of such violation, and shall be accountable only to the Commissioner of Banks and the fiduciaries who are the owners of its stock.

(f) Nothing in this article shall be construed or operate so as to relieve any fiduciary from his responsibility under the will, trust indenture or other instrument under which such fiduciary is acting or from any obligation, responsibility or liability imposed by law upon such fiduciary.

(g) Investment policy of a mutual trust investment company shall be fixed by its board of directors. The board of directors shall be responsible for the execution of policies fixed by it, but shall have the power to employ managers, officers and other personnel necessary for the orderly and efficient operation of the company. No investment shall be made except by vote of a majority of the directors at a meeting at which a majority of the directors are present and voting. (1961, c. 964, s. 4.)

§ 36-60. Purchase of stock by fiduciaries; authority and restrictions.—(a) State banks with trust powers, trust companies and national banks with trust powers located in this State, acting in a fiduciary capacity either alone or with one or more individual cofiduciaries, may, if exercising the care of a prudent investor and with the consent of such individual cofiduciary or cofiduciaries, if any, invest and reinvest funds held in such fiduciary capacity in the shares of stock of a mutual trust investment company complying with the requirements of this article except where the will, trust indenture or other instrument under which such fiduciary is acting prohibits such investment; provided, however, that no funds or property of any estate, trust or fund shall be invested in the stock of a mutual trust investment company in an amount which would result in such estate, trust or fund having a total investment therein in excess of the lesser of the following:

- (1) The maximum amount or percentage that might be invested by such estate, trust or fund, under regulations of the Federal Reserve Board in effect at the time of such investment, in a common trust fund having total assets equal to the total assets of the mutual trust investment company, as increased by the proposed investment.
- (2) Ten percent of the assets of the mutual trust investment company as increased by the proposed investment.

(b) No funds of any estate, trust or fund shall be invested in the stock of a mutual trust investment company in an amount which would result in any bank or trust company having an aggregate holding in excess of twenty-five percent of the total issued and outstanding stock of such mutual trust investment company as increased by the amount of the proposed investment. In the event that by reason of reduction of the holdings of stock by other banks or trust companies, mergers of banks or trust companies, or for other reasons the aggregate holding of stock in the mutual trust investment company by any bank or trust company shall become greater than twenty-five percent of the total issued and outstanding stock, such bank or trust company may retain the stock then held by it but may not make further investments in such stock until its aggregate holdings have become less than such twenty-five percent.

(c) A mutual trust investment company shall be permitted to rely on the written statement of any bank or trust company purchasing its stock, that the purchase complies with the foregoing requirements. (1961, c. 964, s. 5.)

§ 36-61. Powers of Commissioner of Banks.—(a) The Commissioner of Banks shall have authority to adopt and issue reasonable and uniform rules and regulations to govern the conduct and management of all mutual trust investment companies formed pursuant to this article and to prescribe, among other things:

- (1) The records and accounts to be kept by the mutual trust investment company.
- (2) The methods and standards to be employed in establishing the value of the shares of stock in the mutual trust investment company and of its assets.
- (3) The procedure to be followed in the sale and redemption of its stock.

(b) The Commissioner of Banks shall at least once in each calendar year, and whenever he deems it necessary or expedient, examine every such mutual trust investment company. On every such examination of a mutual trust investment company the Commissioner of Banks shall make inquiry as to its financial condition, the policies of its management, whether it is complying with the laws of this State and such other matters as the Commissioner of Banks may prescribe. The reasonable expenses of each examination of a mutual trust investment company pursuant to this section shall be borne and paid for by such company.

(c) In the enforcement of this article and the fulfillment of his responsibilities hereunder, the Commissioner of Banks shall have the same powers and authorities over and with respect to mutual trust investment companies and their directors, officers and employees, including the power to compel the attendance of witnesses and the production of books, records, documents and testimony, the power to require the submission to him of reports and information in such form and at such times as he may prescribe, the power to direct the discontinuation of any practice which he may consider illegal, unauthorized or unsafe, and all other powers and authorities, whether or not specifically mentioned herein, as given the Commissioner of Banks by the laws of this State with respect to banks and trust companies, in the same manner and with like effect as if mutual trust investment companies were expressly named therein. (1961, c. 964, s. 6.)

Chapter 37.

Uniform Principal and Income Act.

Sec.	Sec.
37-1. Definitions.	37-8. Principal comprising animals.
37-2. Application of chapter; powers of settlor.	37-9. Disposition of natural resources.
37-3. Income and principal; disposition.	37-10. Principal subject to depletion.
37-4. Apportionment of income.	37-11. Unproductive estate.
37-5. Corporate dividends and share rights.	37-12. Expenses; trust estates.
37-6. Premium and discount bonds.	37-13. Expenses; nontrust estates.
37-7. Principal used in business.	37-14. Uniformity of interpretation.
	37-15. Short title.

§ 37-1. **Definitions.**—"Income" as used in this chapter means the return derived from principal;

"Principal" as used in this chapter means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto empowered that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person;

"Remainderman" as used in this chapter means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law;

"Tenant" as used in this chapter means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution;

"Trustee" as used in this chapter includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee. (1937, c. 190, s. 1.)

§ 37-2. **Application of chapter; powers of settlor.** — This chapter shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with, or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this chapter, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this chapter. (1937, c. 190, s. 2.)

§ 37-3. **Income and principal; disposition.** — (a) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this chapter.

(b) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, or property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman

alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this chapter. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(c) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established, while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law. (1937, c. 190, s. 3.)

Rent of realty is income. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

And such income is to be distributed to

the person entitled after payment of expenses properly chargeable to it. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 37-4. Apportionment of income. — Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal. (1937, c. 190, s. 4.)

Cross Reference.—As to apportionment in the case of renting real estate, see § 42-5 et seq.

Effect of Section.—This section makes the rule of § 42-6 applicable to the income from trusts. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

This section brings the administration of trusts in harmony with the apportionment principles of both §§ 42-6 and 42-7. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Rents Payable from Crop Proceeds on Sale Days Are "Periodic Payments." —

Where the rents reserved were $\frac{1}{3}$ of the sale price of the tobacco crops and were to be paid "at the warehouse" on the days the tenants sold tobacco, these sale days could not be designated in the lease; but they were no less "fixed periods" within the meaning of § 42-6, and "periodic payments" within the meaning of this section. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Section Held Applicable to Rent Paid in Advance.—See *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 37-5. Corporate dividends and share rights. — (a) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of

receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(b) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(c) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursements of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(d) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(e) Distributions made from ordinary income by a regulated investment company shall be deemed income. All distributions made by such a company from capital gains, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, shall be deemed principal.

(f) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend. (1937, c. 190, s. 5; 1965, c. 629.)

Editor's Note.—The 1965 amendment inserted present subsection (e).

Chapter 1188, Session Laws 1965, makes c. 629, Session Laws 1965, which amended

this section, apply to trusts created and to wills of persons dying after the ratification of c. 629.

§ 37-6. Premium and discount bonds.—Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal. (1937, c. 190, s. 6.)

§ 37-7. Principal used in business.—(a) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(b) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period, the expenses during and the inventory value of the property at the beginning of such period.

(c) Where such business does not consist of buying and selling property, the

net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.

(d) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal. (1937, c. 190, s. 7.)

§ 37-8. Principal comprising animals.—Where any part of the principal consists of animals employed in business, the provisions of § 37-7 shall apply; and in other cases where the animals are held as a part of the principal, partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income. (1937, c. 190, s. 8.)

§ 37-9. Disposition of natural resources.—Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit. (1937, c. 190, s. 9.)

§ 37-10. Principal subject to depletion.—Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of five per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal. (1937, c. 190, s. 10.)

§ 37-11. Unproductive estate.—(a) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year, and until disposed of as hereinafter stated, has not produced an average net income of at least one per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(b) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no

event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property, less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(c) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, otherwise one year after it became unproductive.

(d) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.

(e) In the case of successive tenants the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income. (1937, c. 190, s. 11.)

§ 37-12. Expenses; trust estates.—(a) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in § 37-11, shall be paid out of principal, subject to the provisions of subsection (b) of § 37-11.

(b) All other expenses, including trustee's commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and cost of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of subsection (b) of § 37-3 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(c) Expenses paid out of income according to subsection (a) which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(d) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as part of principal are paid out of principal, as provided in subsection (b), the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement. (1937, c. 190, s. 12.)

Cross Reference.—See note to § 37-4.

The trustee's expenses in raising a crop (labor and supplies) are properly chargeable against the income derived from the

sale of the crop and are properly apportioned. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Expenses will be apportioned in the Trust Co., 265 N.C. 98, 143 S.E.2d 217 same percentages as the apportionment of (1965).
the rents. *Wells v. Planters Nat'l Bank &*

§ 37-13. **Expenses; nontrust estates.**—(a) The provisions of § 37-12, so far as applicable and excepting those dealing with costs of, or special taxes, or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created, subject, however, to any legal agreement of the parties or any specific direction of the taxing or other statutes; but where either tenant or remainderman has incurred an expense for the benefit of his own estate, and without the consent or agreement of the other, he shall pay such expense in full.

(b) Subject to the exceptions stated in subsection (a) the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant, except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the "American Experience Tables of Mortality," and no other evidence of duration or expectancy shall be considered. (1937, c. 190, s. 13.)

§ 37-14. **Uniformity of interpretation.**—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1937, c. 190, s. 14.)

§ 37-15. **Short title.**—This chapter may be cited as the Uniform Principal and Income Act. (1937, c. 190, s. 15.)

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Chapter 38.

Boundaries.

Sec.

38-1. Special proceeding to establish.

38-2. Occupation sufficient ownership.

Sec.

38-3. Procedure.

38-4. Surveys in disputed boundaries.

§ 38-1. **Special proceeding to establish.** — The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. (1893, c. 22; Rev., s. 325; C. S., s. 361.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Strict Observance of Statutes Required.—As under prior statutes relating to processioning proceedings, a strict observance of statutory provisions in all material respects is required. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Purpose of Processioning. — The primary object of this section and the following sections of this chapter is to facilitate the speedy determination of disputed boundaries between adjoining landowners who do not contest each other's title to their respective tracts. *Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903).

The sole purpose of a processioning proceeding is to establish the true location of disputed boundary lines. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Title to the land is not in issue unless so made by the pleadings, *Cole v. Seawell*, 152 N.C. 349, 67 S.E. 753 (1910); but when title is placed in issue by the defendant's denial of the plaintiff's ownership, then, by § 1-399, the pending special proceedings are converted into a civil action to quiet title, and the court will try all the issues in controversy connected therewith. *Woody v. Fountain*, 143 N.C. 67, 55 S.E. 425 (1906). See *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948); *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954).

Title or ownership is not directly put in issue in a processioning proceeding. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Consent of Both Owners Not Required.—Until the passage of this section the consent of both adjoining landowners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors as a matter of right is entitled to have the land processioned, without the other's consent, and, where there has been an appeal, to have all the controverted matters

settled by the jury under the guidance of the court. *Green v. Williams*, 144 N.C. 60, 58 S.E. 549 (1907).

A special proceeding under this chapter may be instituted by an owner of land whose boundary lines are in dispute. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Dispute as to Boundary Necessary.—To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. *Wood v. Hughes*, 195 N.C. 185, 141 S.E. 569 (1928).

Only disputed boundary lines are the subject of processioning proceedings. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Where the petition in processioning proceedings does not allege what boundary is in dispute between petitioners and respondents, and, while containing a legal description of the lands claimed by petitioners, fails to locate any lines as claimed by petitioners on the earth's surface, the petition is fatally defective and insufficient to confer jurisdiction on the court. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Call in Deed Is Binding.—Plaintiffs in a processioning proceeding, under this chapter, are bound by the call in their deed for a named corner whether it be marked or unmarked. *Cornelison v. Hammond*, 224 N.C. 757, 32 S.E.2d 326 (1944).

Where petitioners in a processioning proceeding introduce evidence fixing the corner of a contiguous tract, and the next call in their description is by course and distance to a stone (a corner in dispute), and the evidence is to the effect that the stone was small and had been moved, the disputed corner must, as a matter of law, be fixed at the distance called for from the established corner, with the result that petitioners' evidence is sufficient to support a finding of the corner as contended by

them. *Allen v. Cates*, 262 N.C. 268, 136 S.E.2d 579 (1964).

Effect of Agreement between Parties.—Where, in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. *Lowder v. Smith*, 201 N.C. 642, 161 S.E. 223 (1931).

Right to Have Issue Answered by Jury.—In a processioning proceeding under this chapter, where the only issue is the true boundary line, plaintiffs, as a matter of right, are entitled to have that issue answered by jury so that controversy may be ended by judicial decree, as the statute is expressly designed to provide a means of settlement by an orderly proceeding in court. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945).

Injunctive Relief.—To warrant the granting of an injunction in cases of special proceedings, the relief sought must be subsidiary to the relief asked in the special proceedings, *Hunt v. Sneed*, 64 N.C. 176 (1870); and since this section gives no substantive relief—settles no rights, or titles to property—, but only locates the dividing lines between the parties, the plaintiff was denied an injunction to restrain the defendant from commissions of trespasses when such order was asked for in the special proceedings instituted to determine the boundary line between the adjoining estates. *Wilson v. Alleghany Co.*, 124 N.C. 7, 32 S.E. 326 (1899). See *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939).

Equitable Relief of Mutual Mistake.—As the procedure for the application of this section is that prescribed in § 38-3, subsection (d), it is competent for the defendant under §§ 1-70 and 1-399 to plead the equitable relief of mutual mistake, having the cause transferred to the civil issue docket, and having the common grantor of the plaintiff and defendant made a party defendant. *Smith v. Johnson*, 209 N.C. 729, 184 S.E. 486 (1936).

Action of Trespass Converted into Pro-

cessioning Proceeding.—Where, in an action in trespass, the parties stipulated that each had title to his respective tract, and that the only controversy was as to the true location of the dividing line between the tracts, the action was thereupon converted into a processioning proceeding. It is not thereafter subject to dismissal as in case of nonsuit. *Welborn v. Bate Lumber Co.*, 238 N.C. 238, 77 S.E.2d 612 (1953).

When Title Is Not in Dispute.—Where petitioners allege ownership of contiguous tracts by the respective parties, and a dispute between them as to the true dividing line, and respondents do not deny petitioners' allegation of ownership except with respect to lappages and infringements on lands owned by respondent, and join in the prayer that the dividing line be properly located, title is not in dispute. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954).

Only Question Is Location of True Dividing Line.—Ordinarily, in a special proceeding under this chapter, where it is admitted that the lands of petitioner and respondent adjoin, the only question presented is the location of the true dividing line. *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961).

When Nonsuit Not Proper.—Where in a processioning proceeding it appears that the parties are owners of adjoining tracts and that a bona fide dispute exists between them as to the location of the dividing line, nonsuit is not proper. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E.2d 74 (1949).

Where, in a processioning proceeding, the title of the respective parties is not in dispute, and the only real controversy is as to the location of the dividing line between the lands of the parties, nonsuit is erroneously entered. *Brown v. Hodges*, 230 N.C. 746, 55 S.E.2d 498 (1949).

Applied in *Tice v. Winchester*, 225 N.C. 673, 36 S.E.2d 257 (1945); *Strickland v. Kornegay*, 240 N.C. 758, 83 S.E.2d 903 (1954); *Perkins v. Clarke*, 241 N.C. 24, 84 S.E.2d 251 (1954); *Twiford v. Harrison*, 260 N.C. 217, 132 S.E.2d 321 (1963).

Cited in *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953); *Kanupp v. Land*, 248 N.C. 203, 102 S.E.2d 779 (1958).

§ 38-2. Occupation sufficient ownership.—The occupation of land constitutes sufficient ownership for the purposes of this chapter. (1893, c. 22; 1903, c. 21; Rev., s. 326; C. S., s. 362.)

Sufficiency of Ownership—When Title Not in Dispute.—The courts have construed the term "occupation," as used in

this section, to mean possession, and uniformly hold that one (a) in possession of the land, and/or (b) whose title thereto is

not disputed, so that no issue is raised save only that of the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. *Williams v. Hughes*, 124 N.C. 3, 32 S.E. 325 (1899); *Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903).

Where it was admitted that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true

boundary line, was not error. *Clark v. Dill*, 208 N.C. 421, 181 S.E. 281 (1935).

Same—When Title Is in Dispute.—

Where, however, the defendant puts the title to the land in issue, and the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. *Woody v. Fountain*, 143 N.C. 67, 55 S.E. 425 (1906). See *Williams v. Hughes*, 124 N.C. 3, 32 S.E. 325 (1899).

§ 38-3. Procedure.—(a) *Petition; Summons; Hearing.*—The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Cross References.—See note to § 38-1. As to special proceedings generally, see § 1-393 et seq.

Compliance with the Procedural Steps Mandatory.—This section must be strictly followed in all material respects and any flagrant or negligent departure therefrom will be fatal to the proceedings. *Forney v. Williamson*, 98 N.C. 329, 4 S.E. 483 (1887). But the court will look to the substance and not to the form of the pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff's petition it will be treated as an answer, since it contains all that is required by the section. *Scott v. Kellum*, 117 N.C. 664, 23 S.E. 180 (1895).

Effect of Misjoinder of Parties.—A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. *Rogers v. Rogers*, 192 N.C. 50, 133 S.E. 184 (1926).

A defense bond is not required in a special proceeding to establish boundaries. *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

When Transfer to Regular Term Required.—The jurisdiction of the clerk in these special proceedings is limited in its

scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved, but must transfer the whole proceedings to the regular term of the court. *Parker v. Taylor*, 133 N.C. 103, 45 S.E. 473 (1903); *Smith v. Johnson*, 137 N.C. 43, 49 S.E. 62 (1904); *Brown v. Hutchinson*, 155 N.C. 205, 71 S.E. 302 (1911).

True Location of Disputed Line Must Be Alleged.—Under general rules applicable to pleadings, and specifically under this section, a petitioner must allege the true location of a disputed boundary line. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

The portion of this section providing that petitioner allege "facts sufficient to constitute the location of such line as claimed by him," requires that petitioner allege facts as to the location of the (disputed) line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from petitioner's description thereof. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Parties May Agree to Have Case Heard in First Instance by Presiding Judge.—This section directs that a processioning proceeding be heard first by the clerk. But

the direction is not jurisdictional. A stipulation by which the parties agree to bypass the clerk and have the case heard and determined in the first instance by the presiding judge will be upheld. *Strickland v. Kornegay*, 240 N.C. 758, 83 S.E.2d 903 (1954); *Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960).

Proceeding Assimilated to Action to Quiet Title.—If title becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title under § 41-10. *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948). See *Woody v. Fountain*, 143 N.C. 66, 55 S.E. 425 (1906).

Where in a special proceeding under this chapter to establish a boundary line, the defendant denies by answer the petitioner's title and pleads twenty years' adverse possession under § 1-40 as a defense, the proceeding is assimilated to an action to quiet title under § 41-10 and the clerk, as directed by § 1-399, should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions as originally instituted. *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

Where, in a special proceeding under this chapter to establish a boundary line, the defendant by his answer denies the petitioner's title and as a defense pleads seven years' adverse possession under color of title under § 1-38, or twenty years' adverse possession under § 1-40, the proceeding is assimilated to an action to quiet title. In such case, as provided by § 1-399, the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961).

Transfer of Cause and Injunctive Relief.—When defendant in a processioning proceeding puts title in issue, the cause should be transferred to the civil issue docket for trial, but when he does not do so the proceeding does not involve title or right to possession, but solely the location of the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. *Jackson v. Jackson*, 216 N.C. 401, 5 S.E.2d 143 (1939). See *Wilson v. Alleghany Co.*, 124 N.C. 7, 32 S.E. 326 (1899).

Effect of Erroneous Transfer of Cause.

—The fact that the clerk in a processioning proceeding erroneously concludes that the answer converted the proceeding into an action to try title to realty, and thereupon transfers the cause to the civil issue docket for trial, does not deprive the superior court of jurisdiction to determine the processioning proceeding. *Lance v. Cogdill*, 236 N.C. 134, 71 S.E.2d 918 (1952).

Issues Raised and Waiver of Jury Trial.

—Where a special proceeding to establish a boundary line is assimilated to an action to quiet title by the defendant's answer, the issues raised by the pleadings are (1) whether petitioners own the land described in his petition, and (2) the location of the land so described. In such case if defendant does not tender issues pertinent to the issues above stated he waives his right to a trial by jury. *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

Exceptions Not Giving Right to Jury Trial.

—Where compulsory reference is ordered in a special proceeding to establish a boundary line, upon defendant's denial of petitioners' title and plea of title by twenty years' adverse possession, defendant's exception to the order of reference and exceptions to findings of fact made by the referee do not entitle him to a jury trial when he tenders issues which relate only to questions of fact based upon his exceptions, and fails to tender issues of fact which arise upon the pleadings and to relate such issues to his exceptions and to the findings by their respective numbers. *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

Burden of Proof.—Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden is on the plaintiff to establish such line, *Hill v. Dalton*, 140 N.C. 9, 52 S.E. 273 (1905); *Woody v. Fountain*, 143 N.C. 67, 55 S.E. 425 (1906); and this burden does not shift to the defendant merely because, in addition to denying the line to be as claimed by the plaintiff, he alleges another to be the dividing line. *Garris v. Harrington*, 167 N.C. 86, 83 S.E. 253 (1914).

The plaintiff is the actor and has the burden of establishing the true location of the dividing line. *McCanless v. Ballard*, 222 N.C. 701, 24 S.E.2d 525 (1943); *Jenkins v. Trantham*, 244 N.C. 422, 94 S.E.2d 311 (1956).

The burden of proof rests upon a petitioner to establish the true location of a disputed boundary line. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

In a proceeding to establish disputed

boundary lines petitioners may contend that the true boundary is shown by the line on surveyor's map marked by letters as alleged in their petition and also may contend that the true boundary is shown by the fence on the surveyor's map by reason of title having vested in them to the land in dispute up to the fence by adverse possession under § 1-40. They may assert both contentions leaving it to the court and jury to say which line, if either, they have carried the burden of establishing. *Jenkins v. Trantham*, 244 N.C. 422, 94 S.E.2d 311 (1956).

Questions of Law and Fact.—What is the true dividing line between two contiguous tracts of land is a question of law for the court; where such line is actually located on the premises is an issue of fact for the jury. *Lance v. Cogdill*, 236 N.C. 134, 71 S.E.2d 918 (1952); *Welborn v. Bate Lumber Co.*, 238 N.C. 238, 77 S.E.2d 612 (1953); *Andrews v. Andrews*, 252 N.C. 97, 113 S.E.2d 47 (1960). See *Jenkins v. Trantham*, 244 N.C. 422, 94 S.E.2d 311 (1956).

The provision of a judgment for marking the line as judicially determined, as provided by subsection (c) of this section, was a mere direction for the performance of a ministerial duty which in no way affected the finality of the determination of how the line should be run. *Harrill v. Taylor*, 247 N.C. 748, 102 S.E.2d 223 (1958).

Evidence Generally.—The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. *Tallassee Power Co. v. Savage*, 170 N.C. 625, 87 S.E. 629 (1916). See *Woodard v. Harrell*, 191 N.C. 194, 132 S.E. 12 (1926), containing dicta to the effect that parol evidence of location of boundary line may be properly admitted, if the parties were merely locating the true boundary line, but not to show a verbal agreement to change the true dividing line.

Surveyor's Report as Evidence.—The surveyor, when acting under this section, is not in any sense a referee, and his report to the court should not contain conclusions of law, but should only set forth a detailed account of the facts of the case, and when it does this it is entitled to great evidential weight, although it is not conclusive as to the results contained therein. *Norwood v. Crawford*, 114 N.C. 513, 19 S.E. 349 (1894). See *Green v. Williams*, 144 N.C. 60, 56 S.E. 549 (1907).

What Report of Processioners Must Contain.—A report of a processioner is radically defective when it does not state,

with precision, the claims of the respective parties, so as to show what lines were disputed or how far they were disputed, and no undue laxity in the proceedings in this respect will be tolerated by the court. *Hoyle v. Wilson*, 29 N.C. 466 (1847). So also where one of the parties objects to the processioner's proceeding, the processioner must, in his return to the court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, etc. *Carpenter v. Whitworth*, 25 N.C. 204 (1842).

The clerk's jurisdiction to enter a judgment by default in a processioning proceeding is based solely on the sentence in the portion of this section reading "If the defendants fail to answer, judgment shall be given establishing the line according to petition." *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Failure to Except to Judgment of Clerk and Take Appeal within Time Allowed.—Where there is a failure to except to judgment of the clerk in a processioning proceeding fixing the boundary line between the contiguous tracts, and a failure to take an appeal from such judgment within the time allowed by this section, without any showing of excusable neglect, a petition for certiorari to review the judgment of the clerk is properly denied. *Johnson v. Taylor*, 257 N.C. 740, 127 S.E.2d 533 (1962).

Where Judgment Affirmed on Appeal.—Where judgment in a processioning proceeding establishing the dividing line between the tracts of the respective parties is affirmed on appeal, the lower court may retain the cause thereafter only for the purpose of putting into effect the provisions of this section. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E.2d 472 (1954).

Judgment of Clerk as Res Judicata—Where Title to Land Not in Issue.—Where the only fact in issue is the establishment and location of the boundary line, then the judgment of the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. *Whitaker v. Garren*, 167 N.C. 658, 83 S.E. 759 (1914). But his judgment may not estop the parties from asserting in a separate action title in the land. *Nash v. Shute*, 182 N.C. 528, 109 S.E. 353 (1921).

Same—Where Title in Issue.—Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court, a judgment therein estops the parties both as to the

title and the location of the line. *Whitaker* (1914). See *Nash v. Shute*, 182 N.C. 528, v. *Garren*, 167 N.C. 658, 83 S.E. 759 109 S.E. 353 (1921).

(b) *Appeal to Term.*—Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard *de novo*.

Parties on Appeal.—Under the provision contained in this section for appeal by either party to the regular term of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. *Batts v. Pridgen*, 147 N.C. 133, 60 S.E. 897 (1908).

a processioning proceeding under this chapter when the cause is heard on appeal, unless pleadings are complicated by other allegations the only issue is as to the true location of the dividing line. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E.2d 633 (1945).

Issue Is Location of Dividing Line.—In

(c) *Survey after Judgment.*—When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

(d) *Procedure as in Special Proceedings.*—The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (1893, c. 22; 1903, c. 21; Rev., s. 326; C. S., s. 363.)

§ 38-4. **Surveys in disputed boundaries.**—When in any suit pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit. (1779, c. 157; 1786, c. 252; R. C., c. 31, s. 119; Code, c. 939; Rev., s. 1504; C. S., s. 364.)

This section vests in the court a sound discretion within the limits defined. *Vance v. Pritchard*, 218 N.C. 273, 10 S.E.2d 725 (1940).

Clerk Has No Power to Make Allowance for Costs.—The word "court," as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order allowing compensation to the surveyor, the

clerk has no power to make the allowance; but on appeal from the clerk's refusal, such order will be made by the judge of the superior court. *LaRoque v. Kennedy*, 156 N.C. 360, 72 S.E. 454 (1911); *Cannon v. Briggs*, 174 N.C. 740, 94 S.E. 519 (1917); *Ipock v. Miller*, 245 N.C. 585, 96 S.E.2d 729 (1957).

Cited in *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

Chapter 39.

Conveyances.

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ARTICLE 1.

Construction and Sufficiency.

§ 39-1. **Fee presumed, though word "heirs" omitted.**—When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. (1879, c. 148; Code, s. 1280; Rev., s. 946; C. S., s. 991.)

Cross Reference.—As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see § 8-21.

Editor's Note.—This section changes the common-law rule that in order to convey a fee simple the word "heirs" should appear either in the premises or the habendum of the deed. *Carolina Real Estate Co. v. Bland*, 152 N.C. 225, 67 S.E. 483 (1910). Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estates had already been made. See *Hollowell v. Manly*, 179 N.C. 262, 102 S.E. 386 (1920); *Whitchard v. Whitehurst*, 181 N.C. 79, 106 S.E. 463 (1921), relating to a conveyance in trust. And a series of cases established the proposition that the word "heirs," when used as indicative of the estate to be granted, no matter where the word appeared in the instrument, would be transposed and inserted so as to cause the instrument to operate as a fee simple. See *Smith v. Proctor*, 139 N.C. 314, 51 S.E. 889 (1905). But perhaps the most radical departure from the early rule is found in the case of *Vickers v. Leigh*, 104 N.C. 248, 10 S.E. 308 (1889), where it was decided that if it appeared that the word "heirs" was omitted from the instrument because of ignorance, inadvertence or mistake, the word would be supplied so as to

pass title in fee in accordance with the intention of the grantor.

As to use of fee simple form deed to convey other than a fee, see 39 N.C.L. Rev. 283 (1961).

Deeds Executed Prior to Effective Force of Section.—Although a deed to lands executed and delivered prior to the effective force of this section would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" was sufficient to pass a fee simple title of the lands conveyed therein. *Tucker v. Smith*, 199 N.C. 502, 154 S.E. 826 (1930).

Section Provides Same Rule for Deeds as for Devises.—This section provides the same rule of construction of deeds as is contained in § 31-38 for construction of devises. *Vickers v. Leigh*, 104 N.C. 248, 10 S.E. 308 (1889).

Decisions construing § 31-38, pertaining to the construction of wills, are pertinent in construing this section, since the statutes are similar in wording and effect. *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948).

Fee Simple Presumed Unless Contrary Intention Appears.—All conveyances of land executed since the passage of this section are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words

of the common law shall govern. *Triplett v. Williams*, 149 N.C. 394, 63 S.E. 79 (1908).

By this section a deed, though not using the word "heirs," is a conveyance in fee, unless the contrary intention appears. *Holloway v. Green*, 167 N.C. 91, 83 S.E. 243 (1914).

Presumption Held Rebutted.—The presumption of fee raised by this section was rebutted by the fact that the deed intended to convey only a life estate, which was manifest from the many restraining expressions contained therein. *Boomer v. Grantham*, 203 N.C. 230, 165 S.E. 698 (1932).

This section does not apply where the granting clause of the deed in plain and explicit words shows that the intention of the grantor was to grant merely a life estate, and the habendum clause creates no estate contradictory or repugnant to that given in the granting clause. *Griffin v. Springer*, 244 N.C. 95, 92 S.E. 2d 682 (1956).

When Section Inapplicable.—This section does not apply when the deed discloses an intent to convey an estate less than a fee simple. *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963).

Deed to Husband and Wife and Heirs of Wife.—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of this section, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908).

This section does not change a common-law conveyance of inheritance to a conveyance of less effectiveness, i.e., to one conveying only a life estate. *Whitley v. Arenson*, 219 N.C. 121, 12 S.E. 2d 906 (1941).

Deed Conveying Life Estate Notwithstanding Use of Word "Heirs".—The granting clause of a deed was to one of the grantor's sons, his heirs and assigns, and following the description, "this deed is conveyed to the said grantee to him his lifetime and then to his boy children," with habendum to the said son "and his heirs and not to assign only to his brothers their only use and behoof forever" with warranty to the said son "and his heirs and assigns." It was held that the portion of the habendum restraining assignment except to the brothers of the grantee was equally consistent with an assignment of a life estate and with an assignment of the fee, and to hold that the grant to the "son

and his heirs" conveyed the fee simple would require that other portions of the instrument expressive of the intent of the grantor be disregarded; thus in accordance with the intention of the grantor as gathered from the entire instrument the deed conveyed a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. *Jefferson v. Jefferson*, 219 N.C. 333, 13 S.E. 2d 745 (1941).

Language in Deed Limiting Conveyance to Less than Fee Simple.—The language of the deed must clearly manifest the intention of the parties to convey less than a fee simple absolute. *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963).

The language of the deed conveying the land "for the purpose above named for the term of this conveyance" clearly limits the effect of the conveyance to less than a fee simple absolute. *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963).

The intention of the parties must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought. *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963).

Deed Allowing Removal of Structures from Conveyed Land.—Since the parties stipulated in the deed that the defendant be allowed to remove from the conveyed land all structures whenever it thought proper, it is obvious that the parties intended a conveyance in other than fee simple. *Etheridge v. United States*, 218 F. Supp. 809 (E.D.N.C. 1963).

Section as Curing Repugnancy.—The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns," and the habendum, "to herself, the said M. G. during her lifetime, and at her death said land is to be equally divided between" her children. It was held that since under this section, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there was no repugnance in this deed between the granting clause and habendum. The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children. *Triplett v. Williams*, 149 N. C. 394, 63 S.E. 79 (1908).

Rejection of Repugnant Clause Where Granting Clause and Habendum Convey Fee.—Where the granting clause and the habendum convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee-simple title will be rejected as repugnant to the estate and interest conveyed. *Artis v. Artis*, 228 N.C. 754, 47 S.E.2d 228 (1948); *Pilley v. Smith*, 230 N.C. 62, 51 S.E.2d 923 (1949).

Where the granting clause in a deed purported to convey the fee and the habendum and warranties were in harmony therewith, a clause in the description referring to the property conveyed as a right-of-way 100 feet wide did not limit the conveyance to an easement, and the contention that a fee simple was conveyed was supported by this section. *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330 (1958).

When the granting clause, the habendum, and the warranty in a deed are clear and unambiguous, and fully sufficient to pass immediately a fee-simple estate to the grantee or grantees, a paragraph inserted between the description and the habendum in which grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. *Lackey v. Hamlet City Bd. of Educ.*, 258 N.C. 460, 128 S.E.2d 806 (1963).

Effect of Restraint upon Alienation.—Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. *Holloway v. Green*, 167 N.C. 91, 83 S.E. 243 (1914).

Deed Held Not to Impose Condition Subsequent.—A habendum in a deed to incorporators and trustees of a college, "To have and to hold the aforesaid lands and premises to the party of the second part and their successors in office forever, for the only proper use and behalf of said Claremont Female College as foresaid," did not have the effect of appropriating the specific property to school purposes under condition subsequent, but was held to express only the purpose of the grantor

in making the deed, and as to third persons the power of the trustees or other corporate authority to convey the property was not impaired. *Claremont College v. Riddle*, 165 N.C. 211, 81 S.E. 283 (1914).

Deed Held to Create Defeasible Fee.—The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a defeasible fee-simple estate of his granddaughter, which was to become absolute upon the birth of a child to her. *Sharpe v. Brown*, 177 N.C. 294, 98 S.E. 825 (1919).

Deed Held to Convey Fee Simple Determinable.—Where a reverter clause and the purposes for which the property was to be held as expressed in the habendum were not irreconcilable with or repugnant to the granting clause, a fee simple determinable was conveyed, it being apparent that the grantors intended to convey and estate of less dignity than a fee simple absolute. *Lackey v. Hamlet City Bd. of Educ.*, 258 N.C. 460, 128 S.E.2d 806 (1963).

Determining Whether Grant Is of Easement Appurtenant or in Gross.—The fact that the words "heirs and assigns" are not entered after the name of the grantee of an easement is not controlling in determining whether the easement granted is an easement appurtenant or in gross. *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963).

Section Applied to Reservation of Easement.—In *Ruffin v. Seaboard Air Line Ry.*, 151 N.C. 330, 66 S.E. 317 (1909), this section was applied in holding that a reservation of an easement was a reservation in fee, as no contravening intent appeared from the conveyance.

Retention of Mineral Rights.—Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. *Central Bank & Trust Co. v. Wyatt*, 189 N.C. 107, 126 S.E. 93 (1925).

Applied in *New York Life Ins. Co. v. Lassiter*, 209 N.C. 156, 183 S.E. 616 (1936); *Jackson v. Powell*, 225 N.C. 599, 35 S.E.2d 892 (1945); *Swaim v. Swaim*, 235 N.C. 277, 69 S.E.2d 534 (1952).

Cited in *Krites v. Plott*, 222 N.C. 679, 24 S.E.2d 531 (1943).

§ 39-2. **Vagueness of description not to invalidate.**—No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the rea-

son that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing. (1891, c. 465, s. 2; Rev., s. 948; C. S., s. 992.)

Cross Reference.—As to vagueness of description in paper-writing offered as evidence, see § 8-39.

Editor's Note.—In *Blow v. Vaughan*, 105 N.C. 198, 10 S.E. 891 (1890), it was held that a deed describing land "as adjoining lands of A, B, and others and containing 25 acres, more or less," etc., was too vague and indefinite to be aided by parol proof. A similar holding appears in *Wilson v. Johnson*, 105 N.C. 211, 10 S.E. 895 (1890). These two cases were received by the bar and the State with manifest disapproval, and were the cause of much concern as to the validity of titles. Hence, the legislature in 1891 enacted the salutary provisions of this section. The section does not operate retrospectively. See *Lowe v. Harris*, 112 N.C. 472, 17 S.E. 539 (1893); *Hamphill v. Annis*, 119 N.C. 514, 26 S.E. 152 (1896).

Section Applies Only Where There Is a Description.—In *Harris v. Woodard*, 130 N.C. 580, 41 S.E. 790 (1902), it was said that the statute applies only where there is a description which can be aided, but not when there is no description. *Bryson v. McCoy*, 194 N.C. 91, 138 S.E. 420 (1927); *Holloman v. Davis*, 238 N.C. 386, 78 S.E.2d 143 (1953).

A deed which fails to describe any land is as void now as it was prior to the passage of this section. *Moore v. Fowle*, 139 N.C. 51, 51 S.E. 776 (1905).

Description Too Vague and Indefinite.—A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, this section not applying to such cases. *Katz v. Daughtrey*, 198 N.C. 393, 151 S.E. 879 (1930); *Holloman v. Davis*, 238 N.C. 386, 78 S.E.2d 143 (1953).

Description Capable of Being Reduced to Certainty.—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the in-

strument refers. *Patton v. Sluder*, 167 N.C. 500, 83 S.E. 818 (1914).

Descriptions Held Sufficient.—A description in a mortgage of a life estate in lands as being in a certain county and township, containing 20 acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it, is sufficient to admit parol evidence to fit the locus in quo to the description in the instrument, and is not void for vagueness of description under this section. *Bissette v. Strickland*, 191 N.C. 260, 131 S.E. 655 (1926).

A description of land in a deed, which designates all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient under this section to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land & Timber Co. v. Yarbrough*, 179 N.C. 335, 102 S.E. 630 (1920).

When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract," or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C, or (3) the land is designated by such a term as the home place of D, or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, the description is not void for vagueness and it may be aided by parol evidence. *Peel v. Calais*, 224 N.C. 421, 31 S.E.2d 440 (1944).

Sufficiency of Description in Will.—Where a will leaves to the widow of the testator for life, "at least 75 acres of land . . . to include the dwelling house and to be located as she may want it to be, and as near four-square as is consistent," it is sufficient under this section to be located by parol evidence. *Heirs at Law of Freeman v. Ramsey*, 189 N.C. 790, 128 S.E. 404 (1925).

Stated in *Brown v. Hurley*, 243 N.C. 138, 90 S.E.2d 324 (1955).

§ 39-3: Repealed by Session Laws 1961, c. 52.

§ 39-4. **Conveyances by infant trustees.**—When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age. (1821, c. 1116, ss. 1, 2; R. C., c. 37, s. 27; Code, s. 1265; Rev., s. 1036; C. S., s. 994.)

Editor's Note.—The general rule is that the contracts of an infant are voidable at the option of the infant, and when avoided, the contract is null and void ab initio. *Pippen v. Mutual Benefit Life Ins. Co.*, 130 N.C. 23, 40 S.E. 822 (1902). To this general rule, there is one exception as old as the rule itself: "An infant may bind himself for necessities." *Jordan v. Coffield*, 70 N.C. 110 (1874); *Turner v. Gaither*, 83 N.C. 357, 35 Am. Rep. 574 (1880). It would seem that this section added a second exception to the general rule in this State. It expressly creates a class of contracts which an infant is authorized to make, and which are as binding "as if made by a person of full age." See 3 N.C.L. Rev. 110.

Section Indicates Proceeding in Equity.—The language of this section that "the court may decree" is indicative of a pro-

ceeding in equity. *Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941).

Remedy is Exclusive.—The remedy prescribed by this section, relating to the foreclosure of a deed of trust, must be, under our form of civil procedure, an action in the nature of an equitable proceeding to foreclose a mortgage. No other remedy is given by statute. Hence, it is exclusive and must be resorted to, and in the manner prescribed. *Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941).

Trustors are necessary parties to an action by a purchaser at a foreclosure sale to obtain authority for an infant trustee to execute the deed. *Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941).

Cited in *Coker v. Virginia-Carolina Joint-Stock Land Bank*, 208 N.C. 41, 178 S.E. 863 (1935).

§ 39-5. **Official deed, when official selling or empowered to sell is not in office.**—When a sheriff, coroner, constable or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the State before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (R. C., c. 37, s. 30; Code, s. 1267; 1891, c. 242; Rev., ss. 950, 951; C. S., s. 995.)

Cross References.—As to authority of sheriff to execute deed to land sold under execution, see § 1-309. As to sheriff's deed for trust estate, see § 1-316. As to sheriff's deed on sale of equity of redemption, see § 1-317.

Section Does Not Extend to Clerks.—This section does not extend to clerks, and they cannot exercise the power herein conferred after going out of office. *Shew v. Call*, 119 N.C. 450, 26 S.E. 33 (1896).

A tax deed executed by an "ex-sheriff" may be authorized under this section. *Southern Immigration, Improvement & Mfg. Co. v. Rosey*, 144 N.C. 370, 57 S.E. 2 (1907); *McNair v. Boyd*, 163 N.C. 478, 79 S.E. 966 (1913).

Deed Executed by Successor in Office.

—A deed made by a succeeding sheriff or coroner operates by virtue of this section to pass the title to what was sold. *Isler v. Andrews*, 66 N.C. 553 (1872); *Edwards v. Tipton*, 77 N.C. 222 (1877).

Successor May Demand Evidence of Sale and Payment.—Before a successor in office can be required to make a conveyance sought under this section he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor, and also that the purchase price was paid. *Harris v. Irwin*, 29 N.C. 432 (1847); *Isler v. Andrews*, 66 N.C. 553 (1872).

Deeds as Evidence.—A sheriff's deed

made pursuant to this section after he has gone out of office is still subject to the rule that such deeds are prima facie evidence of sale and execution. But the recitals in a deed made by a successor of the sheriff are only hearsay, as they constitute his opinion based on information and not his own knowledge. *Curlee v. Smith*, 91 N.C. 172 (1884). See *McPherson v. Hussey*, 17 N.C. 323 (1833); *Edwards v. Tipton*, 77 N.C. 222 (1877).

Power to Correct Deeds.—A sheriff's deed is under control of the court, and the court can compel a sheriff to correct his deed; if the sheriff who executes the deed dies, the court can compel his successor to correct the deed, pursuant to this section, hence, the court may on motion during the trial of a suit correct such a deed. *Millsaps v. McCormick*, 71 N.C. 531 (1874).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.—The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner: Provided, that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective: Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provisions that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective. (1893, c. 498; Rev., s. 1045; C. S., s. 996; 1929, c. 305; 1941, c. 264; 1943, c. 437.)

Cross References.—As to registration of deeds, see § 47-17 et seq. As to validation of certain deeds of revocation not in conformity with this section, see § 39-6.1.

Editor's Note.—As a result of the 1929 amendment, this section applies to trusts created before 1929 as well as to such as may be created thereafter. *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

The 1943 amendment added the last three provisos at the end of the section and became effective on March 4, 1943.

For article on this section, see 20 N.C.L. Rev. 278. For comment on the 1941 amendment, see 19 N.C.L. Rev. 507. For com-

ment on the 1943 amendment, see 21 N.C.L. Rev. 359.

The constitutionality of this section was upheld in *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929). Mere expectancies of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the legislature of the power to enact this section authorizing revocation of a voluntary grant. *MacMillan v. Branch Banking & Trust Co.*, 221 N.C. 352, 20 S.E.2d 276 (1942).

The 1929 amendment to this section is constitutional as applied to trusts created before the effective date of the amend-

ment. *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929), distinguishing *Roe v. Journegan*, 175 N.C. 261, 95 S.E. 495 (1918), and *Roe v. Journegan*, 181 N.C. 180, 106 S.E. 680 (1921).

Though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of a trust given by this section is not within the constitutional inhibition. *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

Section before 1929 Amendment Not Retroactive.—This section as it stood before the 1929 amendment did not apply to deeds executed prior to its enactment. *Roe v. Journegan*, 175 N.C. 261, 95 S.E. 495 (1918); *Roe v. Journegan*, 181 N.C. 180, 106 S.E. 680 (1921). See *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

1943 Amendment Is Constitutional.—Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not in esse be regarded as a vested right, the 1943 amendment to this section, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional. *Pinkham v. Unborn Children of Pinkham*, 227 N.C. 72, 40 S.E.2d 690 (1946).

Power of Revocation Is Not a Vested Right.—The right to revoke a voluntary conveyance of future interests in lands limited to persons not in esse is a personal power and privilege created by this section and not a vested right within constitutional protection. *Pinkham v. Unborn Children of Pinkham*, 227 N.C. 72, 40 S.E.2d 690 (1946).

Purpose of 1943 Amendment.—The 1943 amendment was no doubt enacted to resolve a doubtful situation which had arisen through uncertainty as to the effect of this section on the revocability of trusts, and the incidence of federal taxation on trusts already set up, or hereafter to be created. It was intended to bring North Carolina into line with other states where the irrevocability of trusts could be assured to the grantor or settlor when made. *Pinkham v. Unborn Children of Pinkham*, 227 N.C. 72, 40 S.E.2d 690 (1946).

Revocation within Six Months of Effective Date.—This section was applied, as to revocation within six months after the effective date of the 1943 amendment, in *Kirkland v. Deck*, 228 N.C. 439, 45 S.E.2d 538 (1947).

Trustor May Not Withdraw Vested Interest of One in Esse When Trust Created.—This section gives the trustor no right to withdraw a vested interest in property held by one who was in esse when the trust was created, but only to withdraw a future contingent interest to some person or persons not in esse or not determinable until the happening of a future event. *Washington v. Ellsworth*, 253 N.C. 25, 116 S.E.2d 167 (1960).

Equity Jurisdiction Over Trusts Is Not Involved.—In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not in esse, the equitable jurisdiction of the court over trust estates is not involved. *Pinkham v. Unborn Children of Pinkham*, 227 N.C. 72, 40 S.E.2d 690 (1946).

Power of Revocation Rests Solely in Grantor.—The power to revoke future interests conveyed by voluntary deeds to persons not in esse under the provisions of this section, rests solely in the grantor conveying such interests, and where deeds are executed by owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power. *Pinkham v. Unborn Children of Pinkham*, 227 N.C. 72, 40 S.E.2d 690 (1946).

A waiver of the right of revocation by the trustor of a voluntary trust when made without consideration, does not preclude the trustor from exercising his right to revoke under this section. *MacMillan v. Branch Banking & Trust Co.*, 221 N.C. 352, 20 S.E.2d 276 (1942).

Voluntary Trusts.—A trust estate in personality created by the donor in consideration of one dollar and natural love and affection is a voluntary trust revocable by the donor under this section. *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

Deed in Marriage Settlement.—Where a woman received property without restriction from her father's estate and executed a deed in marriage settlement in

trust without consideration, the deed was a voluntary trust in contemplation of this section. *MacRae v. Commerce Union Trust Co.*, 199 N.C. 714, 155 S.E. 614 (1930).

Future Contingent Interests.—Where a voluntary trust was created for the life of the donor's nephew or until he reached the age of fifty years, and at the termination to the nephew's issue or in the absence of issue to his next of kin, those who would take in remainder would take upon a contingency, the vesting of which depended upon the uncertain happening of a future event, and the trust might be revoked by the donor. *Stanback v. Citizen's Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

When Child "in Being."—Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. It was held that the child was in esse at the time of the attempted revocation and therefore the revocation was ineffectual. For the purpose of capacity to take under a deed, and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary, that a child is in esse 280 days prior to its birth. *Mackie v. Mackie*, 230 N.C. 152, 52 S.E.2d 352 (1949).

When Interests Become Vested. — Where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children their interests do not

ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. *MacRae v. Commerce Union Trust Co.*, 199 N.C. 714, 155 S.E. 614 (1930).

Revocation with Consent of Only Beneficiary of Remainder in Esse.—Plaintiff executed a voluntary trust in personality with direction that the income therefrom be paid to her for life and upon her death the trust estate be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate should be paid to a named beneficiary if living and if he were not then living then to plaintiff's heirs generally. Plaintiff had no children, and executed an instrument in writing revoking the trust upon the payment of a specified sum to the only beneficiary of the remainder in esse, who consented to the revocation of the trust upon the payment to him of the amount agreed. It was held that under the provisions of this section plaintiff was entitled to the revocation of the trust. *MacMillan v. Branch Banking & Trust Co.*, 221 N.C. 352, 20 S.E.2d 276 (1942).

Law Governing Power of Revocation of Trust Settlement.—Where the daughter of a British subject took property absolutely from the trustees under his will upon her marriage, and married in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies, the *lex loci contractu* governing the marriage settlement was that of North Carolina and the settlement was controlled by the provisions of our statutes as to its revocation. *MacRae v. Commerce Union Trust Co.*, 199 N.C. 714, 155 S.E. 614 (1930).

Applied in *Cutter v. American Trust Co.*, 213 N.C. 686, 197 S.E. 542 (1938).

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.—All deeds or instruments heretofore executed, revoking any conveyance of future interest made to persons not in esse, are hereby validated insofar as any such deed of revocation may be in conflict with the provisions of G.S. 39-6.

All such deeds of revocation heretofore executed are hereby validated and no such deed of revocation shall be held to be invalid by reason of not having been executed within the six-month period prescribed in the third proviso of G.S. 39-6. (1947, c. 62.)

Editor's Note.—The act from which this section was codified became effective on February 11, 1947, and provided that its

provisions should not affect pending litigation.

§ 39-6.2. Creation of interest or estate in personal property.—Any interest or estate in personal property which may be created by last will and testament may also be created by a written instrument of transfer. (1953, c. 198.)

Editor's Note.—This section overrules the decision in *Speight v. Speight*, 208 N.C. 132, 179 S.E. 461 (1935), which held that there can be no limitation over after a life estate in personal property.

For comment on this section, see 31 N.C.L. Rev. 408 (1953).

The restriction upon the right to create a remainder in personal property after a life estate by deed, or other written instrument, has been eliminated by this section. *Ridge v. Bright*, 244 N.C. 345, 93 S.E.2d 607 (1956).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.—(a) The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or contingent. All future interests in real or personal property, including all reversions, executory interests, vested and contingent remainders, rights of entry both before and after breach of condition and possibilities of reverter may be conveyed by the owner thereof, by an otherwise legally effective conveyance, inter vivos or testamentary, subject, however, to all conditions and limitations to which such future interest is subject.

(b) The power to convey as provided in subsection (a), can be exercised by any form of conveyance, inter vivos or testamentary, which is otherwise legally effective in this State at the date of such conveyance to transfer a present estate of the same duration in the property.

(c) This section shall apply only to conveyances which become operative to transfer title on or after October 1, 1961. (1961, c. 435.)

Future Interests in Personal Property.—As to personal property permanent in nature the generally accepted rule is that the same future interests that are permissible in the field of real property law

are also permissible in the law of personal property. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.—(a) In order to waive the elective life estate of either husband or wife as provided for in G.S. 29-30, every conveyance or other instrument affecting the estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law.

(b) A married person may bargain, sell, lease, mortgage, transfer and convey any of his or her separate real estate without joinder or other waiver by his or her spouse if such spouse is incompetent and a guardian or trustee has been appointed as provided by the laws of North Carolina, and if the appropriate instrument is executed by the married person and the guardian or trustee of the incompetent spouse and is probated and registered in accordance with law, it shall convey all the estate and interest as therein intended of the married person in the land conveyed, free and exempt from the elective life estate as provided in G.S. 29-30 and all other interests of the incompetent spouse.

(c) Subsection (a) shall not be construed to require the spouse's joinder or other waiver of the elective life estate of such spouse as provided for in G.S. 29-30 where a different provision is made or provided for in the General Statutes including, but not limited to, G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, G.S. 31A-1 (d), and G.S. 52-10. (C. C. P., s. 429; subsec. 6; 1868-9, c. 277, s. 15; Code, s.

1256; 1899, c. 235, s. 9; Rev., s. 952; C. S., s. 997; 1945, c. 73, s. 4; 1957, c. 598, s. 3; 1965, c. 855.)

I. General Consideration.

II. Execution by Both Husband and Wife.

A. In General.

B. Husband's Acknowledgment and Proof of Execution.

III. Effect of Feme Covert's Deed.

Cross References.

See Const., Art. X, § 6. As to form of acknowledgment of conveyances and contracts between husband and wife, see § 47-39. As to acknowledgment at different times and places and before different officers, and order of acknowledgment, see § 39-8. As to husband's acknowledgment and wife's acknowledgment before the same officer, see § 47-40. For repeal of laws requiring private examination of married women, see § 47-14.1. For validation of certain instruments executed without private examination of married woman, see § 39-13.1. As to married persons generally, see § 52-1 et seq. As to abolition of dower, see § 29-4.

I. GENERAL CONSIDERATION.

Editor's Note.—This section must be considered in connection with N.C. Const., Art. X, § 6, and chapter 52 of the General Statutes. The Constitution secures to a feme covert her property, real and personal, acquired before or after marriage, as her sole and separate estate and property. However, it requires the written consent of the husband before she can make a valid conveyance thereof. The very year of the adoption of the Constitution the legislature passed an act requiring that for the validity of a conveyance or other instrument, affecting the "estate, right or title of any married woman in lands, tenements or hereditaments," her privy examination must be taken by the proper officer. Code of Civil Procedure, § 429, subsec. 6, reenacted, with some slight modifications, by Laws 1868-9, c. 277, § 15. This enactment continued, in substance, through the various codes and laws on the subject, appearing in Revisal 1905 as § 952. Council v. Pridgen, 153 N.C. 443, 69 S.E. 404 (1910). The section was brought forward in a substantial manner as this section, prior to the 1965 amendment.

The 1965 amendment rewrote this section.

Many of the cases cited in the note to this section construe the section prior to the 1965 amendment.

See 12 N.C.L. Rev. 68, for comment on

this section prior to the 1957 and 1965 amendments.

For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N.C.L. Rev. 228 (1953).

Constitutionality.—This section is constitutional. Council v. Pridgen, 153 N.C. 443, 69 S.E. 404 (1910); Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913); Graves v. Johnson, 172 N.C. 176, 90 S.E. 113 (1916).

It is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Southerland v. Hunter, 93 N.C. 310 (1885).

Strict Compliance Necessary.—Unless the formalities of this section are complied with, the deed is absolutely void. Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913).

Compliance with the statutory requirement in effect at the time the deed was executed was necessary to its validity. Failure to comply with the requirements rendered the deed of a married woman to her husband absolutely void. Noble v. Pittman, 241 N.C. 601, 86 S.E.2d 89 (1955).

The section admits no distinction between legal and equitable interests, and embraces every "estate, right or title," which a married woman may possess in land, and such is the construction put upon it by the court. Clayton v. Rose, 87 N.C. 106 (1882).

Creation of Trust.—A woman under coverture cannot create a trust in land by parol or in any other manner except by embodying it in a written instrument executed in accordance with this section. Ricks v. Wilson, 154 N.C. 282, 70 S.E. 476 (1911).

A power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity. Hollingsworth v. Harman, 83 N.C. 153 (1880).

Deed Executed Same Day That Absolute Divorce Decree Was Rendered.—Where a decree of absolute divorce was rendered and a quitclaim deed from the wife to the husband was executed on the same day, and the requirements necessary to the validity of a deed from a married woman to her husband as prescribed by the statute then in effect were not observed, it was held that if the deed was executed and delivered prior to the rendition of the divorce decree, it would be void, and if it was executed and delivered subsequent thereto, it would be valid. An

instruction that if the deed were executed and delivered at approximately the same time as the rendition of the divorce decree as a simultaneous transaction, the deed would be valid, was error. *Noble v. Pittman*, 241 N.C. 601, 86 S.E.2d 89 (1955).

Liability of Married Woman for Breach of Contract.—Since the enactment of the Martin Act (§ 52-2), it is held that contracts wrongfully broken by married women will subject them to liability for damages, even though they cannot be compelled to convey unless they have been privily examined according to forms of law. In other words they may be liable for damages, although specific performance cannot be required. *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914); *Royal v. Southerland*, 168 N.C. 405, 84 S.E. 708 (1915); *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915).

Cited in *Owens v. Blackwood Lumber Co.*, 212 N.C. 133, 193 S.E. 219 (1937).

II. EXECUTION BY BOTH HUSBAND AND WIFE.

A. In General.

It is necessary that a wife's deed be signed by the husband and acknowledged by both husband and wife. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (M.D.N.C. 1934).

Veto Power of Husband.—While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. *Stallings v. Walker*, 176 N.C. 321, 97 S.E. 25 (1918).

Husband and Wife Must Execute Same Instrument.—This section clearly contemplates that the same instrument of writing shall be executed by both husband and wife. *Green v. Bennett*, 120 N.C. 394, 27 S.E. 142 (1897); *Slocomb v. Ray*, 123 N.C. 571, 31 S.E. 829 (1898).

Reason for Joinder of Husband.—The purpose of this section in making the requirements as to the deeds of a feme covert is stated by Chief Justice Smith in *Ferguson v. Kinsland*, 93 N.C. 337 (1885), as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And *Conner, J.*, in *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905), says: "For the purpose of throwing around her the

protection of her husband's counsel and advice, the legislature declared that with certain exceptions she could not contract without the written consent of her husband." *Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913).

Husband May Execute First.—The deed is nonetheless effectual to pass the title of the wife because the husband executes it before she does. *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889).

Binding Dower Interest by Mortgage.—To bind the dower interest by mortgage the husband and wife must join in the execution of the deed; separate conveyances will not comply with the requirement of this section. *Slocomb v. Ray*, 123 N.C. 571, 31 S.E. 829 (1898), decided prior to the enactment of § 29-4 which abolished dower.

Effect of Husband's Minority.—The part of this section requiring execution by the husband when his wife's lands are conveyed is contractual in its nature; hence when the husband is a minor the conveyance is subject to the usual rules applying to infant's contracts, and he may avoid or ratify it upon reaching his majority. *Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913). But see § 39-13.2 which makes married persons under twenty-one competent to execute certain deeds.

B. Husband's Acknowledgment and Proof of Execution.

Acknowledgment or Proof of Execution Necessary to Pass Title.—The law has been changed to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (see § 39-8), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpaired, and was fully recognized in *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915); *Graves v. Johnson*, 172 N.C. 176, 90 S.E. 113 (1916).

The case of *Southerland v. Hunter*, 93 N.C. 310 (1885), which has been approved on this point in *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889), and in *Slocomb v. Ray*, 123 N.C. 571, 31 S.E. 829 (1898), construes § 1256 of the Code (1883), Revisal, § 952, Consolidated Statutes, § 992, which is this section; and it is there held that a deed signed by the husband, but not proved as to him, was

ineffectual to pass the title of the wife, although her acknowledgement and private examination were taken. The fact that the General Assembly saw fit to change the statute requiring proof as to the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of *McGlennery v. Miller*, 90 N.C. 215 (1884), and *Ferguson v. Kinsland*, 93 N.C. 337 (1885), and left the statute unchanged as to the requirements that the deed must be proved as to the husband to pass the title or interest of the wife, after the decision in *Southerland v. Hunter*, furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained. *Graves v. Johnson*, 172 N.C. 176, 90 S.E. 113 (1916).

Time of Acknowledgment.—While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the section that the act of acknowledgment by both should be contemporaneous. *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889). See § 39-8 and note.

Acknowledgment after Wife's Death.—A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by this section requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, in which thereafter the husband writes in his name as a grantor, and after her death acknowledges its execution before the clerk, is invalid to pass title. *Hensley v. Blankinship*, 174 N.C. 759, 94 S.E. 519 (1917).

Consent Proved and Recorded after

Wife's Death.—No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until after the death of the wife. *Green v. Bennett*, 120 N.C. 394, 27 S.E. 142 (1897).

III. EFFECT OF FEME COVERT'S DEED.

How Lands of Feme Covert Bound.—In *Green v. Branton*, 16 N.C. 500 (1830), the court says that a feme covert can be bound as to her land in only two ways: First, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court. *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902).

Delivery of Deed Not Presumed.—The delivery of a deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife. *Tarleton v. Griggs*, 131 N.C. 216, 42 S.E. 591 (1902).

When Deed Is Inoperative.—In *Scott v. Battle*, 85 N.C. 185 (1881), it is held that a feme covert's deed, not executed in the prescribed mode, is wholly inoperative. *Clayton v. Rose*, 87 N.C. 106 (1882).

A purchase-money deed given by a feme covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife, is void because not complying with this section and Art. X, § 6 of the Constitution. *Hardy v. Abdallah*, 192 N.C. 45, 133 S.E. 195 (1926).

A married woman is not estopped by a deed not executed in the mode prescribed by the statute. *Towles v. Fisher*, 77 N.C. 437 (1877); *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902).

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.—No conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments which was executed by such married woman after February 6, 1964 and before June 8, 1965, shall be invalid for the reason that the instrument was not also executed by the husband of such married woman. (1965, c. 857.)

§ 39-8. Acknowledgment at different times and places; before different officers; order immaterial. — In all cases of deeds, or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and due proof or acknowledgment of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this State or only one in this State and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, it is immaterial whether the execution of the instrument was proven as to or

acknowledged by the husband before or after due proof as to or acknowledgment of the wife. (1895, c. 136; 1899, c. 235, s. 9; Rev., s. 953; C. S., s. 998; 1945, c. 73, s. 5.)

Editor's Note.—Prior to the enactment of this section a deed made by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her privy examination taken. This order was regarded as material, and of the substance of the execution of such a deed. Unless this order of acknowledgment and probate was observed, the deed was ineffectual to pass any title or interest whatsoever. *McGlennery v. Miller*, 90 N.C. 215 (1884). And see *Barrett v. Barrett*, 120 N.C. 127, 26 S.E. 691 (1897).

Obviously such stringent and technical requirements could hardly be said to be in line with the spirit of a statute whose leading purpose was to facilitate alienation by married women, or, as said in *Barfeld v. Combs*, 15 N.C. 514 (1834), to protect, not to hamper, married women. It is hard to see where any additional protection was afforded married women, while the evils and inconveniences resulting therefrom are only too apparent. This section offers a solution to the difficulty by removing the

technicalities, while in nowise decreasing the protection provided for married women. *Burgess v. Wilson*, 13 N.C. 306 (1830); *Pierce v. Wanett*, 32 N.C. 446 (1849); *Malloy v. Bruden*, 88 N.C. 305 (1883); *Barrett v. Barrett*, 120 N.C. 127, 26 S.E. 691 (1897); *Graves v. Johnson*, 172 N.C. 176, 90 S.E. 113 (1916).

For repeal of laws requiring private examination of married women, see § 47-14.1.

Acknowledgment of Husband Still Required.—The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. *Graves v. Johnson*, 172 N.C. 176, 90 S.E. 113 (1916).

Need Not Be at Same Time or before Same Officer.—It is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer. *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889).

§ 39-9. Absence of wife's acknowledgment does not affect deed as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, but no such instrument shall be the act or deed of the wife unless proven or acknowledged by her according to law. (1899, c. 235, s. 8; 1901, c. 637; Rev., s. 954; C. S., s. 999; 1945, c. 73, s. 6.)

Cross Reference.—For provision that clerk of superior court pass on certificate of acknowledgment and order registration, see § 47-14.

Editor's Note.—For repeal of laws requiring private examination of married women, see § 47-14.1.

When Assent of Wife Required.—An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, subject only to her right of dower [dower was abolished by § 29-4] except in the following cases: (1) Where the land in question has been allotted to him as a homestead, either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted;

(3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands. *Hughes v. Hodges*, 102 N.C. 236, 9 S.E. 437 (1889).

By the eighth section of the tenth article of the Constitution, a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. *Wittkowsky v. Gidney*, 124 N.C. 437, 32 S.E. 731 (1899).

When Probate Does Not Authorize Registration.—Where the probate of a deed recites the acknowledgment and privy examination of the wife of the grantor only, it is insufficient and does not authorize registration. *Hatcher v. Hatcher*, 127 N.C. 200, 37 S.E. 207 (1900).

§ 39-10. Officers authorized to take privy examination.—The officials authorized by law to take proofs and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination. (1899, c. 235, s. 6; Rev., s. 955; C. S., s. 1000.)

Cross Reference. — As to officials authorized by law to take acknowledgments, see §§ 2-16, subdivision 13, 10-4, 47-1, 47-2, 47-3.

Editor's Note. — All laws requiring private examination of married women were repealed by Acts of 1945, c. 73, s. 21, codified as § 47-116. See now § 47-14.1.

When Husband and Wife Out of State. — When the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of any city or town. *Paul v. Carpenter*, 70 N.C. 502 (1874).

Acknowledgment before Military Officer. — An acknowledgment and private examination taken by the provost marshal of the city of New Bern while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect as foreign judgments. *Paul v. Carpenter*, 70 N.C. 502 (1874).

When Officer Employee of Grantee. — The privy examination of a married woman

as to her execution of a deed is not invalid because taken by a notary public who was a clerk in the office of the grantee, but had no interest in the transaction. *Wachovia Nat'l Bank v. Ireland*, 122 N.C. 571, 29 S.E. 835 (1898).

When Officer Related to Parties. — Probate and private examinations taken before an officer are not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N.C. 262, 32 S.E. 715 (1899).

Omission of Seal by Justice of the Peace. — The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, which is otherwise regular. *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889).

Corrections after Expiration of Office. — A justice of the peace cannot correct his certificate made to a deed after his term of office has expired, such authority not having been given by statute. *Cook v. Pittman*, 144 N.C. 530, 57 S.E. 219 (1907).

§ 39-11. Certain conveyances not affected by fraud if acknowledgment or privy examination regular. — No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the acknowledgment or private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (1889, c. 389; 1899, c. 235, s. 10; Rev., s. 956; C. S., s. 1001; 1945, c. 73, s. 7.)

Cross Reference. — As to sufficiency of probate and registration without livery, see § 47-17 and note.

Editor's Note. — For repeal of laws requiring private examination of married women, see § 47-14.1.

See 12 N.C.L. Rev. 71.

When Privy Examination Was Not Taken. — In an action to invalidate a deed to lands because, in fact, the privy examination of the feme covert, the owner and plaintiff, had not been taken, though it was expressed to have been taken, as required

in the certificate of the justice of the peace, the plaintiff may by clear, cogent, and convincing proof show that her examination had not been taken at all, and when, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice. *Davis v. Davis*, 146 N.C. 163, 59 S.E. 659 (1907).

Same—Irregularity. — Where the privy examination of a wife was not taken, or was taken in a manner insufficient to fulfill

the requirements of the law, though the grantee had no knowledge thereof, the matter is open to judicial investigation. *Benedict v. Jones*, 129 N.C. 470, 40 S.E. 221 (1901). But see *Brite v. Penny*, 157 N.C. 110, 72 S.E. 964 (1911).

Presence and Undue Influence of Husband.—The presence and undue influence of the husband at the ceremony of the privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. *Brite v. Penny*, 157 N.C. 110, 72 S.E. 964 (1911), citing *Butner v. Blevins*, 125 N.C. 585, 34 S.E. 629 (1899); *Davis v. Davis*, 146 N.C. 163, 59 S.E. 659 (1907).

Fraud of Probate Officer. — Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not have it set aside upon allegation of fraud of a probate officer in taking her separate examination, when she admits that the examination was taken in substantial compliance with the requirement of the statute, and she signed the conveyance, and there is no evidence that the mortgagee participated in the fraud. *Whitaker v. Sikes Co.*, 187 N.C. 613, 122 S.E. 468 (1924).

In *Whitaker v. Sikes Co.*, 187 N.C. 613, 122 S.E. 468 (1924), the court said:

§ 39-12. **Power of attorney of married person.**—Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties or, subject to the provisions of G.S. 52-6, his or her spouse as attorney in fact. Such instruments may confer upon the attorney, and the attorney may exercise, any and all powers which lawfully can be conferred upon an attorney in fact, including, but not limited to, the authority to join in conveyances of real property for the purpose of waiving or quitclaiming any rights which may be acquired as a surviving spouse under the provisions of G.S. 29-30. (1798, c. 510; R. C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C. S., s. 1002; 1965, c. 856.)

Cross Reference.—As to registration of power of attorney, § 47-28.

"Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof, or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside."

Note Procured by Duress.—Upon the principle embodied in this section, a note given by a husband and wife, where the husband procured the wife's execution by duress, is voidable only, and is good in the hands of a bona fide holder. *L. A. Randolph Co. v. Lewis*, 196 N.C. 51, 144 S.E. 545 (1928).

Guilt of Grantee Must Be Alleged.—A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailing unless supported by an allegation that the grantee had notice of or participated in the same. *Wachovia Nat'l Bank v. Ireland*, 122 N.C. 571, 29 S.E. 835 (1898).

Innocent Purchaser from Guilty Grantee Protected.—This section protects the title of an innocent purchaser for value from a grantee who did have notice of such fraud, duress or undue influence. *Butner v. Blevins*, 125 N.C. 585, 34 S.E. 629 (1899).

Applied, as to married woman's attack upon certificate of acknowledgment and privy examination, in *Lee v. Rhodes*, 230 N.C. 190, 52 S.E.2d 674 (1949).

Editor's Note. — The 1965 amendment rewrote this section.

§ 39-13. **Spouse need not join in purchase-money mortgage.**—The purchaser of real estate who does not pay the whole of the purchase money at the time when he or she takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his or her spouse as well as the purchaser, without requiring the spouse to join in the execution of such mortgage or deed of trust. (1868-9, c. 204; Code, s. 1272; Rev., s. 958; 1907, c. 12; C. S., s. 1003; 1965, c. 852.)

Cross Reference. — As to abolition of dower, see § 29-4.

Editor's Note. — The 1965 amendment

added "or she" near the beginning of the section, substituted "his or her spouse as well as the purchaser" for "his wife as

well as himself" and substituted "the spouse" for "her" near the end of the section.

Dower Right Subject to Defeat. — The dower right [since abolished by § 29-4] of a feme covert may be defeated by a mortgage of the husband alone, when for part of the purchase money. *Corporation Comm'n v. Dunn*, 174 N.C. 679, 94 S.E. 481 (1917).

§ 39-13.1. **Validation of certain deeds, etc., executed by married women without private examination.**—No deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, one thousand nine hundred and forty-four, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument. (1945, c. 73, s. 21½.)

§ 39-13.2. **Married persons under twenty-one made competent as to certain transactions; certain transactions validated.**—(a) Any married person under twenty-one years of age is authorized and empowered and shall have the same privileges as are conferred upon married persons twenty-one years of age or older to:

- (1) Waive, release or renounce by deed or other written instrument any right or interest which he or she may have in the real or personal property (tangible or intangible) of the other spouse; or
- (2) Jointly execute with his or her spouse, if such spouse is twenty-one years of age or older, any note, contract of insurance, deed, deed of trust, mortgage, lien of whatever nature or other instrument with respect to real or personal property (tangible or intangible) held with such other spouse either as tenants by the entirety, joint tenants, tenants in common, or in any other manner.

(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-6 whenever applicable.

(c) No renunciation of dower or curtesy or of rights under G.S. 29-30 (a) by a married person under the age of twenty-one years after June 30, 1960 and until April 7, 1961, shall be invalid because such person was under such age. No written assent by a husband under the age of twenty-one years to a conveyance of the real property of his wife after June 30, 1960 and until April 7, 1961, shall be invalid because such husband was under such age. (1951, c. 934, s. 1; 1955, c. 376; 1961, c. 184; 1965, c. 851; c. 878, s. 2.)

Editor's Note. — The first 1965 amendment deleted "now" preceding "conferred" in the introductory paragraph of subsection (a), deleted former subdivision (2) and redesignated subdivision (3) of that subsection as subdivision (2).

The second 1965 amendment substituted

Deeds of Trust Substituted for Purchase-Money Deed.—Where two deeds of trust are executed and substituted for the original purchase-money deed of trust, which is canceled, the wife of the grantee acquires no dower right in land, the original debt for the purchase money not having been extinguished. *Case v. Fitzsimons*, 209 N.C. 783, 184 S.E. 818 (1936).

"G.S. 52-6" for "G.S. 52-12" in subsection (b).

For brief comment on this section, see 29 N.C.L. Rev. 379. For article on tenancy by the entirety in North Carolina, see 41 N.C.L. Rev. 67 (1962).

§ 39-13.3. **Conveyances between husband and wife.**—(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee.

(b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

(c) A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the

entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to the foregoing provisions of this section is not necessary.

(e) Any conveyance by a wife authorized by this section is subject to the provisions of G.S. 52-6. (1957, c. 598, s. 1; 1965, c. 878, s. 3.)

Editor's Note. — The 1965 amendment substituted "G.S. 52-6" for "G.S. 52-12" in subsection (e). North Carolina including brief discussion of this section, see 41 N.C.L. Rev. 67 (1962).

For article on tenancy by the entirety in

§ 39-13.4. Conveyances by husband or wife under deed of separation.—Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation is recorded in the county where the land lies, shall be valid to pass such title as the husband or wife may have to his or her grantee, unless the deed of separation so recorded and registered in the register of deeds' office is cancelled of record by both parties and duly witnessed by the register of deeds or a deputy or assistant register of deeds of said county, or unless an instrument in writing cancelling the deed of separation and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. (1959, c. 512.)

§ 39-14: Repealed by Session Laws 1943, c. 543.

Editor's Note.—Chapter 65 of the Public Laws of 1923, now codified as § 30-9, was a reenactment of this section. However, that act contained no specific repeal of this section. The 1943 act accomplished the repeal in specific terms.

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void. — For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the

homestead, of any interest in such land as may be exempt as a homestead. (50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; R. C., c. 50, s. 1; Code, s. 1545; 1893, c. 78; Rev., s. 960; C. S., s. 1005.)

I. General Consideration.

II. What Conveyances Fraudulent.

A. In General.

B. Intent.

C. Badges of Fraud.

III. Rights and Liabilities of Parties and Purchasers.

IV. Rights and Remedies of Creditors.

Cross References.

As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to preferences in deeds of trust or deeds of assignment for benefit of creditors, see § 23-1 et seq. As to arrest and bail in action for fraud on creditors, see § 1-410, subdivision (5). As to attachment in action for fraud, see § 1-440.

I. GENERAL CONSIDERATION.

Editor's Note.—This section is a substantial reenactment of the statute 13 Eliz., c. 5, s. 2. *Bank of New Hanover v. Adrian*, 116 N.C. 537, 21 S.E. 792 (1895). Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. *Farthing v. Carrington*, 116 N.C. 315, 22 S.E. 9 (1895). At an early period in the judicial history of this State, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. *Logan v. Simmons*, 18 N.C. 13 (1834); *Lee v. Flannagan*, 29 N.C. 471 (1847); *Hardy & Brother v. Skinner*, 31 N.C. 191 (1848); *Helms v. Green*, 105 N.C. 251, 11 S.E. 470 (1890). The statute of 13 Eliz., is declaratory of the common law so far as regards existing creditors; in this sense the statute is sometimes spoken of as being in affirmance of the common law. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. *Long v. Wright*, 48 N.C. 290 (1856).

Section Applies to State. — The statute dealing with fraudulent conveyances applies to the State as well as to individuals, and the State cannot rely on its prerogative. *Hoke v. Henderson*, 14 N.C. 12 (1831).

It applies to voluntary conveyances of personality, as well as realty, as against

creditors. *Garrison v. Brice*, 48 N.C. 85 (1855).

It Prevents Passing of Any Estate.—

This section makes fraudulent conveyances absolutely void, and in that way prevents the passing of any estate whatever, as against creditors of the grantor. *Flynn v. Williams*, 29 N.C. 32 (1846).

It Applies Only to Conveyances Made by Debtor.—

The section operating, as it does, to wholly avoid the conveyances coming within its purview, it can be applied only to conveyances made by the debtor himself. *Gowing v. Rich*, 23 N.C. 553 (1841); *United States v. Haddock*, 144 F. Supp. 720 (E.D.N.C. 1956).

Mortgagor Considered Owner. — In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an encumbrancer. *Wall v. White*, 14 N.C. 105 (1831).

Applied in *Purvis v. Whitaker*, 238 N.C. 262, 77 S.E.2d 682 (1953).

Cited in *Askew v. Interstate Hotel Co.*, 195 N.C. 456, 142 S.E. 590 (1928); *Vollers Co. v. Todd*, 212 N.C. 677, 194 S.E. 84 (1937); *New Amsterdam Cas. Co. v. Waller*, 196 F. Supp. 780 (M.D.N.C. 1961); *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20 (4th Cir. 1963).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated.—In *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), it was held that the principles to be deduced from the authorities as to fraudulent conveyances, are: (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor does not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the

actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. See § 39-17 and note.

Effect of Consideration. — Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. *Eigenbrun v. Smith*, 98 N.C. 207, 4 S.E. 122 (1887).

If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee, or of which he has notice, it is void. *Orta v. Schafer*, 284 F.2d 114 (4th Cir. 1960), quoting *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914).

Preferences.—Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under operation of the statute against fraudulent conveyances. *Hafner v. Irwin*, 23 N.C. 490 (1841).

But an agreement by which a conveyance, made for the purpose of preferring a creditor, is to be kept secret until the debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent towards other creditors, as intended to hinder, delay, or defeat them. *Hafner v. Irwin*, 23 N.C. 490 (1841).

As to recovery of preferences by trustee under assignment for benefit of creditors, see § 23-3.

Conveyance to Trustee for Use of Creditors.—A conveyance to a trustee for the use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide. *Eigenbrun v. Smith*, 98 N.C. 207, 4 S.E.

122 (1887). See *Royster v. Stallings*, 124 N.C. 55, 32 S.E. 384 (1899).

Conveyance to Defeat Claim for Tort.—A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection thereof in the recovery of his damages, is fraudulent and void as to such party, and the former owner of the mill, notwithstanding such conveyance, continues liable for the damage. *Purcell v. McCallum*, 18 N.C. 221 (1835).

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under this section, as to his creditors. *Helms v. Green*, 105 N.C. 251, 11 S.E. 470 (1890).

Secret Trusts. — In *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891), it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, under this section such a deed would be void as to all persons whose claims "are, shall or might be" defrauded thereby. See *Morgan v. McLelland*, 14 N.C. 82 (1831).

Absolute Transfers Intended as Security.—A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. *Gregory v. Perkins*, 15 N.C. 50 (1833).

A deed absolute on its face, which is mere security for a debt, is void as against creditors of the grantor. *Bernhardt v. Brown*, 122 N.C. 587, 29 S.E. 884 (1898).

A deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors. *Halcombe v. Ray*, 23 N.C. 340 (1840).

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same. *John G. Powell & Co. v. Inman*, 53 N.C. 436 (1862).

Feigned and Covinous Judgment. — A feigned and covinous judgment is made utterly void as against the person who is in anywise hindered, delayed, or defrauded of his debts. *Powell v. Howell*, 63 N.C. 283 (1869).

Assignment of Life Insurance Policy.—A life insurance policy issued to one for

the benefit of himself is an integral part of his estate, and a voluntary assignment thereof to his children, made when he is insolvent, is fraudulent and void. *Burton v. Farinholt*, 86 N.C. 261 (1882).

When Insolvent Debtor Improves Wife's Estate.—An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Michael v. Moore*, 157 N.C. 462, 73 S.E. 104 (1911).

Money of Debtor Deposited in Wife's Name.—Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under this section, which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. *Moore v. Greenville Banking & Trust Co.*, 173 N.C. 180, 91 S.E. 793 (1917).

B. Intent.

Intent as Essential Element.—The intent is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be bona fide due, and itself tinged with no vicious ingredient. *Moore v. Hinnant*, 89 N.C. 455 (1883).

This section was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors. *Moore v. Hinnant*, 89 N.C. 455 (1883).

Intent as Objective Element.—The intention of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covinous, the intent is necessarily so. *Stone v. Marshall*, 52 N.C. 300 (1859).

Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was

not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. *Cheatham v. Hawkins*, 80 N.C. 161 (1879).

Sufficiency of Intent.—It is not necessary that there should have been an intent to hinder, delay, and defraud. An intent either to hinder and delay, or an intent to defraud, is sufficient. *Peeler v. Peeler*, 109 N.C. 628, 14 S.E. 59 (1891).

Deed of Trust Executed with Intent to Delay.—A deed of trust executed by a corporation, or an individual, for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from which enough might be realized to pay all the debts, is fraudulent and void as against creditors. *London v. Parsley*, 52 N.C. 313 (1859).

Fraud a Compound Question of Law and Fact.—In *Crow v. Holland*, 12 N.C. 481 (1828), it was said: "Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question of law for the court to decide."

Intention Ascertained from "Badges of Fraud."—It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose—to be to defraud his creditors, we need not look further. This will avoid the assignment. But if he has not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made—to what are called the "badges of fraud." *Royster v. Stallings*, 124 N.C. 55, 32 S.E. 384 (1899).

C. Badges of Fraud.

Badges of Fraud Defined.—It frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what are designated as "badges of fraud." These badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not

accessible to his adversary. *Helms v. Green*, 105 N.C. 251, 11 S.E. 470 (1890).

The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. *Royster v. Stallings*, 124 N.C. 55, 32 S.E. 384 (1899).

Retention of Possession Not Fraudulent Per Se.—Possession retained by the vendor of chattel does not, per se, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none is stated in the bill of sale. *Howell v. Elliott*, 12 N.C. 76 (1826).

Permitting Mortgagor to Remain in Possession of and Sell Stock of Merchandise.—Where mortgagees expressly agree to permit mortgagor to remain in possession of the stock of merchandise and sell the same in the usual course of trade, but do not require him to account for the proceeds of same, until he is adjudged bankrupt, the mortgage is presumptively fraudulent in law, and the burden is upon the mortgagor to rebut that presumption by proof that there were no preexisting debts at the time the mortgage was executed, or that the mortgagor had assets sufficient and available to pay the existing debts exclusive of the property embraced in the mortgage. In re *Joseph*, 43 F.2d 252 (M.D.N.C. 1930). See *Morris Plan Bank v. Cook*, 55 F.2d 176 (4th Cir. 1932).

Reservation of Exemptions.—The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. *Barber v. Buffaloe*, 111 N.C. 206, 16 S.E. 386 (1892).

Secrecy.—It is a mark of fraud if the transaction is secret; and it is secret if it is done in the presence only of near relatives, who are such persons as may be relied on not to disclose what they know to the neighborhood, or if it is done at such distance from the neighborhood that it is unlikely that the affair will become known to them. *Vick v. Kegs*, 3 N.C. 126 (1800).

That the only parties present at a conveyance of all the vendor's land in satisfaction of old debts were the vendor and vendee, who were brothers-in-law, and the subscribing witness, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, i.e., is a badge of fraud. *Peebles v. Horton*, 64 N.C. 374 (1870).

Employing an attorney who resides at some distance, and in another county, to

draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud. *Barber v. Buffaloe*, 111 N.C. 206, 16 S.E. 386 (1892).

Authorizing Private Sale.—It is no ground for a court to pronounce a deed of trust fraudulent per se, as against other creditors, that the property conveyed was to be sold at a private sale. *Burgin v. Burgin*, 23 N.C. 453 (1841). See *Barber v. Buffaloe*, 111 N.C. 206, 16 S.E. 386 (1892).

Evidence of Fraud in Assignment for Creditors.—In *Barber v. Buffaloe*, 122 N.C. 128, 29 S.E. 336 (1898), it was held that there was sufficient evidence of fraud in an assignment for the benefit of creditors to take the case to the jury. There the party preferred, a relative of the assignor, went 16 miles on Sunday night with the attorney who drew the deed of assignment, bought in the property, with the debt secured, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. *Royster v. Stallings*, 124 N.C. 55, 32 S.E. 384 (1899).

Effect of Testimony as to Bona Fides of Transaction.—The rule laid down in *Reiger v. Davis*, 67 N.C. 185 (1872), was that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is regarded as fraudulent, but when these relatives are made witnesses in the cause, and depose to the fairness and bona fides of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them. *Helms v. Green*, 105 N.C. 251, 11 S.E. 470 (1890).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Cross Reference.—See §§ 39-19, 39-21.

Conveyance Is Valid between the Parties.—The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from this section, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. *Lane v. Becton*, 225 N.C. 457, 35 S.E.2d 334 (1945).

Valid against Maker. — A conveyance made with an intent to defraud creditors is nevertheless valid against the maker and all others except creditors and those who purchase under a sale made for their benefit. *Saunders v. Lee*, 101 N.C. 3, 7 S.E. 590 (1888).

When Parties in Pari Delicto.—In *York v. Merritt*, 77 N.C. 213 (1877), the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against either party. *Bank of New Hanover v. Adrian*, 116 N.C. 537, 21 S.E. 792 (1895).

Bona Fide Purchaser from Fraudulent Grantor.—A bona fide purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. *Plummer v. Worley*, 35 N.C. 423 (1852). See § 39-21.

Purchaser with Notice of Former Fraudulent Conveyance. — Since the passage of the Act of 1840 a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor. *Hiatt v. Wade*, 30 N.C. 340 (1848); *Trip-lett v. Witherspoon*, 70 N.C. 589 (1874).

Bona Fide Purchaser from Fraudulent Grantee.—A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the fraudulent grantor. *Saunders v. Lee*, 101 N.C. 3, 7 S.E. 590 (1888). And in *Young v. Lathrop*, 67 N.C. 63 (1872), Chief Justice Pearson said: "Whatever may be said about fairness or unfairness towards creditors, the legislative will gives preference to a bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin."

Constructive Notice.—A purchaser from a trustee, under a conveyance containing upon its face evidence of a fraudulent purpose to defeat creditors, takes with notice of such evidence. *Eigenbrun v. Smith*, 98 N.C. 207, 4 S.E. 122 (1887).

Burden of Proof.—The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903).

Where a conveyance from an insolvent

husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. *Peeler v. Peeler*, 109 N.C. 628, 14 S.E. 59 (1891).

IV. RIGHTS AND REMEDIES OF CREDITORS.

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under this section. *Bryant v. Bryant*, 212 N.C. 6, 192 S.E. 864 (1937).

Prior and Subsequent Creditors. — See first paragraph under analysis line II, A, of this note.

Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to subsequent creditors seeking satisfaction out of the property conveyed, merely evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors, where debts cannot be otherwise satisfied, it constitutes fraud in law to be declared by the court. *O'Daniel v. Crawford*, 15 N.C. 197 (1833).

A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor; as against subsequent creditors, whether the conveyance is fraudulent or not depends upon the bona fides of the transaction, and the question is one of intent, to be passed on by the jury. *Clement v. Cozart*, 109 N.C. 173, 13 S.E. 862 (1891). See § 39-17 and note.

Surety on Bond. — The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that a conveyance with intent to defraud creditors is void as to existing obligations. *Graeber v. Sides*, 151 N.C. 596, 66 S.E. 600 (1909).

Void in Part, Void in Toto.—If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void. *Hafner v. Irwin*, 23 N.C. 490 (1841).

When Trustee in Bankruptcy May Have Conveyance Set Aside. — A trustee in bankruptcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, if any creditor of the bankrupt would be entitled to do so. *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903).

§ 39-16. Conveyance with intent to defraud purchasers void. — Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same. (27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2; R. C., c. 50, s. 2; Code, s. 1546; Rev., s. 961; C. S., s. 1006.)

Cross Reference. — As to registration, see the Connor Act, §§ 47-17, 47-18, 47-19, and 47-20.

Editor's Note. — The statute 27 Elizabeth, from which this section is derived, enacts that conveyances of land, made with intent to defraud purchasers, shall only, as against purchasers for good consideration, be void. Under the act it was, of course, held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and, with notice of the deed, the purchaser had also notice of the fraud. The legislature thought proper in 1840 to alter this, and to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. *Hiatt v. Wade*, 30 N.C. 340 (1848). See also dissenting opinion in *Bank of New Hanover v. Adrian*, 116 N.C. 537, 21 S.E. 792 (1895).

It was formerly a settled and unbroken holding in this State that this section applied only to land. However, the need for an extension of its provisions to personal property was keenly felt. So, while the rule was too well established for the courts to break away, the statute brought relief by extending the section to "goods and chattels, the change appearing for the first time in § 1546 of the Code of 1883. See *Long v. Wright*, 48 N.C. 290 (1856), distinguishing *Plummer v. Worley*, 35 N.C. 423 (1852).

Section Construed with Registration Act.—This section and the Registration Act (§§ 47-17 to 47-20) were both intended to prevent fraud, and must be construed together with that view. *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900).

First Bona Fide Purchaser from Vendor or Vendee Protected.—The statute of 27

Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. *Hoke v. Henderson*, 14 N.C. 12 (1831).

Equity Will Not Deprive of Legal Advantage.—No one has claims to the consideration of a court of equity superior to those of a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. *Crump v. Black*, 41 N.C. 321 (1849).

"Purchaser" Defined. — The term "purchaser" is not used in this section in its technical sense for one who comes to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and, as we think, buys fairly and of course at a fair price. *Fullenwider v. Roberts*, 20 N.C. 420 (1839).

Good faith and a fair price are requisite to constitute a good purchase. *Fullenwider v. Roberts*, 20 N.C. 420 (1839).

What Is Full Value.—The second purchaser must now, as before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonable fair price, such as would indicate fair dealing and not be suggestive of fraud. *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900).

Purchase for "a Petty Sum". — When the consideration is pecuniary, a "petty" sum as compared to the value of the land would not help a second over the head of a first conveyance. *Fullenwider v. Roberts*, 20 N.C. 420 (1839).

One-Half or Two-Thirds Value.—Under this section a man cannot be held to be a purchaser for a valuable consideration who gives for the land not more than one half

or two thirds of the value. *Harris v. De-Graffenreid*, 33 N.C. 89 (1850).

A mortgage to secure a present loan constitutes the mortgagee a purchaser for value within the meaning of the section. *Fowle v. McLean*, 168 N.C. 537, 84 S.E. 852 (1915).

Mortgage to Secure Past Indebtedness.—And the same principle obtains in reference to mortgages and deeds of trust to secure a past indebtedness, except as to an estate or interest existent in the property conveyed. *Potts v. Blackwell*, 57 N.C. 59 (1858); *Brem v. Lockhart*, 93 N.C. 191 (1885); *Fowle v. McLean*, 168 N.C. 537, 84 S.E. 852 (1915).

A deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against a prior deed of gift as being a subsequent sale to a purchaser for a valuable consideration under this section. *Ward v. Wooten*, 75 N.C. 413 (1876).

Assignee of Fraudulent Vendee.—An assignee for the benefit of creditors of a fraudulent vendee, incurring no new liability on the faith of his title, is not protected. *Wallace v. Cohen*, 111 N.C. 103, 15 S.E. 892 (1892).

Such an assignee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor.

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (1840, c. 28, ss. 3, 4; R. C., c. 50, s. 3; Code, s. 1547; Rev., s. 962; C. S., s. 1007.)

When Voluntary Deed Void Per Se.—A voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. *McCanless v. Flinchum*, 89 N.C. 373 (1883); *Hobbs v. Cashwell*, 152 N.C. 183, 67 S.E. 495 (1910).

It is a well-settled rule of law in this State that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. *McCanless v. Flinchum*, 89 N.C. 373 (1883);

Carpenter v. Duke, 144 N.C. 291, 56 S.E. 938 (1907).

Possession by Third Person Legal Notice.—Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor. *Bost v. Setzer*, 87 N.C. 187 (1882).

It is clear that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance, and that such possession of the donee or for him amounts to notice in respect only to those tracts or parcels to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. *Wade v. Hiatt*, 32 N.C. 302 (1849).

Burden of Proof.—Where both parties claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first, the plaintiff makes out a prima facie case, and the burden of proof is shifted upon the defendant to attack the bona fides of the plaintiff's deed, and to defeat it, if he can, by establishing fraud. *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900).

Hobbs v. Cashwell, 152 N.C. 183, 67 S.E. 495 (1910).

Rights of Prior and Subsequent Creditors.—The controlling principle is stated in *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the

property is subjected to the payment of creditors generally." See *Sutton v. Wells*, 177 N.C. 524, 99 S.E. 365 (1919).

Section Applies Only to Gifts Inter Vivos.—This section makes a qualification in the maxim "A man must be just before he is generous" in cases where the donor, at the time of the gift retained property, fully sufficient and available for the satisfaction of all of his then creditors. But this modification is confined to gifts inter vivos. In respect to legacies, or gifts by will, there has been no modification of the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it, and the assent of an executor to a legacy, before he has paid all of the debts of the testator, is void as to creditors. *Pullen v. Hutchins*, 67 N.C. 428 (1872).

Judgment in Partition Proceeding as Voluntary Transfer.—A bankrupt was allotted an undivided interest in certain lands as his homestead, and the remainder in such undivided interest was sold to make assets, and at the sale was bought by the bankrupt's wife. The land was then partitioned by order of court, and in the partition proceeding the husband acknowledged the interest in remainder of his wife. It was held that, if the sale of the reversionary interest to the wife was invalid, the judgment in the partition proceeding estopped the husband from denying the interest of his wife, and operated as a gift to her within the meaning of this section, and in the absence of allegations that the husband had debts at the time of the partition, and that he did not retain sufficient assets to pay them, the land could not be reached by a subsequent creditor of the husband. *Wallace v. Phillips*, 195 N.C. 665, 143 S.E. 244 (1928).

Transfer Is Evidence of Intent to Defraud.—This section provides that the transfer itself is evidence of an intention to defraud the creditor. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

Transfer in Consideration of Support of Debtor for Life.—A contract was made in consideration of support by a son of his father and mother for life, for \$100 and certain shares of stock of the father, of the value of \$7000, and the father did not retain sufficient property out of which to pay his then existing creditors. The son acted in good faith without notice or knowledge. It was held that the transfer of the stock to the son was not valid as against his father's creditors beyond the amount he had expended for the support for which he

was liable under the terms of the contract. *People's Bank & Trust Co. v. Mackorell*, 195 N.C. 741, 143 S.E. 518 (1928).

Transfer in Consideration of Support of Debtor's Invalid Children.—Where a deed from father to son provided that the grantee should support his invalid brothers (naming them) and comply with the conditions imposed, it was not voluntary within the meaning of this section, but rests upon a valuable consideration. *Worthy v. Brady*, 91 N.C. 265 (1884).

Deed Made for Benefit of Debtor's Family.—Where a deed, conveying all of a debtor's property, and made without consideration, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a then existing creditor. *Sturdivant v. Davis*, 31 N.C. 365 (1849).

Where Grantor Afterwards Pays Debt.—A voluntary conveyance to a son is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. *Smith v. Reavis*, 29 N.C. 341 (1847).

Where Grantor Retains Sufficient Property to Pay Debts.—A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. *Finch v. Cecil*, 170 N.C. 114, 86 S.E. 991 (1915).

Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay his debts in existence at the time of the gift, it is not fraudulent as to creditors. *Taylor v. Eatman*, 92 N.C. 602 (1885).

Sufficiency of Property Retained.—In an action to set aside a deed, evidence that the grantor retained \$11,625 to pay debts to the amount of \$11,500 was not sufficient to show that the grantor retained property sufficient to pay his debts, in view of the fact the \$1000 worth of the property was of a perishable nature, and the debtor was entitled to \$1000 worth of real estate as his homestead exemption, and \$500 worth of property as his personal property exemption. *Williams v. Hughes*, 136 N.C. 58, 48 S.E. 518 (1904).

A deed of gift may be fraudulent, though the donor, at the time of the gift, honestly believed that he had property sufficient to satisfy all his debts then ex-

isting, when in fact he was mistaken. *Black v. Sanders*, 46 N.C. 67 (1853).

Gifts of Visible Estate and Retention of Choses in Action.—Gifts of visible estate cannot be defeated where the debtor has resources in stocks or other securities of value to meet his liabilities. *Worthy v. Brady*, 91 N.C. 265 (1884).

Necessary Allegations to Set Aside Gift.

—In order for a creditor to set aside a gift from a debtor to his wife as fraudulent against creditors, the complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer to the complaint is good. *Wallace v. Phillips*, 195 N.C. 665, 143 S.E. 244 (1928).

When Question of Fraud for Jury.—

This section only requires the question of fraud to be submitted to a jury in cases where property fully sufficient and available to pay all creditors is retained by the donor. *Black v. Sanders*, 46 N.C. 67 (1853). See *Sturdivant v. Davis*, 31 N.C. 365 (1849).

Retention of Sufficient Property Is Question for Jury. — It is a question of fact for the determination of the jury whether the donor had retained property amply sufficient to pay his creditors at the time of his making a gift, within the intent and meaning of the section, which determines the validity of the transaction. *Garland v. Arrowood*, 177 N.C. 371, 99 S.E. 100 (1919).

Presumptions and Burden of Proof.—

Where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available to satisfy his then creditors, the presumption of fraud formerly arising from a voluntary conveyance is removed by this section, and the indebtedness of the grantor is evidence only from which a fraudulent intent may be inferred. Thus a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. *Shuford v. Cook*, 169 N.C. 52, 85 S.E. 142 (1915), citing *Hobbs v. Cashwell*, 152 N.C. 183, 67 S.E. 495 (1910). But see *Garland v. Arrowood*, 177 N.C. 371, 99 S.E. 100 (1919), wherein it was said that where there is a voluntary gift or settlement, the burden of, at least,

going forward with proof of retention of sufficient property is on the defendant.

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors. *Hood v. Cobb*, 207 N.C. 128, 176 S.E. 288 (1934).

Evidence of Tax Valuation of Property Retained. —

In an action to set aside a deed as being fraudulent as to creditors, under this section, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. *Hood v. Cobb*, 207 N.C. 128, 176 S.E. 288 (1934).

When Value Determined. — A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, was held incompetent as evidence under this section, the issue being the value of all the debtor's lands at the time of the voluntary deed attacked in the action. *Hood v. Cobb*, 207 N.C. 128, 176 S.E. 288 (1934).

Evidence of Grantee's Resulting Trust in Property Conveyed. —

Where a deed from a husband to his wife was sought to be set aside by his creditors for fraud, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her was held inadmissible, under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee simple title with full covenants and warranty of title. *Kelly Springfield Tire Co. v. Lester*, 192 N.C. 642, 135 S.E. 778 (1926).

Effect of Decree. — When the court under this section has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. *Sturges v. Portis Mining Co.*, 206 Fed. 534 (E.D.N.C. 1934).

Cited in *New Amsterdam Cas. Co. v. Waller*, 196 F. Supp. 780 (M.D.N.C. 1961); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20 (4th Cir. 1963).

§ 39-18. **Marriage settlements void as to existing creditors.**—Every contract and settlement of property made by any man and woman in considera-

tion of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (1785, c. 238, s. 2; R. C., c. 37, s. 25; 1871-2, c. 193, s. 11; Code, ss. 1270, 1820; Rev., s. 963; C. S., s. 1008.)

Cross References.—As to contracts between husband and wife, see § 52-13. As to antenuptial contracts of wife, see § 52-14. As to statutes concerning married women generally, see § 52-1 et seq.

Gifts between Husband and Wife.—All gifts from a husband to his wife are good inter se, and against all persons claiming under them; and good against all persons, if he is not in debt at the time; but such gifts are voidable as to existing creditors, if their rights are not secured. *Walton v.*

Parish, 95 N.C. 259 (1886). See note to § 39-17.

Husband May Surrender Curtesy Initiate.—Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. *Teague v. Downs*, 69 N.C. 280 (1873). See § 52-13 and see also § 29-4 which abolishes curtesy.

§ 39-19. Purchasers for value and without notice protected.—Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud. (13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6; R. C., c. 50, s. 4; Code, s. 1548; Rev., s. 964; C. S., s. 1009.)

Cross Reference.—See note to § 39-15.

Section Is Intended as Proviso.—The purpose of the legislature in enacting this section was to constitute an independent provision, operating as a proviso to the other sections on fraudulent conveyances. *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903).

Scope and Effect.—In *Young v. Lathrop*, 67 N.C. 63, 12 Am. Rep. 603 (1872), the court held that this section was a proviso to the preceding sections of the chapter, and *Pearson, C. J.*, in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being impeached and made void." See *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903).

How Grantee May Protect His Title.—When a grantor executes a deed with intention to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor. *Candler v. Cobb*, 77 N.C. 30 (1877); *Saunders v. Lee*, 101 N.C. 3, 7 S.E. 590 (1888);

Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903).

Bona Fide Purchaser from Fraudulent Vendor Gets Good Title.—Under this section a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from a fraudulent vendor. *People's Bank & Trust Co. v. Mackorell*, 195 N.C. 741, 143 S.E. 518 (1928).

Bona Fide Purchaser from Fraudulent Grantee before Execution Sale.—Where a fraudulent grantee of land conveyed it to a bona fide purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and teste of the terms where it was obtained, it was held that by force of the proviso obtained in this section (4th section of the 50th ch. of the Rev. Code, 13 Eliz., c. 5, s. 6), the title of the bona fide purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. *Young v. Lathrop*, 67 N.C. 63, 12 Am. Rep. 603 (1872).

Trustees and Mortgagees Take Subject to Equities.—It is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration within the provisions of 13 and 27 Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor,

and cannot discharge themselves from it on the ground of being purchasers without notice. *Potts v. Blackwell*, 56 N.C. 449 (1857).

Good Consideration.—“Good consideration” means valuable consideration, or a fair price. *Young v. Lathrop*, 67 N.C. 63, 12 Am. Rep. 603 (1872); *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894).

Conveyance to Daughter in Consideration of Services.—Where A made a deed to his daughter, in consideration of services rendered and to be rendered in the future for attending upon him in his old age, with intent to defraud his creditors, the deed is void, even though the daughter had no knowledge of such fraudulent intent. *Cansler v. Cobb*, 77 N.C. 30 (1877).

When Wife Takes with Notice of Fraud.—Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the section. *Peeler v. Peeler*, 109 N.C. 628, 14 S.E. 59 (1891).

Section Relates to Matters of Defense.

§ 39-20. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.—No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement is forbidden by law, if such purchaser, at the time of his purchase, did not have notice of the unlawful consideration of such debt, contract or agreement. (1842, c. 70; R. C., c. 50, s. 5; Code, s. 1549; Rev., s. 965; C. S., s. 1010.)

Cross Reference.—As to registration of conveyances affecting validity thereof, see § 47-18.

When Part of Debts Secured Are Fictitious.—A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor. *McCorkle v. Earnhardt*, 61 N.C. 300 (1867).

Mortgage Note Tainted with Usury.—This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the “purchaser of the estate or property” at the sale under the mortgage, who buys without notice of the usurious taint in the debt secured. The only case in our reports that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is *Coor v. Spicer*, 65 N.C. 401

—The matters herein stated were intended to be strictly of a defensive character, and are required to be averred and proved by the party who relies on their existence in order to validate a conveyance which the law has declared to be void because made with a fraudulent intent. *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903).

Burden of Proving Consideration and Lack of Notice.—When a deed is made with a fraudulent intent, the law condemns it and pronounces it void, and it remains void, of course, until it is shown for some reason to be valid. Nothing else appearing, it is void, and he who claims under it must aver and prove whatever is necessary to sustain its validity. The burden is on the purchaser, therefore, to show, under the statute, that he purchased not only for value, but without notice. *Cox v. Wall*, 132 N.C. 730, 44 S.E. 635 (1903), distinguishing *Lassiter v. Davis*, 64 N.C. 498 (1870); *Reiger v. Davis*, 67 N.C. 185 (1872). See *Morgan v. Bostic*, 132 N.C. 743, 44 S.E. 639 (1903).

Cited in *Threlkeld v. Malcragson Land Co.*, 198 N.C. 186, 151 S.E. 99 (1930).

(1871), which held that a mortgage given to secure an usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the section. Aside from the fact that it is held expressly otherwise in the latter case of *Moore v. Woodward*, 83 N.C. 531 (1880), an examination of the section will show that *Coor v. Spicer* was a palpable inadvertence. *Ward v. Sugg*, 113 N.C. 489, 18 S.E. 717 (1893).

Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale for a valuable consideration without notice of the illegality of the consideration of the said debt, his title is not affected thereby. *McNeill v. Riddle*, 66 N.C. 290 (1872).

§ 39-21. Bona fide purchaser of fraudulently conveyed property treated as creditor.—Purchasers of estates previously conveyed in fraud of

creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase. (R. C., c. 50, s. 6; Code, s. 1550; Rev., s. 966; C. S., s. 1011.)

§ 39-22. Persons aiding debtor to remove to defraud creditors liable for debts. — If any person removes or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action. (1820, c. 1063; R. C., c. 50, s. 14; Code, s. 1551; Rev., s. 1939; C. S., s. 1012.)

What Constitutes Aid and Assistance.

—Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. *L. M. Wiley & Co. v. McRee*, 47 N.C. 349 (1855).

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. *Moore v. Rogers*, 48 N.C. 91 (1855).

Aid Consisting Mainly in Words.—

There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the criterion of the plaintiff's right of action and the defendant's liability being that the plaintiff should have been damaged in consequence of the fraud of the defendant. *March v. Wilson*, 44 N.C. 143 (1852).

Mere Advice Insufficient. — Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statute against the fraudulent removing of debtors. *L. M. Wiley & Co. v. McRee*, 47 N.C. 349 (1855).

Carrying Debtor to Railway Station.—

Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within this section. *Moffit v. Burgess*, 53 N.C. 342 (1861).

Property Not Carried Entirely Out of County.—

Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. *Godsey v. Bason*, 30 N.C. 260 (1848).

Liability of Principal When Aid Rendered by Agent.—

Where an agent, having money of his principal in his hands for a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus applied does not amount to such a ratification as to subject the principal. *Moore v. Rogers*, 51 N.C. 297 (1859).

Knowledge of Particular Debt Unnecessary.—

Where a person who has removed a debtor out of a county is sued by a creditor, it is not necessary to show that this person had a knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors. *Godsey v. Bason*, 30 N.C. 260 (1848).

Intent of Escaped Debtor Immaterial.

—The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. *Moffit v. Burgess*, 53 N.C. 342 (1861).

Action by Bail of One Arrested under Writ of Capias Ad Respondendum. —

The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to

pay the debt sued on. *March v. Wilson*, 44 N.C. 143 (1852).

Surety on Constable's Bond Not Creditor.—A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor so as to entitle him to recover against one for fraudulently removing his principal. *Booe v. Wilson*, 46 N.C. 182 (1853).

Measure of Damages.—In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. *Godsey v. Bacon*, 30 N.C. 260 (1848).

§ 39-23. Sales in bulk presumed fraudulent. — The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller, at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. Such sale, even though the above requirements as to inventory and notice are fully complied with, renders the transaction prima facie fraudulent, and open to attack on such ground by creditors of the seller. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, as far as they will go in payment of debts actually owing by the owner or owners, or if in fact the proceeds are so applied, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; C. S., s. 1013; 1933, c. 190; 1945, c. 635; 1963, c. 1179.)

Cross References. — As to assignments for benefit of creditors, see § 23-1 et seq. For provisions of the Uniform Commercial Code as to bulk transfers, see §§ 25-6-101 to 25-6-111.

Editor's Note. — The 1963 amendment inserted "or if in fact the proceeds are so applied" near the end of the third sentence.

Section 2, c. 700, Session Laws 1965,

Same Jury in Suit by Different Creditors.—An action on the case, brought by A against B, for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C against B for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A against B, and the challenge ought to be allowed, and this although additional evidence is to be adduced in the second trial. *Baker v. Harris*, 60 N.C. 271 (1864).

repeals this section, effective at midnight June 30, 1967.

It is appropriate to bear in mind that many of the decisions cited in the note to this section were written in the light of the wording of the statute prior to being amended. *Kramer Bros. v. McPherson*, 245 N.C. 354, 95 S.E.2d 889 (1957), discussing the amendments.

This section is not unconstitutional or

void as an unwarranted limitation of the right to sell and dispose of property. *Pender v. Speight*, 159 N.C. 612, 75 S.E. 851 (1912).

Section Is Valid Exercise of Police Power.—This section is a valid exercise of the police powers of government, and such sale is to be regarded as prima facie fraudulent in the trial of an issue as to its validity. *Pennell v. Robinson*, 164 N.C. 257, 80 S.E. 417 (1913); *Gallup & Co. v. Rozier*, 172 N.C. 283, 90 S.E. 209 (1916); *Whitmore-Ligon Co. v. Hyatt*, 175 N.C. 117, 95 S.E. 38 (1918); *Raleigh Tire & Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921).

Strict Construction.—The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919).

History.—For a history of this section, see *Kramer Bros. v. McPherson*, 245 N.C. 354, 95 S.E.2d 889 (1957).

Sale Not in Compliance with Section Void as to Creditors.—A sale in bulk of a large part or the whole of a stock of merchandise under the conditions set forth in this section, without an inventory and proper notice to creditors or without an adequate and proper bond to account for the proceeds, is absolutely void as to creditors, and the merchandise sold may be made available for their debts and claims. *Pennell v. Robinson*, 164 N.C. 257, 80 S.E. 417 (1913); *Gallup & Co. v. Rozier*, 172 N.C. 283, 90 S.E. 209 (1916); *Whitmore-Ligon Co. v. Hyatt*, 175 N.C. 117, 95 S.E. 38 (1918).

Subsequent Creditors Not Included.—This section applies only to creditors of the seller at the time of the sale, and not to a subsequent creditor. *Farmers' Bank & Trust Co. v. Murphy*, 189 N.C. 479, 127 S.E. 527 (1925).

Merchandise Defined.—Within the intent and meaning of this section the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or the furniture and fixtures used in connection with conducting the business of a restaurant. *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919). See *Kramer Bros. v. McPherson*, 245 N.C. 354, 95 S.E.2d 889 (1957).

Business of Purchaser Is Immaterial.—Where a dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the purchasers may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919), for the question is not what the purchaser has done, or proposed to do, with the goods, but what was the business of the vendor who sold them. *Raleigh Tire & Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921).

"Sale" within Statute.—Where a bankrupt transfers a large part of his stock of goods to a corporation, which does not assume any of the debts, but merely issues its capital stock in payment, the sale is void as against creditors, in view of this section, the word "sale" in the statute meaning the transfer of property from one person to another for consideration of value, regardless of the mode of payment of consideration. *First Nat'l Bank v. Raleigh Sav. Bank & Trust Co.*, 37 F.2d 301 (4th Cir. 1930).

This section does not apply to seller's repossession of chattels under conditional sales contracts, even though the chattels constitute the bulk of the purchaser's stock of merchandise, since the debts secured by the instruments are not preexistent but contemporaneous with the conditional sales. *McCreary Tire & Rubber Co. v. Crawford*, 253 N.C. 100, 116 S.E.2d 491 (1960).

Remedies of Creditors.—When a sale of merchandise in bulk is avoided for non-compliance with the statute, the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchasers as long as the goods can be identified, or until they have passed into the hands of a bona fide purchaser for value without notice. *Raleigh Tire & Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921), cited in *Kramer Bros. v. McPherson*, 245 N.C. 354, 95 S.E.2d 889 (1957).

Purchaser Not Personally Liable.—Under the provisions of this section a creditor would be entitled, at most, to have the transfer set aside, but not to hold the purchaser personally liable. *Goldman & Co. v. Chank*, 200 N.C. 384, 156 S.E. 919 (1931), discussing but not deciding

whether sale was contrary to section. See *Raleigh Tire & Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921).

Vendor's Right to Personal Property Exemption.—The vendor in a sale of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor. *Whitmore-Ligon Co. v. Hyatt*, 175 N.C. 117, 95 S.E. 38 (1918).

When Compliance Is Question for Jury.—In an action to set aside the sale of a stock of merchandise in bulk as void against creditors, it is for the jury to determine whether the seller had complied

with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent and not that it was void, is reversible error. *Gallup & Co. v. Rozier*, 172 N.C. 283, 90 S.E. 209 (1916).

Evidence held to make out a case for the jury for violation of this section. *Kramer Bros. v. McPherson*, 245 N.C. 354, 95 S.E.2d 889 (1957).

Cited in *Begnell v. Safety Coach Lines*, 198 N.C. 688, 153 S.E. 264 (1930).

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. **Authority to acquire and hold real estate.**—Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, social or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names and may sue and be sued in their common or corporate names concerning real estate so held: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or profession. (1939, c. 133, s. 1; 1951, c. 86; 1965, c. 809.)

Cross References.—As to unlawfulness of associations, etc., maintaining places for receiving, keeping, etc., liquors, see § 18-15. As to secret political and military organizations, see § 14-10.

Editor's Note.—The 1965 amendment inserted "social" preceding "or patriotic" near the beginning of this section.

Right to Sue in Common Name.—Even prior to the 1951 amendment it was held that, since an unincorporated fraternal association is given power to acquire and hold property in its common name by virtue of this and the following sections and

may be served with summons and sued in the manner provided by § 1-97(6) it has capacity to sue in its common name. *Ionic Lodge # 72 F. & A.A.M. v. Ionic Lodge Free Ancient & Accepted Masons # 72 Co.*, 232 N.C. 252, 59 S.E.2d 829 (1950).

Quoted in *Venus Lodge v. Acme Benevolent Ass'n*, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950).

Cited in *Ionic Lodge # 72 F. & A.A.M. v. Ionic Lodge Free Ancient & Accepted Masons # 72 Co.*, 232 N.C. 648, 62 S.E.2d 73 (1950).

§ 39-25. **Title vested; conveyance; probate.**—Where real estate has been or may be hereafter conveyed to such organizations or associations in their common or corporate name the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyances thus made by such organizations and associations shall convey good and fee simple title to said land. (1939, c. 133, s. 2.)

Cross References.—As to power of corporation to convey, see § 55-17. As to probate and registration for corporate conveyances, see §§ 47-16, 47-41. See note under § 39-24.

Cited in *Ionic Lodge # 72 F. & A.A.M. v. Ionic Lodge Free Ancient & Accepted Masons # 72 Co.*, 232 N.C. 252, 59 S.E.2d 829 (1950).

§ 39-26. **Effect as to conveyances by trustees.**—Nothing in this article shall be deemed in any manner to change the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations where such land is conveyed to and held by such trustees. (1939, c. 133, s. 3.)

Cross Reference.—As to power of trustees of a religious body to convey property, see § 61-4.

§ 39-27. **Prior deeds validated.**—All deeds heretofore executed in conformity with this article are declared to be sufficient to pass title to real estate held by such organizations. (1939, c. 133, s. 4.)

Cited in Ionic Lodge # 72 F. & A.A.M. Masons # 72 Co., 232 N.C. 252, 59 S.E.2d v. Ionic Lodge Free Ancient & Accepted 829 (1950).

ARTICLE 5.

Sale of Building Lots in North Carolina.

§ 39-28. **Application for permit to sell.**—After March 9, 1927, before a building lot or lots in a new subdivision of real estate is offered for sale or sold in North Carolina wherein it is represented or agreed that streets, sidewalks, water, sewer, lights or other improvements are to be made for the benefit of the purchaser or purchasers, the persons, firm or corporation desiring to offer the same for sale shall first apply to the clerk of the superior court of the county wherein the building lot or lots are situated for a permit to so sell said lots. (1927, c. 210, s. 1.)

§ 39-29. **Contents of application.**—The application for a permit to sell must state the location of the lots or lot with an estimate of the cost of the improvement proposed to be made on each lot as a whole; the estimate of cost so made shall be certified as approximately correct by a civil engineer or county surveyor licensed to practice in the State of North Carolina. (1927, c. 210, s. 2.)

§ 39-30. **Investigation by clerk; bond.**—Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased. (1927, c. 210, s. 3.)

§ 39-31. **Application, certificate, bond and order filed as permanent record.**—The clerk of the superior court shall preserve the application, certificate and bond and his orders thereon as a permanent record for the benefit of any party whose rights are affected thereby and shall, when the provisions of this article have been fully complied with, and when a filing fee of one dollar has been paid, issue a permit to the applicant to sell said lot or lots. (1927, c. 210, s. 4.)

§ 39-32. **Penalty for violation.**—Any person, firm or corporation selling or offering for sale any building lot or lots in violation of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1927, c. 210, s. 5.)

ARTICLE 5A.

Control Corners in Real Estate Developments.

§ 39-32.1. Requirement of permanent markers as “control corners”.—Whenever any person, firm or corporation shall hereafter divide any parcel of real estate into lots and lay off streets through such real estate development and sell or offer for sale any lot or lots in such real estate development, it shall be the duty of such person, firm or corporation to cause one or more corners of such development to be designated as “control corner” and shall cause two or more street center lines or offset lines within or on the street right-of-way lines to be permanently monumented at intersecting center lines or offset lines, points of curvature or such other control points, which monuments shall also be designated as control corners and to affix or place at such control corner or corners permanent markers which shall be of such material and affixed to the earth in such a manner as to insure as great a degree of permanence as is reasonably practical. (1947, c. 816, s. 1; 1959, c. 1159.)

Cross Reference.—As to maps of streets and sidewalks in subdivisions, see § 160-226.

Editor’s Note.—The 1959 amendment inserted beginning after “control corner”

near the middle of the section the provision as to street center lines or offset lines. The amendatory act provided that it should not apply to Franklin, Tyrrell and Washington counties.

§ 39-32.2. Control corners fixed at time of recording plat or prior to sale.—Such control corner or corners, as described in § 39-32.1, and such permanent marker or markers, as described in § 39-32.1, must be designated and affixed at the time of recording the plat of said land or prior to the first sale of any lot or lots constituting a part of the real estate development which said person, firm or corporation has caused to be laid off in lots with designated streets. (1947, c. 816, s. 2.)

§ 39-32.3. Recordation of plat showing control corners.—Upon designating a control corner and affixing a permanent marker, said person, firm or corporation shall cause to be filed in the office of the register of deeds of the county in which the real estate development is located a map or plat showing the location of the control corner or corners and permanent marker or markers with adequate and sufficient description to enable a surveyor to locate such control corner or marker. The register of deeds shall not accept for registration or record any map or plat of a real estate subdivision or development made after the effective date of this article, unless the location of such control corner or corners is shown thereon. (1947, c. 816, s. 3.)

Editor’s Note.—Section 6 of the act from which this article was codified made it effective on July 1, 1947.

§ 39-32.4. Description of land by reference to control corner; use of control corner to fix distances and boundaries prima facie evidence of correct method.—Any lot or lots sold or otherwise transferred at the time of or subsequent to the establishment of a control corner may be described in any conveyance so as to include a reference to the location of said lot or lots which are being conveyed with respect to the control corner. Thereafter the use of the control corner in ascertaining distances so as to establish boundary lines of lots within or originally within such real estate development may be admissible as evidence in any court and shall be prima facie evidence of the correct method of determining the boundaries of any lot or lots within any such real estate development. (1947, c. 816, s. 4.)

ARTICLE 6.

Power of Appointment.

§ 39-33. **Method of release or limitation of power.** — A release or limitation of a power of appointment with respect to real or personal property exercisable by deed or will or otherwise may be effected, if such power may be released or limited under the laws of this State, by the execution by the holder of such power of an instrument in writing stating that the power is released or limited to the extent set forth therein, and the delivery of such instrument to any person who might be adversely affected if such power were exercised or to the fiduciary or one of the fiduciaries, if any, having possession or control of the property over which the power is exercisable. (1943, c. 665, s. 1.)

No Release or Estoppel Where Persons Adversely Affected Do Not Join in or Receive Deeds. — Where none of the deeds executed by the donee of a power is joined in by or executed to any person

who would be adversely affected by the exercise of the power, there is no release or estoppel. *Weston v. Hasty*, 264 N.C. 432, 142 S.E.2d 23 (1965).

§ 39-34. **Method prescribed in § 39-33 not exclusive.**—The method of release prescribed in § 39-33 is not exclusive, and this article shall not invalidate or be construed to invalidate any instrument or contract of release or limitation of a power not executed and delivered in the manner provided in § 39-33 or as invalidating any other act of release or limitation of a power, whether such instrument, contract or act has been heretofore or may be hereafter executed, delivered or done. (1943, c. 665, s. 2.)

Method Not Exclusive.—The release of a power of appointment exercisable by deed or will is not limited to the manner provided in § 39-33. *Weston v. Hasty*, 264 N.C. 432, 142 S.E.2d 23 (1965).

§ 39-35. **Requisites of release or limitation as against creditors and purchasers for value.**—No release or limitation of a power of appointment after the effective date of this article which is made by the owner of the legal title to real property in this State shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release or limitation is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3.)

Editor's Note.—The act from which this article was codified was ratified March 8, 1943.

§ 39-36. **Necessity for actual notice of release or limitation to bind fiduciary.**—No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 4.)

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-37. **Short title.**—This article may be cited as the Uniform Vendor and Purchaser Risk Act. (1959, c. 514.)

§ 39-38. **Uniformity of interpretation.** — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1959, c. 514.)

§ 39-39. **Risk of loss.** — Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement

that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

- (1) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;
- (2) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. (1959, c. 514.)

Chapter 40. Eminent Domain.

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ARTICLE 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.—For the purposes of this chapter, unless the context clearly indicates the contrary, the word "corporation"

includes the bodies politic and natural persons, enumerated in the following section [§ 40-2], which possess the power of eminent domain. (C. S., s. 1705.)

Cross Reference.—As to condemnation proceedings by the State Highway Commission, see §§ 136-103 to 136-121.

Editor's Note.—For article on eminent domain in North Carolina, see 35 N.C.L. Rev. 296 (1957).

Applied in Northgate Shopping Center,

Inc. v. State Highway Comm'n, 265 N.C. 209, 143 S.E.2d 244 (1965).

Cited in Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949); North Asheboro-Central Falls Sanitary Dist., 252 N.C. 749, 114 S.E.2d 577 (1960).

§ 40-2. By whom right may be exercised. — The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipelines originating in North Carolina for the transportation of petroleum products or coal, pipelines and mains originating in North Carolina for the transportation, distribution, or both, of gas, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

- (1) Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipelines originating in North Carolina for the transportation of petroleum products or coal, pipelines and mains originating in North Carolina for the transportation, distribution, or both, of gas, limestone, minerals, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.
- (2) Municipalities operating water systems and sewer systems and all water companies operating under charter from the State or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.
- (3) Person or persons, firms, corporations or copartnerships operating or authorized by law to operate electric light plants, or distributing electric current for lights or power, or for the purpose of constructing wires, poles or other necessary things, and for such purposes or things.
- (4) Public institutions of the State for the purpose of providing water supplies, or for other necessary purposes of such institutions.
- (5) School committees of public school districts, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.
- (6) The department of conservation and development in the administration of the laws relating to fish and fisheries.
- (7) Any educational, penal, hospital or other institution incorporated or chartered by the State of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the State for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a sidetrack for railroads, necessary to the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter.
- (8) Franchised motor vehicle carriers or union bus station companies organized by authority of the utilities commission, for the purpose of constructing and operating union bus stations: Provided, that this sub-

division shall not apply to any city or town having a population of less than sixty thousand.

- (9) The State Highway Commission, for the purpose of acquiring such land or property as may be necessary for the erection of or additions to any building or buildings for the purpose of housing its offices, shops, garages, for storage of supplies, material or equipment, for housing, caring or providing for prisoners, or for any other purpose necessary in its work, including the administration of the State prison system.
- (10) Public sewerage systems which have been granted a certificate of public convenience and necessity by the North Carolina Utilities Commission. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C. S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247.)

- I. General Consideration.
- II. Nature and Purpose.
- III. Extent of Power.
- IV. To Whom Granted.
- V. Compensation Essential.

Cross References.

As to the power given railroad companies to condemn land, see § 62-220. As to power of municipal corporations to acquire property by eminent domain, see §§ 160-204, 160-205. As to condemning land for school buildings, see § 115-125. As to condemning land for hospitals, see § 131-15. As to condemning lands for roads, see §§ 136-19, 136-52. As to condemning lands for mill where land on one side of stream is owned, see § 73-5 et seq. As to condemnation for races, waterways, etc., by owner of a mill or millsite, see § 73-14 et seq. As to condemnation for drainage ditches, see § 156-1 et seq.

I. GENERAL CONSIDERATION.

Editor's Note.—For comment on possibility of this section imposing a limitation on § 136-19, see 28 N.C.L. Rev. 403. For comment on subdivision (8), see 19 N.C.L. Rev. 480.

The words "eminent domain" mean the power of the sovereign or some agency authorized by it to take private property for public use. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

Power of Eminent Domain Is Attribute of Sovereignty.—The power of eminent domain is one of the attributes of a sovereign state. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962).

And Exists Independently of Constitutional Provisions.—The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the

State's power to exercise the right. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962).

Founded on Necessity.—The right of eminent domain is possessed by the government, and may be exercised by the legislature or under its authority. It is peculiarly fit to be wielded by the legislature—it is a power founded on necessity. *Raleigh & G.R.R. v. Davis*, 19 N.C. 451 (1837).

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached. *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906).

Power of Condemnation Is Dependent upon Statute.—A public service corporation has no power to condemn land by reason of its being a riparian proprietor, but only under authority given by a valid statute to do so. *Carolina-Tennessee Power Co. v. Hiwassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918).

The right to exercise the power of eminent domain belongs to every independent government exercising sovereign power as a necessary incident to its sovereignty. And this power, unless otherwise provided in the organic law, rests solely in the State unless by legislative action the power is delegated and the purposes for which it may be exercised enumerated and the procedure for such exercise prescribed. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

A municipal corporation, being a creature of the legislature, can only exercise the right of eminent domain when authorized to do so by its charter or by the

general law. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

Statutes Giving Power Must Be Strictly Construed.—Statutes which authorize the exercise of the power of eminent domain must be strictly construed. *Durham & N.R.R. v. Richmond & D.R.R.*, 166 N.C. 16, 10 S.E. 1041 (1890); *Carolina & N.W.R.R. v. Pennearden Lumber & Mfg. Co.*, 132 N.C. 644, 44 S.E. 358 (1903); *Board of Educ. v. Forrest*, 193 N.C. 519, 137 S.E. 431 (1927).

For example, it has been held that the statutory authority given the county board of education to condemn land for school purposes will be strictly construed as to the extent or limit of the power given. *Board of Educ. v. Forrest*, 193 N.C. 519, 137 S.E. 431 (1927).

The right of eminent domain can be exercised only in the mode pointed out in the statute conferring it. *Allen v. Wilmington & W.R.R.*, 102 N.C. 381, 9 S.E. 4 (1889).

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of this section, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. *Crisp v. Nanthala Power & Light Co.*, 201 N.C. 46, 158 S.E. 845 (1931).

Power Not Implied.—The power of eminent domain cannot be implied or inferred from vague or doubtful language. *Commissioners of Beaufort County v. Bonner*, 153 N.C. 66, 68 S.E. 970 (1910).

If the statute is silent on the subject it is to be presumed that the legislature intended that the necessary property should be obtained by contract. *Commissioners of Beaufort County v. Bonner*, 153 N.C. 66, 68 S.E. 970 (1910).

The provisions of the general railroad act prevail over provisions in the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. *Durham & N.R.R. v. Richmond & D.R.R.*, 106 N.C. 16, 10 S.E. 1041 (1890).

Shares of Dissenting Stockholders of Railroad.—The legislature may by the exercise of the power of eminent domain authorize the consolidation of railroads and, in effect, condemn the shares of dissenting stockholders. *Spencer v. Seaboard Air Line R.R.*, 137 N.C. 107, 49 S.E. 96 (1904).

Condemnation proceedings for a school site must be considered as instituted under the provisions of this section pursuant to authority conferred by § 115-125. *Top-*

ping v. State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959).

A municipality, at the present time, cannot condemn land for street purposes under the substantive power granted in this article. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

Cited in *Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.2d 396 (1952); *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

II. NATURE AND PURPOSE.

Purpose of Grant.—The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. *Raleigh, C. & S.R.R. v. Meckenburg Mfg. Co.*, 166 N.C. 168, 82 S.E. 5 (1914).

Draining Public Road.—Digging a ditch across private land for the purpose of draining a public road amounts to a taking of private property for a public use. *State v. New*, 130 N.C. 731, 41 S.E. 1033 (1902).

Remedy for Abuse.—If, after acquiring the land under condemnation for a public use, a company should devote it to private purposes, that is a remedy by quo warranto and otherwise. *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N.C. 314, 78 S.E. 297 (1913).

Diversion of Water. — Diversion of the natural flow and drainage of streams and surface waters incident to the construction of a highway, resulting in the periodic flooding of the lands of a proprietor, is a "taking" of property for which just compensation must be paid. *Braswell v. State Highway & Pub. Works Comm'n*, 250 N.C. 508, 108 S.E.2d 912 (1959).

Additional Rights to Serve Public.—If the property owned by a corporation having the right of eminent domain is inadequate for its corporate purposes, it may purchase such additional rights as it may need to serve the public. Such purchase may be with the consent of the owner or by condemnation—a purchase without the owner's consent at the value of the property taken. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

III. EXTENT OF POWER.

Discretion of Grantees.—A perusal of this entire chapter will clearly disclose that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of

the power, and only become an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Yadkin River Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267 (1912).

A railroad company may use and occupy a right-of-way acquired by it under condemnation proceedings when, in its own judgment, the proper management and business necessities of the road may require it. *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

In *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922), the court said: "In construing this legislation, the court held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law."

A Continuing Power.—The power of eminent domain conferred on electric public service corporations by this section is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. *Yadkin River Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267 (1912).

Rights Acquired.—Only an easement in lands passes from the owner to a railroad company under condemnation proceedings, divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company, but allowing them to use and occupy the right-of-way in any manner not inconsistent with the easement acquired. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902); *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

Same—As to Part Not Needed.—To the extent that the right-of-way is not presently required for the purpose of the road it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N.C. 254, 35 S.E. 458 (1900); *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

Unless the land is needed for some use, the occupation and cultivation by the

owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. *Ward v. Wilmington & W.R.R.*, 109 N.C. 358, 13 S.E. 926 (1891); *Ward v. Wilmington & W.R.R.*, 113 N.C. 566, 18 S.E. 211 (1893); *Blue v. Aberdeen & W.E.R.R.*, 117 N.C. 644, 23 S.E. 275 (1895).

Land acquired by one railroad company under a legislative grant of the right of eminent domain, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. *North Carolina & R. & D.R.R. v. Carolina Cent. Ry.*, 83 N.C. 489 (1880).

IV. TO WHOM GRANTED.

Public Service Corporation Engaging in Private Enterprise.—Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights-of-way and lands for its dams and the ponding of water, such corporation is a public service corporation and has the power of eminent domain, as provided by this section, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, nor does the fact that such public service corporation also engages in private enterprises not connected with its public service alter this result. *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N.C. 52, 175 S.E. 698 (1934).

Railroads are quasi-public corporations, created to serve primarily the public good and convenience. As such they exercise public franchise rights, including that of eminent domain. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 240 N.C. 495, 82 S.E.2d 771 (1954).

Charter Giving Rights of Private Nature.—The right of a corporation, having the statutory powers, to condemn lands for a public use is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. *Mountain Retreat Ass'n v. Mount Mitchell Dev. Co.*, 183 N.C. 43, 110 S.E. 524 (1922).

Where a corporation is authorized to operate a street railway, it may exercise the right of eminent domain, in respect to this business, given to it by its charter and by this section, notwithstanding it is also authorized to conduct business of a private nature. *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N.C. 314, 78 S.E. 297 (1913).

The use of the word "commercial railway" in a petition does not indicate that the land is to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public. *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N.C. 314, 78 S.E. 297 (1913).

A statute giving power to overseers of roads to cut poles on adjacent land is an instance of the exercise on the part of the sovereign of the right to take private property for the use of the public upon making compensation. *Collins v. Creecy*, 53 N.C. 333 (1861).

V. COMPENSATION ESSENTIAL.

Cross Reference. — As to determining compensation, see note to § 40-17.

Necessity for Compensation.—The qualification of the right of eminent domain, that compensation should be made for private property taken for public use, is founded on justice and a due regard for basic property rights, and is applied in North Carolina. *Bennett v. Winston-Salem Southbound R.R.*, 170 N.C. 389, 87 S.E. 133 (1915). See *Johnston v. Rankin*, 70 N.C. 550 (1874); *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902).

A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to

have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public. *Stamey v. Brunsville*, 189 N.C. 39, 126 S.E. 103 (1925).

The right to exercise the power of eminent domain is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner of the property proposed to be taken. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

When the right is exercised, a duty is imposed on condemnor to pay just compensation for the property taken. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

Unconstitutional Unless Compensation Provided.—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public or any other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. *Watts v. Lenoir & Blowing Rock Turnpike Co.*, 181 N.C. 129, 106 S.E. 497 (1921).

Where a statute makes no provision for compensation, it is to be presumed that the legislature did not intend that the power of eminent domain should be exercised. *Commissioners of Beaufort County v. Bonner*, 153 N.C. 66, 68 S.E. 970 (1901).

When Compensation Implied.—Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. *Lloyd v. Venable*, 168 N.C. 531, 84 S.E. 855 (1915). See 15 N.C.L. Rev. 362.

§ 40-3. Right to enter on and purchase lands.—Such bodies politic, corporation, or persons, may at any time enter upon the lands through which they may desire to conduct the roads or works authorized under § 40-2 and lay out the same, and they may also enter upon such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, tool houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land so entered on such sum as may be agreed on between them. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; C. S., s. 1707.)

Nature of Right of Entry.—The right of entry granted a railroad company under this section is only for the purpose of marking out the route and designating the

building sites desired, to the end that the parties may come to an intelligent agreement as to the price. And without the consent of the owner the company cannot

enter by virtue of this section, for the purpose of building its road. *State v. Wells*, 142 N.C. 590, 55 S.E. 210 (1906).

Company Not a Trespasser. — A railroad company having the right of eminent domain, entering upon and occupying lands for building its tracks, is not a trespasser. *Abernathy v. South & W.R.R.*, 150 N.C. 97, 63 S.E. 180 (1908).

Acts Not Constituting a Taking.—The mere threat to take a right-of-way under the power of eminent domain and an isolated act in going upon the land in making a preliminary survey, are insufficient to constitute a "taking." *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950).

§ 40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc.—Any railroad company operating a line or railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting to a union depot which has been ordered by the Utilities Commission, or for the purpose of maintaining, operating, improving, or of straightening its line, or of altering its location, or of constructing double-tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall have the power to condemn all lands needed for such purpose under the provisions of this chapter. More than two acres may be condemned for yard or terminal facilities if required for due operation of the railroad. No lands in any incorporated towns shall be condemned under this section until approved by the Utilities Commission, nor shall any yard, garden or dwelling house be condemned, unless the Utilities Commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling house, except at an excessive cost. The power to condemn land under this section shall be enforceable and matters arising in regard thereto shall be tried only in the courts created by or under the Constitution of this State. No rights granted or acquired under the provisions of this section shall in any way destroy or abridge the rights of the State to regulate or control such railroad company or to exclude foreign corporations from doing business in this State. (1907, c. 458, ss. 1, 2, 3; C. S., s. 1708; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

In General.—This section confers on a railroad company the incidental right to make such changes in its line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public as contemplated by the statute. *Dewey v. Atlantic Coast Line R.R.*, 142 N.C. 392, 55 S.E. 292 (1906).

This section was intended to apply to all cities and towns in the State, where, in the legal discretion of the commissioners, the move is practicable. *Dewey v. Atlantic Coast Line R.R.*, 142 N.C. 392, 55 S.E. 292 (1906).

Right of Access to Union Depot.—This section confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Utilities Commission to be built. *State ex rel. Corporation Comm'n v. Southern Ry.*, 185 N.C. 435, 117 S.E. 563 (1923).

When § 60-49 Applies.—Section 60-49,

requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Utilities Commission, acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. *Dewey v. Atlantic Coast Line R.R.*, 142 N.C. 392, 55 S.E. 292 (1906).

When Injunction Will Not Issue. — Where the Utilities Commission, acting under this section, has selected a site after due inquiry, the railroads will not be enjoined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city is being sidetracked or that their property will be damaged by the proposed change. *Dewey v. Atlantic Coast Line R.R.*, 142 N.C. 392, 55 S.E. 292 (1906).

§ 40-5. Condemning land for industrial sidings. — Any railroad company doing business in this State, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the Utilities Commission to

construct an industrial siding as provided in § 62-45, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right-of-way as may be necessary to carry out the orders of the Utilities Commission. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203; C. S., s. 1709; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

Cited in *State v. Allen*, 197 N.C. 684, 150 S.E. 337 (1929).

§ 40-6. Condemnation by schools for water supply.—If the school authorities mentioned in subdivision (5) of § 40-2 shall be unable to agree with the owners of any lands which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in § 40-12, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or artesian wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply. (1907, c. 671; C. S., s. 1710.)

Cross Reference.—As to condemnation of land for school buildings, see § 115-125.

§ 40-7. Condemnation for steamboat wharves and warehouses.—Upon the order of the Utilities Commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter. (Ex. Sess. 1913, c. 52; C. S., s. 1711; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

§ 40-8. May take material from adjacent lands.—For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees. (R. C., c. 61, s. 22; 1874-5, c. 83; Code, s. 1702; Rev., s. 2576; 1907, c. 39, s. 2; C. S., s. 1712.)

In General.—The power of condemnation granted to these companies is not confined to a right-of-way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. *Yadkin River Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267 (1912).

Liability to Adjacent Owners.—A corporation damaging adjacent property while constructing a railroad is liable in damages just as a private individual would be. *Staton v. Norfolk & C.R.R.*, 111 N.C. 278, 16 S.E. 181 (1892).

Compensation Granted.—The owner of the land is entitled to compensatory damages for the cutting of cross-ties on land not included in the right-of-way, and the

negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N.C. 648, 20 S.E. 718 (1894).

Right to Cut Trees Cannot Be Taken without Compensation.—Where the right to cut trees has not been acquired when the right-of-way is condemned, and has not been paid for in the first proceeding,

the right could not in a subsequent proceeding be taken without compensation. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962).

Compensation for the right to cut trees should be made in a lump sum under the established rule for measuring damages in condemnation proceedings. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962).

§ 40-9. How material paid for.—If for the value of the damages done to the owner by reason of the acts mentioned in § 40-8 the parties may be unable to agree, the same shall be valued in the manner hereinafter provided. (R. C., c. 61, s. 23; 1874-5, c. 83; Code, s. 1703; Rev., s. 2577; C. S., s. 1713.)

§ 40-10. Dwelling houses and burial grounds cannot be condemned.—No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this Code. (Rev., s. 2578; C. S., s. 1714.)

Local Modification. — City of Greensboro: 1951, c. 707, s. 3; city of Hickory: 1949, c. 310.

History of Section.—See *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

Exercise of Discretion.—The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).

The limitation in this section is only upon such corporations as are defined and named in the preceding sections of the article, when exercising the power of eminent domain granted in the article, or the amendments thereto, in connection with the construction of the works or projects enumerated therein, and pursuant to the authority granted thereby. *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952).

And Is Not Applicable to Power Granted Municipalities by §§ 160-204, 160-205. — See *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E.2d 525 (1952); *Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.2d 396 (1952), commented on in 31 N.C.L. Rev. 125 (1952). And see note to § 160-204.

Section Not Applicable to Proceeding to Condemn Lands for Housing Project.—See *In re Housing Authority*, 233 N.C. 649, 65 S.E.2d 761 (1951).

This section does not apply to tenant houses, but only to the dwellings of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a

corporation renting the dwellings to its tenants. *Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co.*, 166 N.C. 168, 82 S.E. 5 (1914).

Subsequent Use by Owner Not Protected.—When a provision in a charter of a railroad company or a deed granting it a right-of-way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right-of-way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has since been appropriated to such use. *Dargan v. Carolina Cent. R.R.*, 131 N.C. 623, 42 S.E. 979 (1902); *Seaboard Air Line R.R. v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906).

Nuisance a Taking under Section.—The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, withdrawing dwellings from the effect of the statute. *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).

Municipal Corporations.—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by this section. *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).

House Not Property of Railroad. — A house standing on the right-of-way does not become the property of the company. *Shields v. Norfolk & C.R.R.*, 129 N.C. 1,

39 S.E. 582 (1901); Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914).

The North Carolina National Park Commission created by Public Acts 1927, c. 48, is an agency of the State created by statute, vested with the power of eminent domain, and is not subject to the limita-

tions provided in this section and § 40-11. Yarbrough v. North Carolina Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).

Cited in Turner v. Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944); Proctor v. State Highway & Pub. Works Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

ARTICLE 2.

Condemnation Proceedings.

§ 40-11. **Proceedings when parties cannot agree.** — If any corporation, enumerated in § 40-2, possessing by law the right of eminent domain in this State, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire fee simple title to such real estate or an easement in such real estate in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s. 13; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1899, c. 64; 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C. S., s. 1715; 1951, c. 59, s. 1.)

Cross Reference. — As to special proceedings generally, see § 1-393 et seq.

Editor's Note.—A number of the State highway cases cited below were decided under this section and § 136-19 as the latter stood prior to the first 1959 amendment, when the power to condemn was exercised pursuant to the provisions of this section rather than the provisions of article 9 of chapter 136.

One cannot condemn that which he owns. To hold otherwise would ignore the requirements of this section. Virginia Elec. & Power Co. v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Proceeding Governed by Rules Laid Down for Civil Actions.—As a proceeding to condemn land under statutory power is a special proceeding and is so denominated by this section, the requirements of § 1-393 that, "except as otherwise provided," special proceedings shall be governed by the same rules laid down for civil actions are applicable thereto. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

Remedy Not Exclusive.—It has been held that this statutory remedy was the only one open to one whose land was appropriated as a right-of-way. McIntire v. Western N.C.R.R., 67 N.C. 278 (1872); Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

This doctrine has been limited, however, as only applying to the preliminary entry upon land and the acquisition of the same for right-of-way purposes. And where a railroad or other public service corporation has made the entry, appropriated the

right-of-way, constructed its road and is operating the same, and neither party has seen fit to resort to the statutory method, the owner of the land has the right at his election to sue for permanent damages and on payment of the same the easement will pass to the defendant. Mason v. Durham County, 175 N.C. 638, 96 S.E. 110 (1918).

Proceeding Is in Rem.—Condemnation under the power of eminent domain is a proceeding in rem—against the property. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

The procedure outlined in this article must be followed in condemning property for the purposes enumerated in § 160-204. Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952).

Joining Owners of Several Tracts in One Proceeding.—Where it is sought to condemn several tracts of land belonging to different owners, all the owners may be joined in one proceeding, in the absence of any statutory provision to the contrary. Such a course is convenient, and can injure no one if damages are separately assessed to each owner. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

Applies to All Railroads.—The method of proceeding for the condemnation of land by railroad corporations prescribed by this section is applicable to all railroads, whether formed under the general law or special act of incorporation. Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Prior Attempt to Agree Mandatory. — The statutory method of condemning a

right-of-way can be exercised when the parties are unable to agree upon the terms of acquirement. *Allen v. Wilmington & W.R.R.*, 102 N.C. 381, 9 S.E. 4 (1889).

Before the agency seeking to acquire can ask the court to condemn, it must make a bona fide effort to purchase by private negotiation. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

Proceedings Instituted Only When Parties Cannot Agree.—It is only when the parties cannot agree that condemnation proceedings may be instituted. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962).

If owner and State Highway Commission are unable to agree as to the amount of compensation for taking of property under eminent domain, either party may institute proceedings to have the matter determined. *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Jacobs v. State Highway Comm'n*, 254 N.C. 200, 118 S.E.2d 416 (1961).

No Application to Trespasser. — The provisions of this section only apply to the mode of acquiring title to real estate and getting a right-of-way, but it has no application to trespasses committed outside of the right-of-way in building the road, and for such trespasses the corporations are liable in a civil action. *Bridgers v. Dill*, 97 N.C. 222, 1 S.E. 767 (1887).

Condemnation by County Board of Education. — Sections 40-11 to 40-19 apply only to those corporations enumerated in § 40-2, and have no application to a county board of education condemning land for school buildings, such proceedings being controlled by § 115-85 [see now § 115-125]. *Board of Educ. v. Forrest*, 193 N.C. 519, 137 S.E. 431 (1927).

Endeavor to Agree with Infant Owners Not Required.—It is not required of a quasi public service corporation authorized to condemn land under the provisions of § 40-2, that it first endeavor to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way. *Western Carolina Power Co. v. Moses*, 191 N.C. 744, 133 S.E. 5 (1926).

No Right of Entry Until Payment.—In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisal has been paid into court. *State v. Wells*, 142 N.C. 590, 55 S.E. 210 (1906).

The State Highway Commission is an unincorporated agency of the State and may only be sued by the citizen when authority is granted by the General Assembly, but in the matter of condemnation of land for highways and compensation therefor right of action lies in the manner set out by the statutes. The procedure prescribed is open to the property owner as well as to the Commission. *Yancey v. North Carolina State Highway & Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942).

Defenses.—Each owner is entitled to defend upon the ground his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the taking agency. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962).

Noncompensable Losses.—Where an entire leasehold estate is taken in the exercise of the power of eminent domain, the lessee is not entitled to recover compensation for the incidental loss attributable to the costs of removing his stock of merchandise, fixtures and other personal property, the interruption or loss of business, or loss of customers or good will, incident to the necessity of moving to a new location, since such losses are not property and are noncompensable. *Williams v. State Highway Comm'n*, 252 N.C. 141, 113 S.E.2d 263 (1960); *Zourzoukis v. State Highway Comm'n*, 252 N.C. 149, 113 S.E.2d 269 (1960).

Applied in State Highway Comm'n v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957); *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 126 S.E.2d 107 (1962); *City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1963); *Duke Power Co. v. Black*, 263 N.C. 811, 140 S.E.2d 540 (1965).

Quoted in Penn v. Carolina Va. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950).

Stated in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963).

Cited in Winston-Salem v. Ashby, 194 N.C. 388, 139 S.E. 764 (1927); *Reed v. State Highway & Pub. Works Comm'n*, 209 N.C. 648, 184 S.E. 513 (1936); *Collins v. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953); *Eller v. Board of Educ.*, 242 N.C. 584, 82 S.E.2d 144 (1955); *Martin v. United States*, 240 F.2d 326 (4th Cir. 1957); *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 40-12. Petition filed; contains what; copy served.—For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court. (1871-2, c. 138, s. 14; Code, s. 1944; 1893, c. 396; Rev., s. 2580; 1907, c. 783, s. 3; C. S., s. 1716.)

Cross Reference.—As to summons in contested special proceedings, see §§ 1-394, 1-395.

Editor's Note.—A number of the State highway cases cited below were decided under this section and § 136-19 as the latter stood prior to the first 1959 amendment, when the power to condemn was exercised pursuant to the provisions of this section rather than the provisions of article 9 of chapter 136.

When Sections Applicable. — This and the following sections, with provisions for commissioners, appraisal, viewing the premises, etc., are applicable only to instances where the condemnor acquires title and right to possession of specific land. *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955).

Remedy When Land Taken for Highway Purposes.—When the State Highway Commission, in the exercise of the power of eminent domain conferred upon it by § 136-19, takes land or any interest therein for highway purposes, the owner's remedy is by special proceeding as provided by this article. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955); *Jacobs v. State Highway Comm'n*, 254 N.C. 200, 118 S.E.2d 416 (1961).

Section 136-19 was amended in 1959 to provide that condemnation proceedings by the State Highway Commission shall be

conducted pursuant to §§ 136-103 to 136-121 enacted in 1959.—Ed. Note.

Recovery of Consideration Agreed to Be Paid. — Where the State Highway Commission has failed to pay consideration for a right-of-way easement executed by landowners in accordance with an agreement between them and the Commission, the landowners may bring an action at law in the superior court to recover such consideration, and a special proceeding under this section and G.S. 136-19 is not proper. *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955).

Action for Breach of Contract Not Authorized. — The special proceeding, provided by this section and § 136-19, is to furnish a procedure to condemn land for a public purpose and to fix compensation for the taking thereof and does not in any way authorize an action for breach of contract. *Dalton v. State Highway & Pub. Works Comm'n*, 223 N.C. 406, 27 S.E.2d 1 (1943).

This section stating the requisites of the petition must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908). See *Durham & N.R.R. v. Richmond & D.R.R.*, 106 N.C. 16, 10 S.E. 1041 (1890).

The particular language of the statute need not be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906).

What Petition Must Allege.—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right-of-way by agreement, and the reason of the failure to do so. In the absence of proof thereof the petition should be dismissed. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908); *Western Carolina Power Co. v. Moses*, 191 N.C. 744, 133 S.E. 5 (1926).

And the petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the commissioners are appointed. *Hill v. Glendon & G. Mining & Mfg. Co.*, 113 N.C. 259, 18 S.E. 171 (1893).

The petition must allege an effort to purchase by private negotiation and the names and residences of the owners. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, it is not required that petitioners allege with particularity the various respects in which the property has been adversely affected by the new highway, and since evidence in support of all elements of damage recoverable is competent under the general allegation of damage, petitioners are not prejudiced by an order striking from the petition allegations relating thereto. *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 85 S.E.2d 392 (1955).

Same—Where Landowner Files.—It is not necessary that the petition filed by a landowner, in proceedings for the assessment of damages for land taken by a railroad company for a right-of-way, shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the actor in such proceedings. *Hill v. Glendon & G. Mining & Mfg. Co.*, 113 N.C. 259, 18 S.E. 171 (1893); *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906).

Description of Property Sought to Be Acquired Is Necessary.—A description of the property sought to be acquired and

not merely a description of the entire tract over which the right-of-way, privilege, or easement is to run is necessary. *Gastonia v. Glenn*, 218 N.C. 510, 11 S.E.2d 459 (1940).

The condemnor must "first locate the property." *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

It is for the condemnor to determine what land it seeks to condemn and to describe it in its petition by reference to uncontroverted monuments. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Only Property Described May Be Acquired.—Ordinarily, absent an amendment, the only property a condemnor may acquire is that described in the petition. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Right of Landowner to Obtain Description.—The statutory procedure described in this section for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by the State Highway Commission. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955).

If the State Highway Commission claims a right-of-way over land, the landowner is entitled as a matter of right to require that the Commission define with particularity the location and extent of its claim; and, if it refuses or fails to do so, the landowner can invoke the remedy of mandamus. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955).

Joinder of All Parties Having Interest in Land Required.—In an action by the owner of an interest in lands against the State Highway Commission to recover compensation for the taking of a portion of the land, the joinder, as a respondent, of the owner of the other interest in the land cannot result in a misjoinder of parties and causes, since the action is to enforce a single right to recover compensation, and the joinder of all parties having an interest in the land is required by this section. *Tyson v. State Highway Comm'n*, 249 N.C. 732, 107 S.E.2d 630 (1959).

Determining Respective Interests of Parties.—While this section contemplates that the respective interests of all parties who claim an estate or assert an interest in

the real estate are to be determined in such proceedings, it contains no provision as to when or in what manner such determination is to be made. *Barnes v. North Carolina State Highway Comm'n*, 237 N.C. 507, 126 S.E.2d 732 (1962).

The owner of land may not maintain a proceeding for the assessment of damages under this section until there has been a taking of his property under the power of eminent domain, and demurrer to the petition is properly sustained when its allegations amount to no more than that respondent had threatened to take an easement and had made preliminary surveys incidental thereto, since in such instance the petition fails to allege a taking of the property. *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950).

This section does not state when "the owner of land sought to be condemned" may proceed to have the land appraised. However, the right to have such appraisal must necessarily be predicated upon a taking of the property by the corporation possessing the right of eminent domain. And "taking" under the power of eminent domain may be defined as "entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950).

This section does not require the court to try and determine the validity of a claim of ownership advanced by an omitted claimant before it permits him to intervene in the proceeding for the purpose of asserting his claim. *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E.2d 669 (1951).

The clause "the corporation has not been able to acquire title thereto" has no reference to the pecuniary resources of the corporation. It may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. *Western Carolina Power Co. v. Moses*, 191 N.C. 744, 133 S.E. 5 (1926).

Map and Profile.—The filing of a proper profile is a condition precedent before an order of condemnation shall be granted to a railroad. *Kinston & C.R.R. v. Stroud*, 132 N.C. 413, 43 S.E. 913 (1903). But the failure to so file the map and profile may be cured by amendment. *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549

(1903); *State v. Wells*, 142 N.C. 590, 55 S.E. 210 (1906).

It is deemed necessary, so that the landowner may know what land is intended to be appropriated and can have his grievances adjusted, to require the filing of maps, profiles, etc. *Durham & N.R.R. v. Richmond & D.R.R.*, 106 N.C. 16, 10 S.E. 1041 (1890).

Summons Should Issue. — The proceeding authorized by this section is a special proceeding and a summons should issue as in all other cases. *Carolina & R.W.R.R. v. Pennearden Lumber & Mfg. Co.*, 132 N.C. 644, 44 S.E. 358 (1903).

Fraudulent Deed May Be Set Aside.—Where a deed for a right-of-way was obtained from a landowner by fraud on the part of a railroad company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right-of-way by the company, although such appropriation was made by the company under the deed in question. *Allen v. Wilmington & W.R.R.*, 102 N.C. 381, 9 S.E. 4 (1889).

Cotenant Can File Petition. — The fact that a cotenant of land has granted a right-of-way to a railroad company will not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor will such facts prevent the cotenant who has made such grant from becoming a party to the proceedings and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, and this, although such forfeiture did not occur until after the petition was first filed by his cotenant. *Hill v. Glendon & G. Mining & Mfg. Co.*, 113 N.C. 259, 18 S.E. 171 (1893).

Clerk Has Jurisdiction.—Where the charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common-law jurisdiction, it was held that the clerk of a superior court has jurisdiction of such proceeding. *Durham & N.R.R. v. Richmond & D.R.R.*, 106 N.C. 16, 10 S.E. 1041 (1890).

In condemnation proceedings, the statement required by this section, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by the jury—a question of fact for the decision of the

clerk in the first instance, and perhaps subject to review by the judge on appeal. *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906); *Red Springs City Bd. of Educ. v. McMillan*, 250 N.C. 485, 108 S.E.2d 895 (1959).

Clerk's Findings of Facts Not Final.—The finding of the facts of the clerk upon preliminary allegations, under this section, in condemnation proceedings are not final and may be appealed from. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908).

Section Does Not Apply to Telegraph Companies. — Inasmuch as § 56-7 sets forth all the necessary statements for the petition of the telegraph company, and § 56-8 provides for its service, only so much of the railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies, and this section cannot be made to apply to telegraph companies. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902).

Limit of Plaintiff's Recovery Where Evidence Is Insufficient to Show Taking for Private Purpose.—Where there is no evidence upon the record showing that the taking over of a road was for a private purpose sufficient to raise an issue of fact, the plaintiff is remitted to his rights under this section and § 136-19 for the recovery of just compensation. *Reed v. State Highway & Pub. Works Comm'n*, 209 N.C. 648, 184 S.E. 513 (1936).

Waiver of Right to Require Proceeding before Clerk.—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipeline is upon the State's highway over the plaintiff's land, the plaintiff, as the servient owner, may maintain his action, and the denial of this title or right by the defendant is a waiver of its right that the plaintiff should have pro-

ceeded before the clerk under this section; and the plaintiff may maintain his action of trespass in the superior court. *Rouse v. Kinston*, 188 N.C. 1, 123 S.E. 482 (1924).

Waiver of Preliminary Hearing.—Where it is stipulated by the parties in condemnation proceedings that a hearing before commissioners appointed by the clerk under the provisions of this section should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained. *State v. Wilmington-Wrightsville Beach Causeway Co.*, 205 N.C. 508, 171 S.E. 859 (1933).

Applied in Laughter v. North Carolina State Highway & Pub. Works Comm'n, 238 N.C. 512, 78 S.E.2d 252 (1953); *Sale v. State Highway & Pub. Works Comm'n*, 238 N.C. 599, 78 S.E.2d 724 (1953).

Cited in *State v. Suncrest Lumber Co.*, 199 N.C. 199, 154 S.E. 72 (1930); *Lewis v. North Carolina State Highway & Pub. Works Comm'n*, 228 N.C. 618, 46 S.E.2d 705 (1948); *Bailey v. State Highway & Pub. Works Comm'n*, 230 N.C. 116, 52 S.E.2d 276 (1949); *Williams v. North Carolina State Highway Comm'n*, 252 N.C. 772, 114 S.E.2d 782 (1960); *Ferrell v. North Carolina State Highway Comm'n*, 252 N.C. 830, 115 S.E.2d 34 (1960); *Bane v. Norfolk-Southern R.R.*, 259 N.C. 285, 130 S.E.2d 406 (1963); *Sherrill v. North Carolina State Highway Comm'n*, 264 N.C. 643, 142 S.E.2d 653 (1965).

§ 40-13. How process served.—The summons and a copy of the petition shall be served in the same manner as in special proceedings. (1871-2, c. 138, s. 14; Code, s. 1944; Rev., s. 2581; C. S., s. 1717.)

Cross Reference. — As to service of summons in special proceedings generally, see §§ 1-394, 1-395.

Applied in *Carolina & N.W.R.R. v. Pen-*

naiden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903); *United States v. Parks*, 211 F. Supp. 516 (W.D.N.C. 1962).

§ 40-14. Service where parties unknown. — If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situated, once

in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh. (Code, s. 1944, subsec. 5; Rev., s. 2582; C. S., s. 1718.)

A condemnation proceeding by the United States under which it claimed title complied with Title 40 USC §§ 257 and 258 and this section, and was sufficient to give notice to all unknown claimants of any interest in the tracts of land described therein. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962).

§ 40-15. Orders served as in special proceedings in absence of other provisions.—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings. (Code, s. 1944, subsec. 7; Rev., s. 2583; C. S., s. 1719.)

Cross Reference. — As to special proceedings generally, see § 1-393 et seq.

§ 40-16. Answer to petition; hearing; commissioners appointed. — On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners. (1871-2, c. 138, s. 15; Code, s. 1945; Rev., s. 2584; C. S., s. 1720.)

Finding of Facts Conclusive.—In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908).

Collateral Attack by Landowner.—The court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation. *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N.C. 314, 78 S.E. 297 (1913).

Advisability of Project. — The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither the defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906).

Denial That Land Necessary.—A railroad company is entitled to so much of the right-of-way as may be necessary for the purpose of the company, and the denial by a person in the possession of a portion of the right-of-way that the portion in controversy is necessary for the purposes of the company does not raise an

issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use. *Seaboard Air Line R.R. v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906).

If a corporate charter is on its face inoperative and void, a court will so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. *Kinston & C.R.R. v. Stroud*, 132 N.C. 413, 43 S.E. 913 (1903); *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903).

What Matters Issuable. — A perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. *Yadkin River Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267 (1912), distinguishing *Carolina Cent. R.R. v. Love*, 81 N.C. 434 (1879).

Where issuable matters are raised before the clerk under this section he should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise

any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).

Rights Protected by Injunction. — And the rights of the parties may be protected in the meantime from interference by an injunction issued by the judge on application made in the cause, and in instances properly calling for such course. *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922).

Appeal from Order Appointing Commissioners. — An order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners. *American Union Tel. Co. v. Wilmington, C. & A.R.R.*, 83 N.C. 420 (1880); *Commissioners of Davie County v. Cook*, 86 N.C. 18 (1882); *Nor-*

folk & So. R.R. v. Warren, 92 N.C. 620 (1885); *Hendrick v. Carolina Cent. R.R.*, 98 N.C. 431, 4 S.E. 184 (1887), distinguishing *Click v. Western N.C.R.R.*, 98 N.C. 390, 4 S.E. 183 (1887).

Clerk Is to Hold Hearing Only after Notice to Parties. — The implication of this section is plain that the clerk is to hold the hearing on the challenge only after notice to the parties. *Collins v. North Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953).

Quoted in *Wescott v. State Highway Comm'n*, 262 N.C. 522, 138 S.E.2d 133 (1964).

Cited in *Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.2d 396 (1952); *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 85 S.E.2d 392 (1955); *Gatling v. State Highway & Pub. Works Comm'n*, 245 N.C. 66, 95 S.E.2d 131 (1956).

§ 40-17. Powers and duties of commissioners. — The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days. (1871-2, c. 138, ss. 16-18; Code, s. 1946; 1891, c. 160; Rev., s. 2585; C. S., s. 1721.)

Local Modification. — City of Greensboro: 1951, c. 707, s. 3.

Editor's Note. — In the published Acts of 1871-72, ch. 138, a large part of § 18 was erroneously printed under § 16. This error was repeated in the Revisal, ch. 99. See note to *American Union Tel. Co. v. Wilmington, C. & A.R.R.*, 83 N.C. 420 (1880). In the Code of 1883, § 1946 included §§ 16-18 of ch. 138, supra. In the Consolidated Statutes, §§ 1721 and 1723 both contained a part of § 1946 of the Code of 1883. Those sections have been brought forward in the General Statutes as § 40-17 and § 40-19.

Not Interference with Right to Jury Trial. — It seems to have been settled in *Raleigh & G.R.R. v. Davis*, 19 N.C. 451 (1837), that the Constitution (art. 1, sec. 19), guarantees the right to trial by jury in controversies respecting property only

in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the quantum of compensation to the landowner for a right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. *Chowan & S.R.R. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890). As to provision for jury trial on exceptions to report, see § 40-20.

Basis of Award. — The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right-of-way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the con-

demned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. *Blue v. Aberdeen & W.E.R.R.*, 117 N.C. 644, 23 S.E. 275 (1895).

Just Compensation—Measure of Damages.—It seems to be the general rule in this jurisdiction that "the compensation which ought justly to be made" is such compensation after special benefits peculiar to the land are set off against damages. *Stamey v. Burnsville*, 189 N.C. 39, 126 S.E. 103 (1925).

In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. *Stamey v. Burnsville*, 189 N.C. 39, 126 S.E. 103 (1925).

The owner of lands, through which a railroad has acquired a right-of-way by condemnation, is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

Market Value. — In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right-of-way, subject to modification under special circumstances, as where there is a mineral deposit with the use of which the easement does not interfere. *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

General Benefits.—Prior to 1872 in estimating damages the jury were not allowed to deduct any benefits arising from the railroad under construction, which were common to the owner and all other persons in the vicinity, but could set off any benefits peculiar to the particular tract involved. *Freedle v. North Carolina R.R.*, 49 N.C. 89 (1856). At the session of 1871-2 the legislature changed this rule so that no benefits whatever could be deducted. Code, § 1946. This latter provision was repealed in 1891, Laws 1891, ch. 160. The courts have subsequently construed this repeal to mean a restoration of the old rule as stated in *Freedle's Case*, supra. *Southport, W. & D.R.R. v. Owners of*

Platt Land, 133 N.C. 266, 45 S.E. 589 (1903).

The legislature has the power to allow municipal corporations to have the general benefits assessed as offsets against damages in an action to acquire land for a public purpose. But the power or authority must be given either by special charter or general state act. *Stamey v. Burnsville*, 189 N.C. 39, 126 S.E. 103 (1925).

Notice to Parties.—When this statutory provision is obeyed by the commissioners, the parties to the proceeding receive notice of the filing of their report. This is necessarily so because this section requires the commissioners to give the parties or their attorneys notice of the meeting at which the report is adopted and ordered filed. *Collins v. North Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953).

Commissioners Do Not Pass on Facts Prerequisite to Recovery for Alleged Appropriation.—The statutory procedure for condemnation does not contemplate that commissioners pass upon issues of fact prerequisite to an adjudication as to whether a landowner is entitled to recover for an alleged appropriation by use of an easement of flight. *City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1965).

Value as of Date Taken Governs.—For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and the land is taken within the meaning of this principle when the proceeding is begun. *Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 136 S.E. 353 (1927).

Only Actual and Direct Damage Considered.—In estimating damages of any kind to lands taken by a railroad company it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property. *Madison County R.R. v. Galligan*, 161 N.C. 190, 76 S.E. 696 (1912).

The owner is entitled to compensation for the actual and direct damages which he may sustain by being deprived of his property. *Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co.*, 166 N.C. 168, 82 S.E. 5 (1914).

Damage to Adjoining Land.—The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed. *Hendrick v. Carolina Cent. R.R.*, 101 N.C. 617, 8 S.E. 236 (1888).

The owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. *Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 136 S.E. 353 (1927).

Damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. *Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co.*, 166 N.C. 168, 82 S.E. 5 (1914).

Evidence Admissible.—In a proceeding to condemn land for a right-of-way, evidence to show the value of the land by its location and surroundings is admissible. But a tax list is not admissible for that purpose. *Suffolk & C. Ry. v. West End Land & Improvement Co.*, 137 N.C. 330, 49 S.E. 350 (1904).

Additional Burdens.—When a railroad company puts additional burdens upon a right-of-way which it has acquired by condemnation not properly embraced in the general purpose for which it was obtained, the owner is entitled to compensation for them. *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912).

A telegraph line along a railroad and on the right-of-way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022, 89 Am. St. Rep. 868 (1902); *Hodges v. Western Union Tel. Co.*, 133 N.C. 225, 45 S.E. 572 (1903); *Query v. Postal Tel. Cable Co.*, 178 N.C. 639, 101 S.E. 390, 8 A.L.R. 1290 (1919). The same rule applies to electric light wires placed along the street. *Brown v. Asheville Elec. Light Co.*, 138 N.C. 533, 51 S.E. 62, 60 L.R.A. 631, 107 Am. St. Rep. 554 (1905). But the use of streets for a street railway is one of the ordinary purposes for which streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the

abutting property owner to further compensation. *Hester v. Durham Traction Co.*, 138 N.C. 288, 50 S.E. 711, 1 L.R.A. (n.s.) 981 (1905).

Owner at Time of Taking Is One to Be Paid.—Compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of the taking, and not to the owner at an earlier or later date. *Empie v. United States*, 131 F.2d 481 (4th Cir. 1942).

The right to flood lands in derogation of plaintiff's easement of access does not arise merely upon the erection of the structure causing the flooding, but upon the institution of proceedings looking to the award of due compensation; and, until such proceedings are instituted by one side or the other, the flooding constitutes a mere invasion of rights which pass with a conveyance of the property to which they are attached. *Empie v. United States*, 131 F.2d 481 (4th Cir. 1942).

If plaintiff does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. *Abernathy v. South & W.R.R.*, 150 N.C. 97, 63 S.E. 180 (1908).

Diversion of Water.—Damages caused by diversion of water are not covered by statute providing for equipment of a right-of-way by railroad companies. *Ward v. Albemarle & Raleigh R.R.*, 112 N.C. 168, 16 S.E. 921 (1893).

Finding of Commissioners Conclusive.—The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. *Southport, W. & D.R.R. v. Owners of Platt Land*, 133 N.C. 266, 45 S.E. 589 (1903).

Cited in *Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40 (1929); *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 85 S.E.2d 392 (1955); *Gatling v. State Highway & Pub. Works Comm'n*, 245 N.C. 66, 95 S.E.2d 131 (1956).

§ 40-18. Form of commissioners' report.—When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of County:

We,, commissioners appointed by the court to assess the damages that have been and will be sustained by, the owner of certain land lying in the county of, which the corporation proposes to condemn for its use, do hereby certify that we met on (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely

to result to the owner, we have estimated and do assess the damages aforesaid at the sum of \$.

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of \$.

Given under our hands, the day of, A. D. 19. (R. C., c. 61, s. 17; 1874-5, c. 83; Code, s. 1700; Rev., s. 2586; C. S., s. 1722.)

Seal Not Required. — It was formerly provided that the report of the commissioners should be under seal. In *Hanes v. North Carolina R.R.*, 109 N.C. 490, 13 S.E. 896 (1891), the court held that this provision was not mandatory but directory only and the omission of the seal was not a fatal defect.

Report Need Not State Particulars as to Benefits. — The report of the commissioners will not be set aside because it fails to show in what the benefits assessed consist, where no objection was made when the report was submitted. *Wilmington & W.R.R. v. Smith*, 99 N.C. 131, 5 S.E. 237 (1888).

Description of Land Not Essential.—A report of the commissioners is not invalid

because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right-of-way. *Hanes v. North Carolina R.R.*, 109 N.C. 490, 13 S.E. 896 (1891).

But as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, it seems that the said easement should be described therein as fully and correctly as it would be in a grant. *Suffolk & C. Ry. v. West End Land & Improvement Co.*, 137 N.C. 330, 49 S.E. 350 (1904).

Cited in *Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40 (1929); *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E.2d 111 (1960).

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid or if the proceedings have been instituted by such corporation to acquire a fee simple title to such real estate, then all persons who have been made parties to the proceedings shall be divested and barred of all right, title and interest in such real estate. The original of such judgment or a certified copy thereof, such original or certified copy to be under the seal of the court if recorded outside the county in which the court rendering the judgment is located, shall be registered in the county where the land is situated, and the original judgment or a certified copy thereof or a certified copy of the registered instrument may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the posses-

sion of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1.)

Exceptions May Be General. — Upon proper denial of the matters alleged in the petition, exceptions to the clerk's order appointing commissioners in condemnation proceedings may be of general character, and, upon appeal, will present any question appearing upon the record. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908).

Exceptions Filed on Twenty-First Day. — In the absence of notice of the meeting of commissioners as required by G.S. 40-17, the filing of exceptions by the landowner on the twenty-first day after the filing of the report was held timely. *Gatling v. State Highway & Pub. Works Comm'n*, 245 N.C. 66, 95 S.E.2d 131 (1956).

Exceptions Filed Nunc Pro Tunc. — The judge has the discretionary power to allow the exceptions mentioned in this section to be filed nunc pro tunc. *Gatling v. State Highway & Pub. Works Comm'n*, 245 N.C. 66, 95 S.E.2d 131 (1956).

Clerk to Make Determination on Exceptions Only after Notice. — The implication of this section is indisputable that the clerk is to make his determination on the exceptions only after notice and an opportunity to be heard thereon is given the parties. *Collins v. North Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953).

No Appeal to Judge at Chambers. — No appeal lies to the judge at chambers under this section. *Cape Fear & N.R.R., v. Stewart*, 132 N.C. 248, 43 S.E. 638 (1903).

Effect of Appeal. — The appeal, provided by this section, from a judgment by the clerk of the superior court in condemnation proceedings, under § 40-12, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908).

Same—By Both Parties. — On appeal by both parties in proceedings to condemn land to the superior court in term, the trial is de novo; and where the defendant

has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. *Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916).

Power of Judge. — The judge has authority unquestionably to set aside the report, and to direct a new appraisal by the same commissioners or others appointed in their stead, on the ground that the damage assessed was excessive. *Hanes v. North Carolina R.R.*, 109 N.C. 490, 13 S.E. 896 (1891).

Same—No Appeal from Remanding Order. — An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom. *Cape Fear & Y. V. Ry. v. King*, 125 N.C. 454, 34 S.E. 541 (1899). This is true though a plea in bar was filed by the defendant. *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903).

Payment before Entry. — Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right-of-way, nor was the compensation required to be paid before entry. This section changed this by requiring the company to pay into court the sum assessed before entry. *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903); *State v. Jones*, 139 N.C. 613, 52 S.E. 240 (1905).

Injunction Will Not Issue before Payment. — Where a railroad company, seeking to condemn land for its right-of-way, has given ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction will not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court. *Wellington & P.R.R. v. Cashie & C.R.R. & Lumber Co.*, 116 N.C. 924, 20 S.E. 964 (1895); *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903).

The title of the landowner is not divested until final confirmation and payment in full of the amount appraised. *Nantahala*

Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936). See § 40-26 and note.

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report, since this section provides that the title shall pass at that time, and since petitioner may withdraw at any time prior thereto, and in proceedings instituted by the United States, the federal practice requires that the proceedings shall conform, as nearly as may be, to the law of the state in which they are brought. Bemis Hardwood Lumber Co. v. Graham County, 214 N.C. 167, 198 S.E. 843 (1938).

It is obvious that a procedural statute may specify the stage of a condemnation proceeding at which the taking of the property of the owner and the acquisition of title by the condemnor shall occur; and this is precisely what this section has been held to accomplish. *Empie v. United States*, 131 F.2d 481 (4th Cir. 1942).

Power of Acquiring Fee Not Restricted.—The legislature did not intend, by referring in this section to the procedure to be used in acquiring by condemnation, to restrict the power of acquiring in fee when necessary. The reference was merely for procedural purposes. *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E.2d 111 (1960).

If Value of Land Is Not Paid within Year the Right to Condemn Ceases.—After final judgment fixing petitioner's right to condemn, if the appraised value of the land be not paid within one year, the petitioner's right to take the property shall end, and the petitioner or claimant shall not be liable for the consideration (value of the land). *Nantahala Power & Light Co. v. Whiting Mfg. Co.*, 209 N.C. 560, 184 S.E. 48 (1936).

Petitioners Liable for Costs.—This section contemplates that in the event, for any reason, the condemnation proceedings are not carried through, all the costs of the proceeding, except the appraised value of the land, shall be paid by the petitioners. *Nantahala Power & Light Co. v. Whiting Mfg. Co.*, 209 N.C. 560, 184 S.E. 48 (1936).

Charter May Grant Power to Enter before Condemnation.—The legislature may by charter empower a railroad company to enter land and construct their road before instituting condemnation proceedings. Compensation must be provided to warrant the taking, but it need not precede the

taking and the owner is confined to the special remedy given him by the statute under which his property is seized. *State v. Lyle*, 100 N.C. 497, 6 S.E. 379 (1888); *Watauga & Y.R.R. v. Ferguson*, 169 N.C. 70, 85 S.E. 156 (1915); *State v. Jones*, 170 N.C. 753, 87 S.E. 235 (1915).

Same—Power Must Be Express.—When the legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms in the charter. *State v. Jones*, 139 N.C. 613, 52 S.E. 240 (1905).

The counsel fees authorized to be taxed in proceedings to condemn lands for railway uses under this section, can only be allowed and taxed in those cases where the court, under § 40-24, is directed to appoint an attorney to represent a party in interest who is unknown or whose residence is unknown. *North Carolina R.R. v. Goodwin*, 110 N.C. 175, 14 S.E. 687 (1892); *Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916); *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Condemner May Not Take Voluntary Nonsuit after Obtaining Temporary Possession.—A condemner may not, as a matter of right, take a voluntary nonsuit, over the landowner's objection, after obtaining temporary possession by payment of the amount of damages assessed by the commissioners, but this is because the landowner may, if he elects to do so, assert his claim for damages on account of the condemner's possession pendente lite. *Topping v. State Bd. of Educ.*, 249 N.C. 291, 106 S.E.2d 502 (1959).

Judgment Should Fix Boundaries.—In an action for damages for the location of a railroad, the judgment should definitely fix the land over which the road is located and the width of the right-of-way. *Beal v. Durham & C.R.R.*, 136 N.C. 298, 48 S.E. 674 (1904).

Interest from Rendition of Judgment.—Damages given in proceedings under this section fall directly under § 24-5 and the law gives interest only from the rendition of the judgment. Hence a judgment allowing interest from the date of condemnation would be erroneous. *Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916).

The judgment in an action must correspond with the verdict, and where, in condemnation proceedings tried in the superior court on appeal, the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be presumed to include the element of interest, nothing else appearing, and it is reversible error for the trial judge to allow in-

terest from the time the damages were determined upon by the appraisers and render judgment accordingly. *Red Springs City Bd. of Educ. v. McMillan*, 250 N.C. 485, 108 S.E.2d 895 (1959).

Title Is Not Divested Until Final Judgment and Payment of Damages to Landowner.—The title of the landowner is not divested unless and until the condemner obtains a final judgment in his favor and pays to the landowner the amount of the damages fixed by such final judgment. *Topping v. State Bd. of Educ.*, 249 N.C. 291, 106 S.E.2d 502 (1959); *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

Payment of Damages into Court Does Not Vest Title in Condemner. — In proceedings to condemn land for a school site, the payment into court by the county board of education of the amount of damages assessed by the commissioners and the taking of possession by it under order of the clerk, while the cause remained pending for trial on exceptions directed both to petitioner's right to condemn and to the adequacy of the damages awarded by the commissioners, did not vest title in the board. *Topping v. State Bd. of Educ.*, 249 N.C. 291, 106 S.E.2d 502 (1959).

Effect of Judgment.—A railroad company by condemnation proceedings acquires an easement upon the land condemned with the right to actual possession of so much only thereof as is necessary for the operation of its road and to protect it

against contingent damages. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902). And hence a house situated on the right-of-way at the time of the condemnation proceedings does not become the absolute property of the company. *Shields v. Norfolk & C.R.R.*, 129 N.C. 1, 39 S.E. 582 (1901).

Provision as to Registration Superseded.—The provision of this section that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies is superseded by § 47-27. *Carolina Power & Light Co. v. Bowman*, 228 N.C. 319, 45 S.E.2d 531 (1947).

No Nonsuit after Order of Ejectment.—In proceedings by one railroad company to condemn a right-of-way upon which another has lawfully constructed its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after a decree has been made, for rights which the defendant is entitled to have settled by the action have attached. *Johnson City So. R.R. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908).

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871 (1930); *Reidsville v. Slade*, 224 N.C. 48, 29 S.E.2d 215 (1944); *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 85 S.E.2d 392 (1955); *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963); *City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1965).

§ 40-20. Provision for jury trial on exceptions to report. — In any action or proceeding by any railroad or other corporation to acquire rights-of-way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire any real property or easements with respect thereto or rights-of-way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by jury be demanded. (1893, c. 148; Rev., s. 2588; C. S., s. 1724; 1957, c. 582.)

Editor's Note.—Prior to 1893 if the parties did not demand trial by jury before the appointment of the commissioners they were deemed to have waived it and it would not be thereafter granted. This section, however, specifically grants the right of trial by jury upon an appeal from the report of the commissioners. *Chowan & S.R.R. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890); *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903); *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906).

Limitations on Right to Jury Trial.—This section is a limitation upon the right

to demand trial by jury and clearly excludes the idea that any such right is given in respect to the questions of the fact to be decided preliminary to the question of damages. *Madison County R.R. v. Gahagan*, 161 N.C. 190, 76 S.E. 696 (1912).

Thus a landowner is not entitled at the hearing before the clerk to have issues tried by a jury. *Holly Shelter R.R. v. Newton*, 133 N.C. 132, 45 S.E. 549 (1903); *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963).

Court Enters Judgment upon Verdict

of Jury.—Upon appeal from the award of the appraisers in condemnation proceedings the trial in the superior court is de novo, and must proceed so far as the question of damages is concerned as though no commissioners of appraisal had ever been appointed, and therefore the court properly enters judgment upon the verdict of the jury regardless of whether it is greater or smaller than the award of the commissioners and regardless of which party took the appeal. *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949).

Municipal Corporations.—Where a municipal charter provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provision for appeal, this section preserves the right of appeal, and the charter provisions will not be declared unconstitutional for failure to specially provide therefor. *Long v. Rockingham*, 187 N.C. 199, 121 S.E. 461 (1924).

§ 40-21. When benefits exceed damage, corporation pays costs.—In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant or other structure, are ascertained to exceed the damages to the land, then the corporation acquiring the same by right of eminent domain shall pay the costs of the proceeding except as provided by law, and shall not have a judgment for the excess of benefits over the damage. (1891, c. 160; Rev., s. 2589; C. S., s. 1725.)

Cross Reference.—As to provision that petitioner pay costs in certain condemnation proceedings, see § 6-22, subdivision 3.

Cost in Trial Court.—Where, in an action to recover damages for the taking of land for use as a sidewalk by defendant municipality, the jury finds plaintiff is entitled to recover nothing, the court may properly tax the costs against defendant. *Jervis v. Mars Hill*, 214 N.C. 323, 199 S.E. 96 (1938).

§ 40-22. Title of infants, persons non compos, and trustees without power of sale, acquired.—In case any title or interest in real estate required by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real

In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by the jury in the superior court to determine his damages when he has duly preserved the right by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. *Ayden v. Lancaster*, 195 N.C. 297, 142 S.E. 18 (1928).

Applied in *Simmons v. North Carolina State Highway & Pub. Works Comm'n*, 238 N.C. 532, 78 S.E.2d 308 (1953).

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871 (1930); *Moody v. Wickard*, 136 F.2d 801 (D.C. Cir. 1943); *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 85 S.E.2d 392 (1955).

Cost upon Appeal.—When it is decided by the superior court that the defendant's benefit equals the damages, the plaintiff corporation pays the costs, but if the defendant appeals and the decision of the lower court is affirmed then the cost of the appeal falls upon the defendant. *Madison County R.R. v. Gahagan*, 161 N.C. 190, 76 S.E. 696 (1912).

estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same. (1871-2, c. 138, s. 28; Code, s. 1956; Rev., s. 2590; C. S., s. 1726.)

Cross References.—As to requirement that judge approve special proceeding where petitioner is infant, see § 1-402. As to sales of ward's estate by guardian, see

§§ 33-31, 33-33. As to sale of land required for public use on cotenant's petition, see § 46-27.

§ 40-23. Rights of claimants of fund determined. — If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (1871-2, c. 138, s. 19; Code, s. 1947; Rev., s. 2591; C. S., s. 1727.)

Editor's Note.—The purpose of this section is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation. Under the provisions of the section the company acquires the right-of-way and the court distributes the compensation. See *Abernathy v. South & W.R.R.*, 150 N.C. 97, 63 S.E. 180 (1908).

Section Not Mandatory as to Manner of Determining Interests of Parties. — This section contains no mandatory provision as to when or in what manner the respective interests are to be determined. *Barnes v. North Carolina State Highway Comm'n*, 257 N.C. 507, 126 S.E.2d 732 (1962).

It Does Not Deprive Claimant of Right to Jury Trial on Controverted Issues of Fact.—The provision of this section that the court "may determine who is entitled to the same and direct to whom the same shall be paid" contemplates a situation where such determination may be made as a matter of law, and it does not deprive any claimant of his right to a jury trial as to controverted issues of fact. *Barnes v. North Carolina State Highway Comm'n*, 257 N.C. 507, 126 S.E.2d 732 (1962).

Who May Be "Claimants".—The phrase "adverse and conflicting claimants" is limited to (a) those who assert adverse titles to the property and hence a conflict in interest as to the party entitled to the sum awarded, or (b) those who are in

agreement as to their respective titles but are in disagreement as to the value of their respective estates and hence the proportion of the award to which each is entitled. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

The phrase "adverse and conflicting claimants" does not include condemnor. *Virginia Elec. & Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

Claimant May Except to Order of Compulsory Reference.—The provision of this section that the court "may in its discretion order a reference to ascertain the facts on which such determination and order are to be made" does not deprive any claimant of his right to except to an order of compulsory reference and preserve his right to a jury trial as to controverted issues of fact. *Barnes v. North Carolina State Highway Comm'n*, 257 N.C. 507, 126 S.E.2d 732 (1962).

Trial of Collateral Issues Should Be Separate. — Ordinarily, the trial of collateral issues, involving a determination of what the respective claimants own, should be separate from the trial to determine the gross amount the Highway Commission is required to pay. *Barnes v. North Carolina State Highway Comm'n*, 257 N.C. 507, 126 S.E.2d 732 (1962).

Applied in *Stubbs v. United States*, 21 F. Supp. 1007 (M.D.N.C. 1938); *Meadows v. United States*, 144 F.2d 751 (4th Cir. 1944).

§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed. — The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause

new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (1871-2, c. 138, s. 20; Code, s. 1948; Rev., s. 2592; C. S., s. 1728.)

Counsel fees for attorneys appointed under this section are provided for in § 40-19. See *North Carolina R.R. v. Goodwin*, 110 N.C. 175, 14 S.E. 687 (1892); *Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916).

The counsel fees the court is authorized to tax in condemnation proceedings under

§ 40-19 are fees to counsel appointed by the court "to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown" in accordance with this section. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

§ 40-25. Court may make rules of procedure in.—In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts. (1871-2, c. 138, s. 21; Code, s. 1949; Rev., s. 2593; C. S., s. 1729.)

In General.—The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure, and the legislature, recognizing the difficulty of doing more than outlining the practice so as to safeguard the rights of the parties, has conferred upon the court

the power to make rules of procedure when they are not expressly provided by the statute. *Abernathy v. South & W.R.R.*, 150 N.C. 97, 63 S.E. 180 (1908).

Quoted in *Nantahala Power & Light Co. v. Whiting Mfg. Co.*, 209 N.C. 560, 184 S.E. 48 (1936).

§ 40-26. Change of ownership pending proceeding.—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C. S., s. 1730.)

The right to convey land is not affected by the mere filing of condemnation proceedings, nor by appraisal without confirmation and payment, as all rights would pass to the grantee. *Nantahala Power & Light Co. v. Whiting Mfg. Co.*, 209 N.C. 560, 184 S.E. 48 (1936), citing *Liverman v. Roanoke & T.R.R.*, 109 N.C. 52, 13 S.E. 734 (1891); *Beal v. Durham & C.R.R.*, 136 N.C. 298, 48 S.E. 674 (1904).

Since the title of the person who owned the land immediately prior to the commencement of the proceedings is not divested until compensation is paid, he can sell. *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

Subsequent Purchaser May Recover Compensation.—An owner of land who acquires title subsequent to the location by a railroad company is not barred of his remedy for compensation where the road was not finished more than two years before he begins his action. *Hendrick v. Carolina Cent. R.R.*, 101 N.C. 617, 8 S.E.

236 (1888); *Beattie v. Carolina Cent. R.R.*, 108 N.C. 425, 12 S.E. 913 (1891).

The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken. *Phillips v. Postal Tel. Cable Co.*, 130 N.C. 513, 41 S.E. 1022 (1902); *Beal v. Durham & C.R.R.*, 136 N.C. 298, 48 S.E. 674 (1904).

Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. *Liverman v. Roanoke & T.R.R.*, 109 N.C. 52, 13 S.E. 734 (1891).

The person who owns when the award is confirmed is the person to be compensated. *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

Action for Unlawful Entry Is Personal.—The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent

conveyance of the premises. *Liverman v. Roanoke & T.R.R.*, 109 N.C. 52, 13 S.E. 734 (1891).

The purchaser at the mortgage sale, while not entitled to the damages incident

to the act of entry, might recover compensation for the land appropriated to the use of the company. *Liverman v. Roanoke & T.R.R.*, 109 N.C. 52, 13 S.E. 734 (1891).

§ 40-27. Defective title; how cured.—If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same. (1871-2, c. 138, s. 23; Code, s. 1951; Rev., s. 2595; C. S., s. 1731.)

§ 40-28. Title to State lands acquired. — The Secretary of State shall have power to grant to any railroad company any land belonging to the people of this State which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. (1871-2, c. 138, s. 27; Code, s. 1955; Rev., s. 2596; C. S., s. 1732.)

§ 40-29. Quantity which may be condemned for certain purposes.—

(a) **Right-of-Way of Railroad.**—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

(b) **Plankroads, etc.**—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

(c) **Depot or Station.**—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume, or canal, shall be condemned at one place for a depot or station. (1852, c. 92; R. C., c. 61, ss. 27, 28, 29; 1874-5, c. 83; Code, ss. 1707, 1708, 1709; Rev., s. 2597; 1907, c. 39; C. S., s. 1733.)

Cross Reference.—As to power of railroad companies to condemn more than two acres, see § 40-4.

If the charter prescribes no maximum or minimum width of the right-of-way, then subsection (a) of this section applies, and the law presumes the width therein specified subject to the right of the owner to recover compensation by compliance with § 1-51. *Griffith v. Southern R.R.*, 191 N.C. 84, 131 S.E. 413 (1926).

Company May Use Entire Right-of-Way.—A railroad company may occupy its right-of-way to its full extent whenever the proper management and business necessities of the road, in its own judg-

ment, may require it, though the owner of the land can use and occupy a part of the right-of-way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement. *Atlantic Coast Line R.R. v. Bunting*, 168 N.C. 579, 84 S.E. 1009 (1915); *Tighe v. Seaboard Air Line R.R.*, 176 N.C. 239, 97 S.E. 164 (1918).

A right-of-way of specified width must be located and constructed in order to be exclusive. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N.C. 254, 35 S.E. 458 (1900).

Easement over Portion Not Occupied.—It is universally held in this jurisdiction that a railroad corporation acquires by

condemnation an easement over that portion of its right-of-way not actually occupied by its roadbed, tracks, drains and side ditches. *Griffith v. Southerland Ry.*, 191 N.C. 84, 131 S.E. 413 (1926).

Owner's Right to Use.—To the extent that the land covered by the right-of-way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. *Raleigh & Augusta Air Line R.R. v. Sturgeon*, 120 N.C. 225, 26 S.E. 779 (1897); *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N.C. 254, 35 S.E. 458 (1900); *Seaboard Air Line R.R. v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906); *Earnhardt v. Southern R.R.*, 157 N.C. 358, 72 S.E. 1062 (1911); *Virginia & C.S.R.R. v. McLean*, 158 N.C. 498, 74 S.E. 461 (1912); *Coit v. Owenby-Wofford Co.*, 166 N.C. 136, 81 S.E. 1067 (1914).

Same—Permitting Others to Use.—The grant of a right-of-way of a specified width does not preclude the grantor from such use of his land himself or permitting the same to others, which is not in conflict therewith. *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N.C. 254, 35 S.E. 458 (1900).

Crop Raised Must Not Endanger Company's Business.—While land included in the right-of-way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature when matured or

maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines, for, in such case, the company would have the right to enter and remove such crops. *Raleigh & Augusta Air Line R.R. v. Sturgeon*, 120 N.C. 225, 26 S.E. 779 (1897).

Duty of Company to Clear Right-of-Way.—A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes; but is required to keep the right-of-way clear of such growth to the outside of the side ditches on either side of the track. *Ward v. Wilmington & W.R.R.*, 109 N.C. 358, 13 S.E. 926 (1891).

Same—Negligence. — Where a railroad company permitted dry grass or leaves or other combustible rubbish to remain near its track, and the same took fire from sparks emitted from one of its locomotives which had no spark arrester, and the fire was thereby communicated to the plaintiff's adjoining land, destroying timber, etc., it was held that the injury resulted from the negligence of the defendant company. *Aycock v. Raleigh & Augusta Air Line R.R.*, 89 N.C. 321 (1883).

Cited in *Dowling v. Southern Ry.*, 194 N.C. 488, 140 S.E. 213 (1927); *Carolina & N.W. Ry. v. Piedmont Wagon & Mfg. Co.*, 229 N.C. 695, 51 S.E.2d 301 (1949).

ARTICLE 3.

Public Works Eminent Domain Law.

§ 40-30. Title of article. — This article may be referred to as the "Public Works Eminent Domain Law." (1935, c. 470, s. 1.)

Cross Reference.—As to condemnation of land for restoration of Tryon's Palace, see note to § 121-8.

Editor's Note. — For act authorizing North Carolina Cape Hatteras Seashore Commission, created by Public Laws 1939, c. 257, to condemn land according to the

procedure contained in this article, see Public Laws 1941, c. 100.

Cited in *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950); *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952).

§ 40-31. Finding and declaration of necessity. — (a) It is hereby declared that widespread unemployment exists throughout the State, making it impossible for many people in the State to support themselves and their families; that these conditions create a public emergency and constitute a menace to the health, safety, morals and welfare of the people of the State; that it is essential that public works projects, financed in whole or in part by the United States of America or by the State, be commenced as soon as possible in order to reduce and relieve this unemployment and prevent irreparable injury to the people of the State; that to this end, it is necessary to provide a method for the expeditious acquisition of any lands necessary for such public works projects; that such pub-

lic works projects are hereby declared to be in furtherance of the public welfare and to be public uses and purposes for which public money may be spent and private property acquired; and the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination.

(b) Without limitations upon the generality of the foregoing subsection hereof, it is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside therein; that these conditions cause an increase in and spread of disease and crime, constitute a menace to the health, safety, morals and welfare of the citizens of the State, impair economic values and are not being, and cannot within a reasonable time be corrected by the investment of private capital available for profit-making enterprises; that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe conditions exist and the provision of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired. (1935, c. 470, s. 2.)

Cited in *In re Housing Authority*, 233 N.C. 649, 65 S.E.2d 761 (1951).

§ 40-32. Definitions.—The following terms whenever used or referred to in this article shall have the following respective meanings unless a different meaning clearly appears from the context:

- (1) "Authorized corporation" shall mean any corporation or association engaged or about to engage in any public works project, as herein defined, for a public use: Provided, that the construction of said public works project and its conduct thereafter by the corporation or association shall be subject to regulation or supervision by a federal agency, as herein defined, or a State public body, as herein defined, whether by virtue of an agreement, provision of law, or otherwise.
- (2) "Court" shall mean the court in which jurisdiction over proceedings hereunder is vested by the provisions of § 40-33.
- (3) "Federal agency" shall mean the United States of America, the federal emergency administration of public works, or any other agency or instrumentality, corporate or otherwise, of the United States of America.
- (4) "Petitioner" shall mean the one by whom proceedings for the acquisition of real property, as herein defined, are instituted hereunder pursuant to the provisions of § 40-33.
- (5) "Public works project" shall mean any work or undertaking which is financed in whole or in part by a federal agency, as herein defined, or by a State public body, as herein defined.
- (6) "Real property" or "property" or "land" shall include all lands, including improvements and fixtures thereon, lands under water, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and all rights, interests, privileges, easements, encumbrances, and franchises relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.
- (7) "State public body" shall mean this State or any county, city, town, municipal corporation, authority, or any other subdivision, agency, or instrumentality, corporate or otherwise, thereof. (1935, c. 470, s. 3.)

Cited in *In re Housing Authority*, 233 N.C. 649, 65 S.E.2d 761 (1951).

§ 40-33. Institution of proceedings; venue; immediate hearing; entry upon land by petitioner.—Any federal agency, State public body or au-

thorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project.

Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The clerk of the superior court shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which is required by this article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property. (1935, c. 470, s. 4; 1947, c. 781.)

§ 40-34. Filing and form of petition. — A proceeding may be instituted hereunder by the filing of a petition which shall be sufficient if it sets forth:

- (1) The name of the petitioner.
- (2) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof.
- (3) A statement that the acquisition of such property by the petitioner is necessary for a public works project and a brief general description of said public works project.
- (4) A statement that the proceedings are being instituted under this article.
- (5) A suitable prayer for relief. (1935, c. 470, s. 5.)

§ 40-35. Inclusion of several parcels. — Any number of parcels of land, whether owned by the same or different persons and whether contiguous or not, may be included and condemned in one proceeding: Provided, such parcels are to be used for a single public works project. (1935, c. 470, s. 6.)

§ 40-36. Notice of proceedings. — Notice of such proceedings shall be given by one publication in a newspaper having a general circulation in each county in which any part of the property sought to be condemned is located. Such publication shall be at least twenty days and not more than thirty days prior to the date set for the hearing of the validity of the proceedings. Such notice shall be in substantially the following form (the blanks being appropriately filled):

TO WHOM IT MAY CONCERN:

Notice is hereby given that (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for (here give brief general description of the public works project for which the land is sought to be acquired) the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

Notice is further given that on (here insert date of hearing, which must be at least twenty days and not more than thirty days after the date of publication) there will be a hearing in this court, at the opening thereof, for

- (1) Determining the validity of said proceedings and the right of the petitioner, if it so elects, to take title to and possession of such property prior to final judgment, as authorized by § 40-45, of the Public Works Eminent Domain Law, and any persons having any interest in or lien upon the above described property shall be deemed to have waived their rights thereafter to object to the court's decision with respect to such issues, unless prior to said date they shall have filed in writing with the clerk of said court their objections thereto;
- (2) The appointment of a special master to determine the compensation to be awarded for such property and the persons entitled thereto;

- (3) The fixing of the date and place at which said special master shall hear and determine the compensation to be paid for such property and the person entitled thereto.

Notice is further given that all claims or demands for compensation because of the taking and condemnation of such property must be filed with the above court before (here insert date fifteen days after the date above specified for the court hearing), or the same shall be deemed waived.

Dated, the day of, A. D.,

.....
Clerk of said Court.

Notice of such proceedings shall also be given

- (1) By posting a copy of the above notice in conspicuous places on the real property sought to be condemned,
- (2) By filing a copy thereof in the office of the clerk of the court in which such proceedings are pending, and
- (3) By filing a copy thereof in the proper office or offices for the filing of lis pendens in each county in which any part of the real property is situated.

Such publication, posting and filing shall constitute a legal and sufficient notice to all persons having any interest in or lien upon the property described in said notice. The filing of such notice in the aforesaid county office shall also be a constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the petitioner shall take all property condemned under this article free of the claims of any such person. (1935, c. 470, s. 7.)

Cited in *In re Housing Authority*, 233 N.C. 649, 65 S.E.2d 761 (1951).

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.—All persons who have not filed written objections with the court prior to the time of the hearing specified in the notice prescribed by § 40-36 shall be deemed to have waived the right to file objections as to the sufficiency and validity of the petition, the proceedings and the relief sought thereby, and as to the right of the petitioner to take title and possession prior to final judgment, as authorized by § 40-45.

The court, at the time specified in said notice, after hearing and determining all issues of fact and law raised by the objections which have been filed, if any there be, shall enter a final judgment with respect to such issues, and thereafter there shall remain for determination only the amount of the compensation to be paid and the persons entitled thereto.

If any infant or other person under a legal disability shall not have appeared in the proceedings by his duly authorized legal representative, the court shall appoint a guardian ad litem to represent such person's interest in the proceedings before the special master. (1935, c. 470, s. 8.)

Discretion of Commissioners.—In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of

eminent domain is delegated. *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962).

Cited in *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952).

§ 40-38. Appointment of special master. — The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to anyone having an interest in or lien upon the property sought to be condemned. The compensation of said special master shall not exceed fifteen (\$15.00) dollars per day plus travel

and subsistence expenses. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9.)

§ 40-39. Notice of hearing by special master. — Immediately after his appointment and taking of oath, the special master shall cause notice to be sent by registered mail to all persons who have appeared in the proceedings or to their attorneys of record and to all others having any interest in or lien upon the property sought to be condemned, as shown by the record of the proper county office or offices for the recording of documents pertaining to such real estate, and to all guardians ad litem appointed pursuant to the provision of § 40-37, such notice to be addressed to such persons at their respective last known addresses. Such notice shall be substantially in the following form (with the blanks appropriately filled) :

IN THE COURT FOR THE OF
TO WHOM IT MAY CONCERN:

Notice is hereby given that (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for (here give brief general description of the public works project for which the land is sought to be acquired), the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

All persons having an interest in or lien upon the above described property, for which compensation will be demanded, are hereby notified that all claims or demands for compensation by reason of the taking and condemnation of such property shall be filed in writing with said court before (here insert date at least fifteen days after the date set for the court hearing in the notice specified in § 40-36 hereof), and shall be deemed waived unless so filed, and that on a hearing will be held by the special master at (insert time and place fixed by the court for such hearing in blanks) with respect to (1) the amount of compensation to be paid for the property sought to be condemned, and (2) the persons entitled to such compensation.

Dated day of, A. D.,

.....
Special master appointed by said Court.

The special master shall also cause a copy of said notice to be posted in conspicuous places on the property sought to be condemned.

After such notice by mailing and posting, the special master, on the date for hearing specified in the aforesaid notice, shall proceed immediately to hear and determine the question of just compensation for the taking and condemnation of the property and the persons entitled to such compensation. To this end, the special master may issue subpoenas, administer oaths to witnesses, and receive evidence and cause same to be recorded. (1935, c. 470, s. 10.)

§ 40-40. Evidence admissible; increase in value; improvements.— For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted and considered by the special master :

- (1) Evidence that a building or improvement is unsafe or insanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition.

- (2) Evidence that any State public body, charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or insanitary structures, issued an order directing the abatement or correction of any conditions existing with respect to said building or improvement or the demolition of said building or improvement, and of the cost which compliance with any such order would entail.
- (3) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on account of obsolescence or depreciation of such property.
- (4) Evidence that such buildings and improvements are being used for illegal purposes or are being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use.
- (5) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

The award of compensation shall not be increased by reason of any increase in the value of the property resulting from the public works project to be placed thereon.

No allowance shall be made for improvements begun on property after the publication of the notice specified in § 40-36, except upon good cause being shown. (1935, c. 470, s. 11.)

§ 40-41. Report of special master.—The report of the special master must be filed with the clerk of the court in which said proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the court. The court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence, be prepared within the time fixed. (1935, c. 470, s. 12.)

§ 40-42. Notice of report.—Upon the filing of such report by the special master, the court, without delay, shall fix a date for the hearing of any objections filed thereto. Notice that said report has been filed, that all objections thereto must be filed with the court within ten days after the date of the mailing of such notice and that the court has fixed a certain date (which shall be stated therein) for the hearing of such objections, shall be given by sending a copy of such notice by registered mail to all persons who have appeared in the proceeding or their attorneys of record at their last known addresses. Upon the expiration of ten days after the mailing of such notice, all objections to the report shall be deemed waived by all persons who have not filed written objections with the court. (1935, c. 470, s. 13.)

§ 40-43. Hearing of objections by clerk of superior court.—If no objections are filed to the special master's report, the clerk of the superior court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the clerk of the superior court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the clerk of the superior court shall at once appoint another special master in the

same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the clerk of the superior court shall approve the special master's report, with or without modification, the clerk of the superior court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the clerk of the superior court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the clerk of the superior court shall designate the day (not exceeding thirty days thereafter, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 14; 1947, c. 781.)

§ 40-44. **Certified copy of judgment.** — Upon the rendition of the final judgment vesting title in the petitioner, the clerk of the court shall make and certify, under the seal of the court, a copy or copies of such judgment, which shall be filed or recorded in the proper county office or offices for the recording of documents pertaining to the real property described therein, and such filing or recording shall constitute notice to all persons of the contents thereof. A copy of the judgment certified by the clerk of the court as aforesaid shall be competent and admissible evidence in any proceedings at law or in equity. (1935, c. 470, s. 15.)

§ 40-45. **Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award.**—At any time at or after the filing of the petition referred to in § 40-34, and before the entry of final judgment, the petitioner may file with the clerk of the court a declaration of taking signed by the duly authorized officer or agent of the petitioner declaring that all or any part of the property described in said petition is to be taken for the use of the petitioner.

Said declaration of taking shall be sufficient if it sets forth:

- (1) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof;
- (2) A statement of the estate or interest in said property being taken; and
- (3) A statement of the sum of money estimated by the petitioner to be just compensation for the property taken.

Upon the filing of said declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration title to the property specified in said declaration shall vest in the petitioner and said property shall be deemed to be condemned and taken for the use of the petitioner, and the right to just compensation for the same shall vest in the persons entitled thereto. Upon the filing of the declaration of taking, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession shall be required to surrender possession to the petitioner. In the event that the petitioner is an authorized corporation, the court, prior to directing surrender of possession to the petitioner, shall require such security to be given, in addition to the amount deposited in court, as will reasonably assure the payment of any amount ultimately determined as the compensation to be paid.

The ultimate amount of compensation shall be fixed in the manner heretofore

specified. If the amount so fixed shall exceed the amount so deposited in court by the petitioner, the court shall enter judgment against the petitioner in the amount of such deficiency, together with interest at the rate of six per centum per annum on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the petitioner) and the court shall order the petitioner to deposit the amount of such deficiency in court. (1935, c. 470, s. 16.)

§ 40-46. **Right to dismiss petition.**—At any time prior to the vesting of title to the property in the petitioner, the petitioner may withdraw or dismiss its petition with respect to any or all of the property therein described. (1935, c. 470, s. 17.)

§ 40-47. **Divesting title of owner.** — Upon vesting of title to any property in the petitioner, all the right, title and interest of all persons having any interest therein or lien thereupon shall be divested immediately, and such persons thereafter shall be entitled only to receive compensations for such property. (1935, c. 470, s. 18.)

§ 40-48. **Payment of award into court and disbursement thereof.**—The payment into court by the petitioner of the amount of any award or the deposit into court by the petitioner of the amount of any award or the deposit in court of the amount estimated by the petitioner to be the just compensation for the property taken or condemned shall be deemed to be a payment or deposit of money for the use of the persons entitled thereto. Such payment or deposit shall constitute a payment to the persons entitled thereto to the extent of the moneys so paid or deposited into court.

Any such payment shall be as valid and effectual in all respects as if it were made by the petitioner directly to the person entitled thereto or, in the case of a person under legal disability, to his guardian, whether or not (i) such person or his whereabouts is known or unknown, (ii) such person is under a legal disability, or (iii) there are adverse or conflicting claims to such awards.

The money paid into court shall be secured in such manner as may be directed by the court and shall be paid out by the special master to the persons found to be entitled thereto by the final judgment of the court. (1935, c. 470, s. 19.)

§ 40-49. **Recovery of award.**—If an award shall be paid to a person not entitled thereto, the sole recourse of the person to whom it should have been paid shall be against the person to whom it shall have been paid. In such event the person entitled to the award may sue for and recover the same, with the lawful interest and costs of suit, as such money had and received to his use by the person to whom the same shall have been paid. (1935, c. 470, s. 20.)

§ 40-50. **Appeal.**—Any time within thirty days from the filing of any interlocutory or final order or judgment by the court, any person or persons of record in the proceedings, who shall have filed exceptions at any stage of the proceedings within the time and in the manner specified, may appeal therefrom, but only with respect to those questions or issues which were raised by such exceptions.

The taking of an appeal shall not operate to stay the proceedings under this article except when the person or persons appealing shall have obtained a stay of the execution of the judgment or order appealed from, in which event the proceedings shall be stayed only with respect to the person or persons appealing and their respective interests in the proceedings. Upon the taking of an appeal the proceedings shall be deemed severed as to the person or persons appealing and their respective interests in the proceedings.

Any interlocutory or final order or judgment shall be final and conclusive upon all persons affected thereby who have not appealed within the time herein prescribed.

Any petitioner, other than an authorized corporation, may appeal without giving bond; but any other person or persons appealing shall give bond, with good and sufficient surety, to be approved by the court, conditioned to pay all costs taxed against appellant on such appeal. (1935, c. 470, s. 21.)

§ 40-51. Costs.—If the petitioner, prior to the making of the award, shall have tendered to an interested person for his property or deposited in court for such property an amount which such interested person refused to accept or agree to as just compensation, all costs shall be assessed against such person in the event that the aforesaid amount tendered or deposited is equal to or in excess of the award fixed or confirmed by the court with respect to such parcel. (1935, c. 470, s. 22.)

§ 40-52. Powers conferred are supplemental. — The powers conferred by this article shall be in addition and supplemental to and not in substitution for the power conferred by any other law. The power of eminent domain may be exercised hereunder, notwithstanding that any other law may provide for the exercise of said power for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Procedure hereunder, which is not prescribed herein, shall be that which is otherwise prescribed by the law of the State. (1935, c. 470, s. 23.)

§ 40-53. Necessity for certificate of public convenience and necessity from Utilities Commission. — Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the Utilities Commission of North Carolina, the said Utilities Commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 470, s. 25.)

In General.—In construing this section, Justice Denny, in the case of *In re Housing Authority*, 233 N.C. 649, 65 S.E.2d 761 (1951), says: "We think the finding of public convenience and necessity, either in general or specific terms, as pointed out in G.S. 40-53, has reference to any finding made 'either in general or specific' terms by the legislature and set forth in the Housing Authorities Law, which findings shall not be sufficient to warrant the exercise of eminent domain in connection with any project authorized thereby. But a certificate of public convenience and necessity for such project must be obtained from the Utilities Commission—that is, the public need for such a project in a particular community must be made to appear and a certificate of public convenience and necessity must be obtained before the petitioner may proceed to condemn property for such project." *State ex rel. North Carolina Util. Comm'n v. Story*, 241 N.C. 103, 84 S.E.2d 386 (1954).

Acquisition of Land by Wildlife Resources Commission. — The Wildlife Resources Commission has been delegated the power to acquire land for game farms or game refuges in the public interest, under §§ 113-84 and 143-237 et seq., but the public need for such a project in a particular locality must first be established by a certificate of public convenience and necessity from the North Carolina Utilities Commission under this section. *State v. Story*, 241 N.C. 103, 84 S.E.2d 386 (1954).

Determination of Utilities Commission Presumed Valid. — The determination by the Utilities Commission of an application for a certificate of public convenience and necessity is presumed valid and will not be disturbed unless it is made to appear that it is clearly unreasonable and unjust. *In re Department of Archives & History*, 246 N.C. 392, 98 S.E.2d 487 (1957).

Cited in *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500 (1952).

Chapter 41.

Estates.

Sec.

- 41-1. Fee tail converted into fee simple.
- 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.
- 41-2.1. Right of survivorship in bank deposits created by written agreement.
- 41-3. Survivorship among trustees.
- 41-4. Limitations on failure of issue.
- 41-5. Unborn infant may take by deed or writing.
- 41-6. "Heirs" construed to be "children" in certain limitations.
- 41-7. Possession transferred to use in certain conveyances.
- 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.

Sec.

- 41-9. Spendthrift trusts.
- 41-10. Titles quieted.
- 41-10.1. Trying title to land where State claims interest.
- 41-11. Sale, lease or mortgage in case of remainders.
- 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.
- 41-12. Sales or mortgages of contingent remainders validated.
- 41-13. Freeholders in petition for special taxes defined.

§ 41-1. **Fee tail converted into fee simple.**—Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. (1784, c. 204, s. 5; R. C., c. 43, s. 1; Code, s. 1325; Rev., s. 1578; C. S., s. 1734.)

I. General Consideration.

II. Rule in Shelley's Case.

III. Application and Illustrative Cases.

Cross Reference.

As to fee presumed, though word "heirs" omitted, see § 39-1.

I. GENERAL CONSIDERATION.

Editor's Note.—For an account of the history and purpose of this section, see *Walter v. Trollinger*, 192 N.C. 744, 135 S.E. 871 (1926).

For case law survey on real property, see 41 N.C.L. Rev. 500 (1963).

Estates Tail Converted.—The section converted by one stroke of the legislative pen estates tail into fee simple. *Hodges v. Lipscomb*, 128 N.C. 57, 38 S.E. 281 (1901).

Form of Acquisition Not Changed.—The act of 1784, which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase. *Ballard v. Griffin*, 4 N.C. 237 (1815).

"Heirs of their bodies" is equivalent to the words "heirs general." *Revis v. Murphy*, 172 N.C. 579, 90 S.E. 573 (1916); *Cohoon v. Upton*, 174 N.C. 88, 93 S.E. 446 (1917).

Remainder Dependent upon Estate Tail.—The section will bar a remainder dependent upon an estate tail, in possession of tenant in tail, at the time of passing the section. *Lane v. Davis*, 2 N.C. 277 (1796).

Confirmation of Alienation in Fee.

This section converted no estates tail into estates in fee, but such whereof there was a person seized and possessed, and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. *Wells v. Newbolt*, 1 N.C. 537 (1802).

Cited in *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940); *Lackey v. Hamlet City Bd. of Educ.*, 258 N.C. 460, 128 S.E.2d 806 (1963).

II. RULE IN SHELLEY'S CASE.

Editor's Note.—For a discussion of the effect of this section upon the application of the rule in Shelley's case, see 1 N.C.L. Rev. 110. See also § 41-6 and note.

Statement of Rule.—A good definition of the rule in Shelley's case, and the most general, is as follows: "That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase." *Nichols v. Gladden*, 117 N.C. 497, 23 S.E. 459 (1895). See also the statement of the rule in *Smith v. Proctor*, 139 N.C. 314, 51 S.E. 889, 2 L.R.A. (n.s.) 172 (1905).

Force of Rule in North Carolina.—The common-law doctrine known as the rule in Shelley's case is in force in this State.

Nichols v. Gladden, 117 N.C. 497, 23 S.E. 459 (1895). It has never been abolished in North Carolina, and this section does not affect that principle of law. *Dawson v. Quinnerly*, 118 N.C. 188, 24 S.E. 483 (1896); *Hammer v. Brantley*, 244 N.C. 71, 92 S.E.2d 424 (1956).

Nature and Operation of Rule.—The rule in *Shelley's* case is a rule of law and not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker. *Nichols v. Gladden*, 117 N.C. 497, 23 S.E. 459 (1895).

Where the conveyance is to the first taker for life and then by whatever language employed to his bodily heirs or heirs of his body, the rule in *Shelley's* case applies and the first taker acquires a fee. *Whitson v. Barnett*, 237 N.C. 483, 75 S.E.2d 391 (1953).

When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee-simple estate upon the death of the testator subject to any prior life estate created by the will. *Hammer v. Brantley*, 244 N.C. 71, 92 S.E.2d 424 (1956).

Limitation within Rule Passes a Fee Simple.—A limitation coming within the rule in *Shelley's* case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. *Wallace v. Wallace*, 181 N.C. 158, 106 S.E. 501 (1921).

When Rule Inapplicable.—See post, this note, "III. Application and Illustrative Cases."

"Heirs" or "Heirs of Body".—The words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. *Wallace v. Wallace*, 181 N.C. 158, 106 S.E. 501 (1921).

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed Sufficient Formerly to Convey Fee Tail.—A deed, which was sufficient under the old law to confer a fee tail, is sufficient under this section, where a contrary intent may not be gathered from the instrument construed as a whole, to convey an estate in fee simple, but such a deed must be distinguished from a conveyance in which the words "bodily heirs" are used as *descriptio personarum*, which merely conveys to them an estate in remainder and as purchasers from the grantor. *Harrington v. Grimes*, 163 N.C. 76, 79 S.E. 301 (1913). See *Whitfield v. Garris*, 134 N.C. 24, 45 S.E. 904 (1903); *Jones v. Ragsdale*, 141 N.C. 200, 53 S.E. 842 (1906); *Sessoms v. Sessoms*, 144 N.C. 121, 56 S.E. 687 (1907); *Perrett v. Bird*, 152 N.C. 220, 67 S.E. 507 (1910). See also *Acker v. Pridgon*, 158 N.C. 337, 74 S.E. 335 (1912); *Puckett v. Morgan*, 158 N.C. 344, 74 S.E. 15 (1912).

Conveyance to One and Heirs of the Body.—A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee tail at common law, but under this section it is converted into a fee simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. *Revis v. Murphy*, 172 N.C. 579, 90 S.E. 573 (1916); *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941).

An estate to H. during his life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee simple title. *Howard v. Edwards*, 185 N.C. 604, 116 S.E. 1 (1923), distinguishing *Leathers v. Gray*, 101 N.C. 162, 7 S.E. 657 (1888) and *Chamblee v. Broughton*, 120 N.C. 170, 27 S.E. 111 (1897).

Deed to Daughter, "Her Children or Heirs".—Grantors executed a deed to their daughter and "her children or heirs." At the time of the execution of the deed the daughter had no children. It was held that the deed conveyed an estate tail to the daughter, which estate is converted into a fee simple by this section, and the daughter had power to dispose of the

property by will. *Davis v. Brown*, 241 N.C. 116, 84 S.E.2d 334 (1954).

Conveyance to One and His Children.—Where a conveyance is made to A and his children, and A has children at the time the deed is executed, A and his children take as tenants in common, but if A has no children at the time the deed is executed, A takes an estate tail which is converted into a fee by this section. *Davis v. Brown*, 241 N.C. 116, 84 S.E.2d 334 (1954).

Devise to Go on Devisees' Deaths to Their "Children & So On".—Where testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on," the brother took a life estate with remainder to his children and the named grandson in fee under the rule in *Shelley's case*, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession and created an estate tail converted into a fee by this section. In re *Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

Devise to One and Lawful Heirs of His Body.—A devise to S. and the lawful heirs of his body forever confers an estate in fee tail, converted into a fee simple under the section. *Sessoms v. Sessoms*, 144 N.C. 121, 56 S.E. 687 (1907). See *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904).

If testatrix intended to use the term in its strict technical sense, a devise to one and his "bodily heirs" would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. *Elledge v. Parrish*, 224 N.C. 397, 30 S.E.2d 314 (1944).

Where Words "Bodily Heirs" Not Used in Technical Sense.—If it appears by correct construction that the words "bodily heirs" are not used in the technical sense as conveying the estate to the entire line of heirs of the first taker, as inheritors under the canons of descent, but as words designating certain persons, the rule in *Shelley's case* does not apply. *Whitson v. Barnett*, 237 N.C. 483, 75 S.E.2d 391 (1953).

Where the conveyance was made "to Roy Whitson and bodily heirs, and their heirs and assigns," Roy Whitson being the father of four children, it was held that the words "bodily heirs" were intended to mean children and not heirs general in the technical sense. The words were inter-

preted to mean "to Roy Whitson and children, and their heirs and assigns." *Whitson v. Barnett*, 237 N.C. 483, 75 S.E.2d 391 (1953).

Effect of § 41-6.—Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living, the deed conveys a fee tail special to M. which is converted to a fee simple by this section, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, § 41-6, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. *Paul v. Paul*, 199 N.C. 522, 154 S.E. 825 (1930), distinguishing *Sharpe v. Brown*, 177 N.C. 294, 98 S.E. 825 (1919). See *Bank of Pilot Mountain v. Snow*, 221 N.C. 14, 18 S.E.2d 711 (1942).

A deed to a married woman and her heirs by her present husband, with granting clause, habendum and warranty to "parties of the second part, their heirs and assigns," is held to convey to the married woman a fee tail special, which is converted into a fee simple absolute by this section. *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941).

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by this section into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land; § 41-6 is not applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs." *Bank of Pilot Mountain v. Snow*, 221 N.C. 14, 18 S.E.2d 711 (1942).

A deed to grantor's wife "and to her heirs" by grantor, conveys a fee tail special, converted by this section into a fee simple absolute. *Pittman v. Stanley*, 231 N.C. 327, 56 S.E.2d 657 (1949).

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent

provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. *Sharpe v. Isley*, 219 N.C. 753, 14 S.E.2d 814 (1941).

Life Estate with Limitation over to Bodily Heirs.—A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under this section. *Keziah v. Medlin*, 173 N.C. 237, 91 S.E. 836 (1917).

Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in *Shelley's case*, converted into a fee simple absolute by this section. *Morehead v. Montague*, 200 N.C. 497, 157 S.E. 793 (1931).

Conveyance to Husband and Wife for Life Then to Heirs of the Body of Wife.—A deed conveyed to husband and wife a life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the feme grantee. It was held that the husband took only a life estate, and the conveyance being to the wife and then to heirs of her body, the rule in *Shelley's case* applied, and the estate in fee tail conveyed to the wife was converted by this section into a fee simple absolute. *Edgerton v. Harrison*, 230 N.C. 158, 52 S.E.2d 357 (1949).

Devise "to Have and to Hold for the Heirs of Their Bodies".—A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, to have and to hold during their natural lives for the heirs of their bodies, constitutes an estate tail, converted by this section into a fee simple. *Washburn v. Biggerstaff*, 195 N.C. 624, 143 S.E. 210 (1928).

When Rule in *Shelley's Case* Inapplicable.—The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike" and it was held that even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of this section, the addition of the words "share and

share alike" prevents the application of the rule in *Shelley's case*, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will. *Cheshire v. Drewry*, 213 N.C. 450, 197 S.E. 1 (1938).

Word "Heirs" Not Used in Technical Sense.—The rule in *Shelley's case* does not apply to a devise to testator's grandchildren during the term of their natural lives, then "to their bodily heirs, or issue surviving them," with limitation over of the share of any grandchild who should die without issue to his next of kin, since it is apparent that the word "heirs" was not used in its technical sense, and the grandchildren take only a life estate. *Williams v. Johnson*, 228 N.C. 732, 47 S.E.2d 24 (1948).

The use of the word "children" following the life estate does not create a fee simple estate or fee tail estate which would be converted by this section into a fee simple estate where a will devises real estate to the three daughters of testator, naming them, "during the time of their natural lives" and provides that "the share of each one of my said daughters shall upon her death go to her children and their heirs absolutely," for the word "children" is a word of purchase. *Moore v. Baker*, 224 N.C. 133, 29 S.E.2d 452 (1944).

"Lawful Heirs".—Where a devise is to one for life and then to his "lawful heirs," the word "lawful," qualifying the word "heirs," does not have the effect of preventing the latter word from operating as one of limitation and of restricting the meaning of the words "lawful heirs" to that of "children," who will take not by descent from their parent, but by purchase from the devisor. *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904).

"Heirs, if Any".—A conveyance to one for "his lifetime, and at his death to his heirs, if any," invokes the application of the rule in *Shelley's case* and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. *Glover v. Glover*, 224 N.C. 152, 29 S.E.2d 350 (1944).

"Heirs or Heiresses".—A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple. *Leathers v. Gray*, 101 N.C. 162, 7 S.E. 657 (1888).

Devise "for Life Only".—A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in *Shelley's case*, not-

withstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee simple title. *Merchants Nat'l Bank v. Dortch*, 186 N.C. 510, 120 S.E. 60 (1923), citing *Harrington v. Grimes*, 163 N.C. 76, 79 S.E. 301 (1913).

When Conveyance Is of Defeasible Fee.

—The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee simple title, under this section, does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. *Smith v. Parke*, 176 N.C. 406, 97 S.E. 209 (1918).

A devise to testator's daughter and her bodily heirs, and if she dies without bodily heirs, then in trust for the heirs of testator's sisters, is held to create a fee simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. *Murdock v. Deal*, 208 N.C. 754, 182 S.E. 466 (1935).

Where land is devised to a person for life at her death to vest in the children of the testator during their natural lives and at their death to vest in their lawful heirs, and should they leave no lawful heirs, then to the testator's lawful heirs, such children

take a fee simple absolute on the death of the life tenant. *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904).

Where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he die without leaving heirs of his body. *Whitefield v. Garris*, 134 N.C. 24, 45 S.E. 904 (1903).

When Such Estate Becomes Absolute.

—A conveyance to a granddaughter and the heirs of her own body passed an estate in fee tail, which by this section was converted into a fee simple, defeasible under the terms of the deed if no child was born to her, but which became absolute upon the birth of a child. *Sharpe v. Brown*, 177 N.C. 294, 98 S.E. 825 (1919). See *Paul v. Paul*, 199 N.C. 522, 154 S.E. 825 (1930).

An estate in remainder to the testator's son "and to his children or issue, but in case he should die childless and without issue, then . . . to my heirs in equal degree in fee simple," there being no child or children of the son until long after the testator's death, was held to create an estate tail at common law, which was converted into a fee simple by this section, defeasible upon the testator's son dying without issue, and as there was an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue could not convey a fee simple title. *Ziegler v. Love*, 185 N.C. 40, 115 S.E. 887 (1923).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.—In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. (1784, c. 204, s. 6; R. C., c. 43, s. 2; Code, s. 1326; Rev., s. 1579; C. S., s. 1735; 1945, c. 635.)

- I. General Consideration.
- II. Estates of Husband and Wife.
- III. Joint Tenancy in Partnership Property.

Cross References.

As to executors, administrators, or collectors holding in joint tenancy, see § 28-184. As to survivorship among trustees given power of sale, see § 45-8.

I. GENERAL CONSIDERATION.

Survivorship Only Abolished as Incident of Joint Tenancy.—This section abolished survivorship only where it follows as a legal incident to an existing joint tenancy. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964).

Meaning of "Estate".—"Estate" is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. In this sense it includes choses in action. *Pippin v. Ellison*, 34 N.C. 61 (1851); *Webb v. Bowler*, 50 N.C. 362 (1858); *Hurdle v. Outlaw*, 55 N.C. 75 (1854). But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. *Taylor v. Dawson*, 56 N.C. 87 (1856). The word "estate" was used in this later sense by the Rev. Stat., ch. 43, § 2 [now this section]. *Bond v. Hilton*, 51 N.C. 180 (1858).

Section Applies Only to Estates of Inheritance.—The act of 1784, converting joint tenancies into estates in common, applies only to estates of inheritance. *Blair v. Osborne*, 84 N.C. 417 (1881); *Powell v. Morisey*, 84 N.C. 421 (1881).

If the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the "jus accrescendi" in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personalty. *Powell v. Allen*, 75 N.C. 450 (1876).

Joint Estates for Life and Estates by Entirety Not Affected.—Joint tenancies are not abolished by the section. It abolishes the right of survivorship in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. *Vass v. Freeman*, 56 N.C. 221 (1857); *Powell v. Allen*, 75 N.C. 450 (1876); *Blair v. Osborne*, 84 N.C. 417 (1881); *Powell v. Morisey*, 84 N.C. 421 (1881); *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

In *Powell v. Allen*, 75 N.C. 450 (1876), in construing the act of 1784, now this section, Chief Justice Pearson says: "It is obvious that these words cannot be made to apply to joint tenants for life." *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

Legatees May Hold as Joint Tenants.—Legatees may still hold by a joint tenancy in North Carolina, though the incident of survivorship was abolished by the act of 1784, now this section. *Vass v. Freeman*, 56 N.C. 221 (1857).

Severance of Joint Tenancy by This Section.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that between the children, by the act of 1784, now this section. And in a suit in trover by one of the children he was allowed to recover only one-third part of the value. *Witherington v. Williams*, 1 N.C. 89 (1789).

When Remaindermen Take as Tenants in Common.—A deed of gift, executed by W. B. to his son J. B., "during his natural life only, and then to return to the male children of the said J. B., lawfully begotten of his body, for the want of such to return to the male children of my other sons W. and B., their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," vested a life estate in J. B., with remainder in fee to his sons as tenants in common under the section. *Brown v. Ward*, 103 N.C. 173, 9 S.E. 300 (1889).

Survivorship May Be Provided for by Contract.—The section abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. *Taylor v. Smith*, 116 N.C. 531, 21 S.E. 202 (1895); *Jones v. Waldroup*, 217 N.C. 178, 7 S.E.2d 366 (1940); *Bunting v. Cobb*, 234 N.C. 132, 66 S.E.2d 661 (1951); *Wilson County v. Wooten*, 251 N.C. 667, 111 S.E.2d 875 (1960).

This section does not operate to prohibit persons from entering into written contracts as to lands so as to make future rights of the parties depend upon survivorship. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964).

Survivorship in Personalty Must Be Pursuant to Contract.—Since the abolition of survivorship in joint tenancy, the right of survivorship in personalty, if such right exists, must be pursuant to contract and

not by operation of law or statutory provision. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947); *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956).

A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid. *Taylor v. Smith*, 116 N.C. 531, 21 S.E. 202 (1895).

Instrument Held Ineffective to Provide for Survivorship.—While this section may not preclude tenants in common from providing for survivorship by adequate contract inter sese, an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. The execution by the administrator of the deceased tenant in common of a deed to the surviving tenant, made under the supposed authority of the contract, is without effect. *Pope v. Burgess*, 230 N.C. 323, 53 S.E.2d 159 (1949).

Applied in *Powell v. Malone*, 22 F. Supp. 300 (M.D.N.C. 1938).

Cited in *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946).

II. ESTATES OF HUSBAND AND WIFE.

Section Inapplicable to Conveyances to Husband and Wife.—The act of 1784, now this section, abolishing survivorship in joint tenancies, does not apply to conveyances to husband and wife, for the reason assigned in *Motley v. Whitmore*, 19 N.C. 537 (1837), that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." *Long v. Barnes*, 87 N.C. 329 (1882); *Phillips v. Hodges*, 109 N.C. 248, 13 S.E. 769 (1891).

In construing this statute, the Supreme Court held that it had no application to an estate granted to husband and wife, on the ground that it is not an estate in joint tenancy, but an entirety estate. *Motley v. Whitmore*, 19 N.C. 537 (1837); *Gray v. Bailey*, 117 N.C. 439, 23 S.E. 318 (1895); *Woolard v. Smith*, 244 N.C. 489, 94 S.E.2d 466 (1956).

Survivorship in Joint Bank Accounts.—Where agreements of husband and wife relating to savings accounts provide that the accounts are held by them as joint tenants with right of survivorship, and not as tenants in common, the right of survivorship exists pursuant to the contracts, and upon the death of the husband the widow is entitled to take the whole.

Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

Estate by Entireties Not Abolished.—It has been held in several well considered decisions of the Supreme Court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a conveyance to a husband and wife. *Bruce v. Nicholson*, 109 N.C. 202, 13 S.E. 790 (1891); *Ray v. Long*, 132 N.C. 891, 44 S.E. 652 (1903); *West v. Aberdeen & R.F.R.R.*, 140 N.C. 620, 53 S.E. 477 (1906); *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906); *Jones v. W. A. Smith & Co.*, 149 N.C. 318, 62 S.E. 1092 (1908); *McKinnon, Currie & Co. v. Caulk*, 167 N.C. 411, 83 S.E. 559 (1914). See also *Martin v. Lewis*, 187 N.C. 473, 122 S.E. 180 (1924).

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and title vests in the heirs of the one surviving the other. *Murchison v. Fogleman*, 165 N.C. 397, 81 S.E. 627 (1914).

A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole. *Needham v. Branson*, 27 N.C. 426 (1845); *Todd v. Zachary*, 45 N.C. 286 (1853); *Woodford v. Highly*, 60 N.C. 234 (1864); *Long v. Barnes*, 87 N.C. 329 (1882).

Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety and not a joint estate is created which they hold per tout et non per my. *Ray v. Long*, 132 N.C. 891, 44 S.E. 652 (1903).

III. JOINT TENANCY IN PARTNERSHIP PROPERTY.

Joint Tenancy of Partnership in Land.—This section provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive to the others for the purpose of paying the partnership debts. Real estate held and used for partnership purposes is subject to partnership debts to the exclusion of the heir or widow of the deceased. When the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to the heirs, executors, administrators or assigns. *Stroud v. Stroud*, 61 N.C. 525 (1868).

Upon Settlement Partnership Land Descends as Real Estate.—When land is purchased in fee by partnership funds and

for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir as real estate. *Summey v. Patton*, 60 N.C. 601 (1864).

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. *Sherrod v. Mayo*, 156 N.C. 144, 72 S.E. 216 (1911).

Heir May Recover from Surviving Partner.—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. *Sherrod v. Mayo*, 156 N.C. 144, 72 S.E. 216 (1911).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.—(a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

- (1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.
- (2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.
- (3) Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased.
- (4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, the portion of the unwithdrawn deposit made subject to the claims of the creditors of the deceased and to

Immaterial Whether Claim Is by Deed or Inheritance.—When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. *Sherrod v. Mayo*, 156 N.C. 144, 72 S.E. 216 (1911).

Section 59-74 is to be read in connection with this section respecting the settlement of partnership affairs by surviving partners. *Coppersmith v. Upton*, 228 N.C. 545, 46 S.E.2d 565 (1948).

The fact that the surviving partner instituting action on a partnership asset has not filed a bond as required by § 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with § 59-75, which provides that upon failure of the surviving partner to file bond, the clerk of the superior court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner. *Coppersmith v. Upton*, 228 N.C. 545, 46 S.E.2d 565 (1948).

governmental rights as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims of the creditors of the deceased or governmental rights unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay any remaining debts of the deceased or governmental claims. Any part of said unwithdrawn deposit not used for the payment of such debts or charges of administration of the deceased shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(c) This section shall be subject to the provisions of law applicable to transfers in fraud of creditors.

(d) This section shall not be deemed exclusive; deposit accounts not conforming to this section, and other property jointly owned, shall be governed by other applicable provisions of the law.

(e) As used in this section:

- (1) "Banking institution" includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.
- (2) "Deposit account" includes both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.
- (3) "Unwithdrawn deposit" shall be the amount in the deposit account held by the banking institution at the time of the death of the joint tenant; provided, however, that the banking institution shall not be held responsible for any amount properly paid out of said account prior to notice of such death.

(f) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24 relating to the administration of the inheritance laws or any other provisions of the law relating to inheritance taxes.

(g) A deposit account under subsection (a) of this section may be established by a written agreement in substantially the following form:

"We, the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the
(name of institution) in the joint account of the undersigned, shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of § 41-2.1 of the General Statutes of North Carolina.

Witness our hands and seals, this day of, 19.....
..... (Seal)
..... (Seal)
..... (Seal)
..... (Seal)"

(1959, c. 404; 1963, c. 779.)

Editor's Note. — The 1963 amendment rewrote this section.

Rights of Creditors.—The legislature has not enacted any statute with respect to the rights of creditors against property held by virtue of a contract creating a joint tenancy with right of survivorship, except

as to the right of survivorship in bank deposits created by a written agreement by husband and wife as provided by this section. *Wilson County v. Wooten*, 251 N.C. 667, 111 S.E.2d 875 (1960).

Cited in *Smith v. Smith*, 255 N.C. 152, 120 S.E.2d 575 (1961).

§ 41-3. Survivorship among trustees.—In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four. (1885, c. 327, s. 1; Rev., s. 1580; C. S., s. 1736.)

Cross References.—As to survivorship among trustees with power of sale, see § 45-8. As to limitation on actions by cotenants of personal property, see § 1-29.

The trustees of a trust estate hold as joint tenants, and not as tenants in common. *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906); *Webb v. Borden*, 145 N.C. 188, 58 S.E. 1083 (1907).

§ 41-4. Limitations on failure of issue.—Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight. (1827, c. 7; R. C., c. 43, s. 3; Code, s. 1327; Rev., s. 1581; C. S., s. 1737.)

Purpose of Section.—This section was enacted for the primary purpose of making contingent limitations good by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. *Sain v. Baker*, 128 N.C. 256, 138 S.E. 858 (1901); *Harrell v. Hagan*, 147 N.C. 111, 60 S.E. 909 (1908); *Kirkman v. Smith*, 174 N.C. 603, 94 S.E. 423 (1917); *Bell v. Kessler*, 175 N.C. 525, 95 S.E. 881 (1918).

The primary purpose of the enactment of this section was not to abrogate the rule which favors the early vesting of estates but it has been given that effect under certain circumstances in the North Carolina decisions. *Cabarrus Bank & Trust Co. v. Finlayson*, 286 F.2d 251 (4th Cir. 1961).

This section was enacted in 1827 to meet the rule then generally prevailing in this country that a gift over on "death without issue" in a deed or will meant an indefinite failure of issue and hence was void for re-

Loss of Right to Trustee Is Loss to Cestui and Cotrustees.—When a right of entry is barred and the right of action lost by a trustee, through an adverse occupation, the cestui que trust and the cotrustees are also concluded from asserting claim to the land. *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906).

Section Is Obligatory.—The rule laid down by this section is obligatory on the courts, and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919).

Inapplicable to Wills Executed before January 15, 1828.—See *Rice v. Satterwhite*, 21 N.C. 69 (1835); *Brown v. Brown*, 25 N.C. 131 (1842); *Gibson v. Gibson*, 49 N.C. 425 (1857); *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919).

Does Not Interfere with Rule in Shelley's Case.—The section does not interfere with the application of the principle laid down in Shelley's case in determining the nature and extent of the precedent estate. This is declared in *Sanderlin v. Deford*, 47 N.C. 75 (1854), in construing a will executed in 1838. *King v. Utley*, 85 N.C. 59 (1881). See note to § 41-1, "II. Rule in Shelley's Case."

Doctrine of Shifting Uses and Executory Devises Unaffected.—This section is a rule of construction upholding the sec-

ond and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. *Sessoms v. Sessoms*, 144 N.C. 121, 56 S.E. 687 (1907).

Common-Law Rule Superseded.—Where there was a devise of lands for life, then to J. and C. equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J. and C. equally, it was held that the common-law doctrine that a limitation contingent upon death and failure of issue is void for remoteness gives place to the new rule of construction enacted by this section, made applicable since January 15, 1828, without restriction as to immediate estates, and a contrary intent not being expressly and plainly declared in the face of the instrument, the death without issue referred to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survived, with issue, the absolute fee simple title to the lands was in C. and the other ulterior remaindermen. *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919).

Rule When Will Is Ambiguous.—Where there is ambiguity in a will as to whether the vesting of an estate devised for life with contingent limitation over shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. *Westfeldt v. Reynolds*, 191 N.C. 802, 133 S.E. 168 (1926).

Provisions of Section Prevail over Rule of Stare Decisis.—A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expressions of a statutory change of the rule to the contrary, where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves or upon prior executed instruments excepted by the statute, or without express reference thereto; and this section, changing the rule of construction as to the vesting of an interest con-

tingent upon a death with issue, cannot be affected by the rule laid down in *Hilliard v. Kearney*, 45 N.C. 221 (1853), and subsequent decisions on the subject. *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919).

The law favors early indefeasible or absolute vesting of estates. As a corollary of this rule, such a construction is to be put upon conditional expressions, which render a testamentary gift defeasible, as to confine their operation to as early a period as the words of the will allow, so that it may become an absolute interest as soon as the language of the testator will permit. *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

Contingent Remaindermen Take Transmissible Estate.—Where there is a contingent executory devise to named persons in the event the first taker should die without issue, the persons who are to take the contingent limitation over are certain and only the event upon which they are to take is uncertain, and the contingent remaindermen take a transmissible estate which is not dependent upon their surviving the first taker, and upon the death of the contingent remaindermen prior to the death of the first taker without children then surviving, the estate goes to the heirs, next of kin, and successors of interest of the contingent remaindermen. *Seawell v. Cheshire*, 241 N.C. 629, 86 S.E.2d 256 (1955).

A contingent remainder dependent upon the death of a certain donee without issue means, under the terms of this section, without issue living at the time of death. *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

Roll Must Be Called as of Death of First Taker.—To determine the effectiveness of a limitation over the roll must be called as of the date of the death of the first taker. *Turpin v. Jarrett*, 226 N.C. 135, 37 S.E.2d 124 (1946).

Where a will set up a trust with provision that the income therefrom be divided among named beneficiaries for life and the corpus proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, his share of the corpus should become a part of, and be distributed in accordance with, the residuary clause, it was held that the person entitled to each share of the corpus was contingent upon whether each of the life beneficiaries died with or without issue surviving, and therefore the will set up a contingent and not a vested limitation, and the roll must be called as to each share of the corpus as of the death of

its life beneficiary. *Van Winkle v. Berger*, 228 N.C. 473, 46 S.E.2d 305 (1948).

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940).

Dying without heirs or issue, upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. *House v. House*, 231 N.C. 218, 56 S.E.2d 695 (1949). See *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 34, 65 S.E.2d 317 (1951); *Seawell v. Cheshire*, 241 N.C. 629, 86 S.E.2d 256 (1955).

Not as of Death of Testator.—A devise of land to L. with limitation that if she “shall die leaving issue surviving her, then to such issue and their heirs forever,” but if she “die without issue surviving her, then the property to return to my eldest daughter,” the vesting of the estate in remainder depends upon the contingency of the death of L. without leaving “issue” surviving her, and not upon the death of the testatrix. *Rees v. Williams*, 164 N.C. 128, 80 S.E. 247 (1913).

Unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the deviser, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till the event occurs by which same is to be determined, or the estate becomes absolute. *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919). See *Williams v. Lewis*, 100 N.C. 142, 5 S.E. 435 (1888); *Harrell v. Hagan*, 147 N.C. 111, 60 S.E. 909, 125 Am. St. Rep. 539 (1908).

Rule in Hilliard v. Kearney Changed.—Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate time, such as the termination of the life estate, or some other designated period, and held that the phrase “dying without issue” was to be referred to this intermediate period. *Hilliard v. Kearney*, 45 N.C. 221 (1853). This principle was entirely changed by the act of 1827, which is now this section. *American Yarn & Processing Co. v. Dewstoe*, 192 N.C. 121, 133 S.E. 407 (1926). See *Clapp v. Fogleman*, 21 N.C.

467 (1836); *Tillman v. Sinclair*, 23 N.C. 183 (1840); *Moore v. Barrow*, 24 N.C. 436 (1842); *Garland v. Watt*, 26 N.C. 287 (1844); *Jones v. Oliver*, 38 N.C. 369 (1844); *Weeks v. Weeks*, 40 N.C. 111 (1847); *Spruill v. Moore*, 40 N.C. 284 (1848); *Holton v. McAllister*, 51 N.C. 12 (1858); *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919); *Love v. Love*, 179 N.C. 115, 101 S.E. 562 (1919); *Willis v. Mutual Loan & Trust Co.*, 183 N.C. 267, 111 S.E. 163 (1922); *Vinson v. Gardner*, 185 N.C. 193, 116 S.E. 412 (1923); *Alexander v. Fleming*, 190 N.C. 815, 130 S.E. 867 (1925).

Section Applies Notwithstanding Intervening Life Estate.—On devise of an estate to M. for life, then to G. and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. *Kirkman v. Smith*, 175 N.C. 579, 96 S.E. 51 (1918). The section has been construed by the Supreme Court at least twenty-six times, and in every case in which it has come before the court for construction it has uniformly been held that “dying without heirs or issue,” upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. *Patterson v. McCormick*, 177 N.C. 448, 99 S.E. 401 (1919). See *Cowand v. Meyers*, 99 N.C. 198, 6 S.E. 82 (1888); *Dunning v. Burden*, 114 N.C. 33, 18 S.E. 969 (1894); *Kornegay v. Morris*, 122 N.C. 199, 29 S.E. 875 (1898); *Harrell v. Hagan*, 147 N.C. 111, 60 S.E. 909 (1908); *Dawson v. Ennett*, 151 N.C. 543, 66 S.E. 566 (1909); *Perrett v. Bird*, 152 N.C. 220, 67 S.E. 507 (1910); *Elkins v. Seigler*, 154 N.C. 374, 70 S.E. 636 (1911); *Vinson v. Wise*, 159 N.C. 653, 75 S.E. 732 (1912); *Hobgood v. Hobgood*, 169 N.C. 485, 86 S.E. 189 (1915); *Whichard v. Craft*, 175 N.C. 128, 95 S.E. 94 (1918).

First Taker Has Base and Qualified Fee.—O. devised his lands to certain of his children, S., D., and J. By item 3 of the will a certain tract was devised to D. and “the lawful heirs of his body lawfully begotten;” by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations. It was held that these items should be construed together, and that the estate de-

vised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. *Perrett v. Bird*, 152 N.C. 220, 67 S.E. 507 (1910).

First Taker Dying without Issue Cannot Devise Property.—When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son, dying without children, cannot by will give his wife a life estate with the remainder to a third party. *Sain v. Baker*, 128 N.C. 256, 38 S.E. 858 (1901); *Seawell v. Cheshire*, 241 N.C. 629, 86 S.E.2d 256 (1955).

Instances of Fee Simple Defeasible.—A devise to testator's four sons, but if any one of them should "fail to become a father of a living child by lawful wedlock" his share should revert to the estate, was held to devise a fee simple to each son, defeasible upon his death without having a living child born in wedlock, but which becomes a fee simple absolute as to each son upon the birth of him of a living child in wedlock. *Buffaloe v. Blalock*, 232 N.C. 105, 59 S.E.2d 625 (1950).

By residuary clause, testator devised the remainder of his estate to his four sons, his sole heirs at law, each to take a defeasible fee to become absolute as to each upon the birth of a living child in wedlock. It was held that testator intended to dispose of all the residue of his estate in the residuary clause, including any reversion, and therefore if the fee of any one of the sons should be defeated, the reversion would go to the estate and pass under the residuary clause to the other sons or their heirs, who would not take as purchasers under the will but by descent from the devisees, and therefore deed executed by the four sons conveys the fee simple absolute, since the deed of each would estop him or his heirs from claiming any reversionary interest if such interest should thereafter arise. *Buffaloe v. Blalock*, 232 N.C. 105, 59 S.E.2d 625 (1950).

Testator devised a life estate to his wife with provisions that at her death his lands should be divided among his living children, with particular description as to the share each should take, with further provision that one daughter (who had living children at the time the will was executed) should take a life estate in her share with remainder to her children, and that his other named daughters and three named sons should have their share in fee simple forever "And if either one of my daughters shall die without issue, their share of the lands shall be equally divided among" the three named sons. It was held that the

words "shall die without issue" refer to the death of the devisees of the fee and not to the death of the life tenant, and the daughters took a defeasible fee so that upon the death of one of them without issue her surviving, her share became vested in the three named sons. *House v. House*, 231 N.C. 218, 56 S.E.2d 695 (1949).

Where a will provided that some of the beneficiaries shall each receive a percentage of the income from the trust estate for twenty years, then, as to all of these, the trust shall terminate and each shall receive a like percentage of the corpus of the trust absolutely, but should any of them die before the termination of the trust, the interest and corpus shall go to their respective surviving issue, but if any die without issue surviving, "their respective shares shall be added to the residue of (the) estate," each of the beneficiaries, at the death of testator, had a vested interest, subject to the twenty year trust, in his or her respective share in fee, defeasible upon dying without issue before the termination of the trust. *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960).

Where testatrix bequeathed property to her daughter or to the children of testatrix's son if the daughter should die childless, the daughter took only a defeasible title which terminated upon her death without children. *Cabarrus Bank & Trust Co. v. Finlayson*, 286 F.2d 251 (4th Cir. 1961).

Instance of Fee Simple Determinable.—Testator devised lands to his daughter with further provision that the gift should become absolute if she improved the land by erecting a dwelling or if she should die leaving issue, but that if she should fail to improve the lot or should die without living issue, then the lands should be disposed of as directed in a subsequent item. It was held that the devise created a fee simple determinable, and under the rule of construction requiring that the fee simple absolute should vest as soon as the language of the testator permits, the ambiguous provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee should be defeated, and therefore upon the erection of a dwelling house upon the property of the daughter her fee became absolute. *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950).

Estate Created Direct to Second Taker.—When by the operation of § 41-1 a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate

is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the enactment of this section. *Sessoms v. Sessoms*, 144 N.C. 121, 56 S.E. 687 (1907).

A devise of lands to B in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself; and upon the death of B and the nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. *Burden v. Lipsitz*, 166 N.C. 523, 82 S.E. 863 (1914).

An estate to M. and her bodily heirs, without further limitation, is converted into a fee simple under § 41-1, but such an estate followed by the words "if no heirs, said lands shall go back to my estate," will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event, as a shifting use under the statute of uses, § 41-7, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. *Willis v. Mutual Loan*

& Trust Co., 183 N.C. 267, 111 S.E. 163 (1922).

An estate to testator's daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., under this section, and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. *Vinson v. Gardner*, 185 N.C. 193, 116 S.E. 412 (1923).

Where a father devised the land in question to plaintiff "to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children," and at the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children, it was held that the plaintiff's deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, or as not coming within the rule in *Shelley's case*. *Hudson v. Hudson*, 208 N.C. 338, 180 S.E. 597 (1935).

Applied in *Conrad v. Goss*, 227 N.C. 470, 42 S.E.2d 609 (1947); *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949); *Blanchard v. Ward*, 244 N.C. 142, 92 S.E.2d 776 (1956).

Cited in *West v. Murphy*, 197 N.C. 488, 149 S.E. 731 (1929); *Rigsbee v. Rigsbee*, 215 N.C. 757, 3 S.E.2d 331 (1939); *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941).

§ 41-5. Unborn infant may take by deed or writing.—An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born. (R. C., c. 43, s. 4; Code, s. 1328; Rev., s. 1582; C. S., s. 1738.)

Unborn Infant Takes from Time of Conception.—This section gives the same capacity to an unborn infant to take property as such infant has under the law governing its right to take by inheritance or devise, which is from the time of conception. *Mackie v. Mackie*, 230 N.C. 152, 52 S.E.2d 352 (1949).

When Child Presumed in Esse.—For the purpose of capacity to take under a deed, it will be presumed in the absence of contrary evidence that a child is in esse 280 days prior to its birth. *Mackie v. Mackie*, 230 N.C. 152, 52 S.E.2d 352 (1949).

Grant Directly to Children of Living

Person.—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then en ventre sa mere. *Powell v. Powell*, 168 N.C. 561, 84 S.E. 860 (1915).

Under a deed to a woman "and her children" a child en ventre sa mere at the date of the conveyance will take, but children born more than a year thereafter will not. *Heath v. Heath*, 114 N.C. 547, 19 S.E. 155 (1894).

Child Takes as Tenant in Common.—By virtue of this section a child if en ventre sa mere at the time the deed is executed takes as tenant in common with the living

children. *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905).

Life Estate to Parent with Limitation Over.—Where there is a reservation of a life estate in the parent or another, with limitation over to the children, all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. *Powell v. Powell*, 168 N.C. 461, 84 S.E. 860 (1915).

Remainder after Freehold to Children

§ 41-6. “Heirs” construed to be “children” in certain limitations.—A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will. (R. C., c. 43, s. 5; Code, s. 1329; Rev., s. 1583; C. S., s. 1739.)

Editor’s Note.—For note on doctrine of worthier title, see 41 N.C.L. Rev. 317 (1963).

Purpose of Section.—It seems that the main object of this section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated that by “the heirs” was meant the children of the person named. This section provides that in such a case the word “heirs” shall be construed to mean “children” and the limitation therefore would be good. By this construction of the section it does not affect the rule in Shelley’s case. *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893); *Hartman v. Flynn*, 189 N.C. 452, 127 S.E. 517 (1925).

“Limitation” Explained. — The word limitation has two different senses: the original sense, namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the derivative sense, namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate. In this statute, the word is manifestly used in its derivative or secondary sense. *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905). See *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893).

The rule in Shelley’s case is not abrogated by this section. *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893). As to the rule in Shelley’s case, see note to § 41-1.

Common-Law Rule Changed.—While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with re-

Not in Esse. — Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the life estate of the first taker is sufficient to uphold the estate of his children, though not in esse at the time, by way of contingent remainder till they are born, and thereafter as owners of a vested remainder. *Johnson Bros. v. Lee*, 187 N.C. 753, 122 S.E. 839 (1924).

Quoted in *Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959).

mainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that *nemo est haeres viventis*, this does not prevail under the provisions of this section. *Thompson v. Batts*, 168 N.C. 333, 84 S.E. 347 (1915).

Section Applies Only When No Precedent Estate to Said Living Person.—The Code of 1883, s. 1329, now this section, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. *Jones v. Ragsdale*, 141 N.C. 200, 53 S.E. 842 (1906); *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941).

If it were not true that this section applies only when there is no precedent estate conveyed to said living person, it would not only repeal the rule in Shelley’s case, but would pervert every conveyance to “A and his heirs” into something entirely different from what those words have always been understood to mean. *Marsh v. Griffin*, 136 N.C. 333, 48 S.E. 735 (1904).

Conveyance to Living Person and Limitation to Heirs.—This section applies only when there is no precedent estate conveyed to said living person, nor is this section applicable where there is a conveyance to a living person, with a limitation to his heirs. *Bank of Pilot Mountain v. Snow*, 221 N.C. 14, 18 S.E.2d 711 (1942).

Conveyance Must Be to Heirs of Living Person. — This section applies only when the conveyance is to the heirs of a living person. *Scott v. Jackson*, 257 N.C. 658, 127 S.E.2d 234 (1962), commented on in 41 N.C.L. Rev. 317 (1963).

Devise to “Heirs of His Children.”—A testator devised a lot to trustees for twenty years from the date of his death

and provided that at the end of said period the estate should "be equally divided between the heirs of my children, per stirpes." By virtue of this section, the word "heirs" as used in this item of the will, must be construed to mean the "children" of the son and daughter of the testator. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949).

By his will, the testator devised a lot to trustees for twenty years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," as used in the will, must be construed to mean "children." *Lide v. Wells*, 190 N.C. 37, 128 S.E. 477 (1925).

"Lawful Heirs of Her Body".—Where a testator, by separate devises, gave to each of his three daughters, who were his only heirs at law, a certain tract of his land, with provision in each item "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs," by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. *Kornegay v. Cunningham*, 174 N.C. 209, 93 S.E. 754 (1917).

Remainder to Living Heirs of Grantor.—Grantor conveyed the land in question to her son after the reservation of a life estate, and by habendum stipulated that the grantee should have an estate for the term of his natural life and at his death to his issue surviving, with further provision that should he die without issue "then to the living heirs of" the grantor. It was held that the other children of grantor have a remainder contingent upon the death of the grantee without issue, which interest cannot be defeated by a conveyance executed by the grantee with the joinder of the grantor. *Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d 772 (1950).

This section does not apply when the limitation is to a living person and his heirs. *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941).

Section Validates Conveyance Directly to Heirs of Living Person.—By virtue of the section a deed conveying land directly to the "heirs" of a living person passes whatever title the grantor had to the chil-

dren of such person. *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905).

A deed to "the heirs" of A., he being still alive, although void at common law, is good under this section, and is construed to be a limitation to the children of A., and includes after-born children. *Graves v. Barrett*, 126 N.C. 267, 35 S.E. 539 (1900).

A devise to the "heirs" of a person will be construed to be to his "children" in the absence of a contrary intention expressed in the instrument. *Moseley v. Knott*, 212 N.C. 651, 194 S.E. 100 (1937).

An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, s. 1583, now this section, which construes the word "heirs" to mean children, in such instances. *Condor v. Secrest*, 149 N.C. 201, 62 S.E. 921 (1908).

Child Born during Life of Life Tenant.—A devise was of lands to the widow of the testator for life, then to the heirs of his son J., and it appeared that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate. It was held that the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it included all who were members of the class and filled the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, took his share with the other children of J. *Cooley v. Lee*, 170 N.C. 18, 86 S.E. 720 (1915).

Limitation to Heirs of One with Conditional Limitation Over.—Where an estate was devised to A "and the heirs of his body, but if he die without heirs living at the time of his death, then to the heirs of B," "heirs" was construed to mean children. *Smith v. Brisson*, 90 N.C. 284 (1884).

Limitation Over Provided First Taker Dies without Heirs.—Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." *Sain v. Baker*, 128 N.C. 256, 38 S.E. 858 (1901).

Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon the first taker's dying without issue, this section has no application. *Massengill v. Abell*, 192 N.C. 240, 134 S.E. 641 (1926).

Reverter to Heirs upon Nonhappening of Contingency. — A conveyance of land in contemplation of marriage, to M., “to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of” the grantor, the “reverter” to his heirs under this section meant to his children after the death of his wife and the nonhappening of the stated contingency. *Thompson v. Batts*, 168 N.C. 333, 84 S.E. 347 (1915).

“Lawfully Begotten Heirs of the Body”. — In *Lockman v. Hobbs*, 98 N.C. 541, 4 S.E. 627 (1887), it was held that “the lawfully begotten heirs of her body” in a will referred most obviously to the children of the devisee for life, of whom there were only two, and was construed to mean “the

children of such person” since contrary intention did not appear from the will.

When Children Illegitimate. — Where a bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate, they have the right to take under the section which declares that a limitation to the “heirs” shall be construed to be the “children” of such person, unless a contrary intention appears. *Howell v. Tyler*, 91 N.C. 207 (1884).

Applied in *Sprinkle v. Reidsville*, 235 N.C. 140, 69 S.E.2d 179 (1952); *Clarke v. Clarke*, 253 N.C. 156, 116 S.E.2d 449 (1960).

Cited in *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940).

§ 41-7. **Possession transferred to use in certain conveyances.**—By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant. (27 Hen. VIII, c. 10; R. C., c. 43, s. 6; Code, s. 1330; Rev., s. 1584; C. S., s. 1740.)

Editor's Note. — It is conceded, on all hands, that the Statute of Uses, 27 Hen. VIII, c. 10, was in force and in use, in this State, up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land adopted and used in this State are based on, and take effect by, the operation of that statute. In the Rev. Stat., c. 43, s. 4, and the Rev. Code, c. 43, s. 6, the words used in 27 Hen. VIII, c. 10, i.e., “When one person or persons stand, or be seized, or at any time thereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.” are omitted and the provision is simply “By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc.” Substantially in this form the section is carried through all the various codes up to this one. The tendency, while no material change has been made, has been to make the section all inclusive by extending its application to every possible case involving the principle. *Wilder v. Ireland*, 53 N.C. 85 (1860).

Possession Transferred.—The statute of uses, substituted for 27 Hen. VIII, now this section, provides that the possession of the bargainor shall be transferred to the bargainee as perfectly as if the bargainee “had been enfeoffed at common law with the livery of seizin of the land intended to be conveyed, etc.” *Kirby v. Boyette*, 118 N.C. 244, 24 S.E. 18 (1896).

Same Footing with Feoffments at Common Law. — Deeds of bargain and sale, and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. *Ivey v. Granberry*, 66 N.C. 224 (1872); *Love v. Harbin*, 87 N.C. 249 (1882). A use may be limited on a use. *Rowland v. Rowland*, 93 N.C. 214 (1885).

Necessity of Consideration.—A deed of bargain and sale is governed in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable, consideration. *Blount v. Blount*, 4 N.C. 389 (1816); *Brockett v. Foscue*, 8 N.C. 64 (1820); *Bruce v. Faucett*, 49 N.C. 391 (1857).

If no consideration, either good or valuable, appears on the face of the instrument, or can be proved aliunde, the instru-

ment will be void. *Springs v. Hanks*, 27 N.C. 30 (1844); *Jackson v. Hampton*, 30 N.C. 457 (1848); *Bruce v. Faucett*, 49 N.C. 391 (1857).

Resulting Use at Common Law. — At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. *Pittman v. Pittman*, 107 N.C. 159, 12 S.E. 61 (1890).

Love and Affection as Consideration. — Though in form a deed is one of bargain and sale, yet if the only consideration is that of love and affection, it will operate as a covenant to stand seized. *Slade v. Smith*, 2 N.C. 248 (1796); *Hatch v. Thompson*, 14 N.C. 411 (1832); *Cobb v. Hines*, 44 N.C. 343 (1853); *Bruce v. Faucett*, 49 N.C. 391 (1857).

This section merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trusts, the legal title vests and remains in the trustee for the purpose of the trust. *Fisher v. Fisher*, 218 N.C. 42, 9 S.E.2d 493 (1940). See *Security Nat'l Bank v. Sternberger*, 207 N.C. 817, 178 S.E. 595 (1935).

Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the cestui que trust; but where the use is not executed, the legal title passes to the trustee. *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

In *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916), it was said: "As to Mrs. Lee's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her." See *Perkins v. Brinkley*, 133 N.C. 154, 45 S.E. 541 (1903); *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906); *Springs v. Hopkins*, 171 N.C. 486, 88 S.E. 774 (1916).

The Statute of Uses, 27 Henry VIII, preserved in this State by this section, merges the legal and equitable titles in the beneficiary of a passive trust. *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E.2d 588 (1961).

Where conveyance of wife's property to trustee for her sole use and benefit during her life and, after her death, for the benefit of her husband was ineffective to

create any estate or trust in favor of the husband because of noncompliance with § 52-12, a passive trust for the wife for her natural life was created and it was executed by the statute. *Pilkington v. West*, 246 N.C. 575, 99 S.E.2d 798 (1957).

In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

Where Legal and Equitable Title in Same Person. — Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect. *Peacock v. Scott*, 101 N.C. 149, 7 S.E. 885 (1888); *Odom v. Morgan*, 177 N.C. 367, 99 S.E. 195 (1919).

Exceptions to Rule That Beneficial Use Is Converted into Legal Ownership. — Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operation, i.e.: (1) Where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the separate use and maintenance of a married woman. *Wilder v. Ireland*, 53 N.C. 85 (1860); *Kirby v. Boyette*, 118 N.C. 244, 24 S.E. 18 (1896).

Rule Does Not Apply to Active Trusts. — While this section converts the beneficial use into the legal ownership and unites the legal and equitable estates in the beneficiary, this rule applies only to passive or simple trusts and not to active trusts. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936), citing *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); *Patrick v. Beatty*, 202 N.C. 454, 163 S.E. 572 (1932).

This section merges the legal and equitable titles in the beneficiary of a passive trust, but the rule established by the statute does not apply to active trusts. *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957).

If the trust is active the legal and equitable titles do not merge. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

An active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular pur-

pose. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936), citing *Perkins v. Brinkley*, 133 N.C. 154, 45 S.E. 541 (1903); *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957).

Where there is any control to be exercised by the trustee or any duty to be performed by him in relation to the trust property or in regard to the beneficiaries, the trust is an active trust, and the legal and equitable titles do not merge in the beneficiaries. *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957).

Where a deed purports to convey land in trust, but prescribes no duties of any kind to be performed by the trustee, he is made a depositary only of title, and by operation of this section the legal, as well as the equitable, estate in the land passed to and became vested solely in the beneficiary. *Pippin v. Barker*, 233 N.C. 549, 64 S.E.2d 830 (1951).

Trust for "Sole and Separate Use" of Married Woman. — The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created. *Kirby v. Boyette*, 118 N.C. 244, 24 S.E. 18 (1896).

Passive Trust for Husband and Wife. — Where a husband purchases realty and has the deed made to a trustee of a passive trust for the benefit of himself and wife, nothing else appearing, the instrument creates an estate by entirety. *Akin v. First Nat'l Bank*, 227 N.C. 453, 42 S.E.2d 518 (1947).

An estate of freehold to commence in futuro can be conveyed by a deed of bargain and sale operating under this section, or by executory devise; therefore, an estate to H. for life and at her death to her children in fee, reserving a life estate to the grantor, is good. *Savage v. Lee*, 90 N.C. 320 (1884).

Covenant to Stand Seized on Death of Grantor. — In *Davenport v. Wynne*, 28 N.C. 128 (1845), where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by the court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendee on the death of the

donor. To the same effect is *Hodges v. Spicer*, 79 N.C. 223 (1878). And in *Sasser v. Blythe*, 2 N.C. 259 (1796), overruling *Ward v. Ward*, 1 N.C. 59 (1793), a similar construction was given to an instrument of like import. In the note to that case Judge Battle says: "There cannot be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities." *Savage v. Lee*, 90 N.C. 320 (1884).

Life Estate to Woman with Limitation Over to Children. — Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was held that the legal estate in the remainder, by force of the statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. *Wilder v. Ireland*, 53 N.C. 85 (1860).

Future Contingent Use. — It is settled that a future contingent use to one unknown, or not in esse, cannot be raised by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger. *Smith v. Smith*, 46 N.C. 135 (1853); *Bruce v. Faucett*, 49 N.C. 391 (1857).

Shifting or Springing Use. — Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use. *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

Fee Simple Limited after a Fee Simple. — A fee simple may be limited after a fee simple either by a deed or will by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise. *Smith v. Brisson*, 90 N.C. 284 (1884). See *Rowland v. Rowland*, 93 N.C. 214 (1885).

Applied in Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

Cited in Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

§ 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants. — All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same de-

scending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenantor in like manner as other obligations. (4 Anne, c. 16, s. 21; 1852, c. 16; R. C., c. 43, s. 10; Code, s. 1334; Rev., s. 1587; C. S., s. 1741.)

Editor's Note.—For history and discussion of section, see *Southerland v. Stout*, 68 N.C. 446 (1873); *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902).

Remainder Not Defeated by Warranty.—A warranty in a deed of a life tenant cannot defeat the remainder of the heirs by way of rebutter. *Moore v. Parker*, 34 N.C. 123 (1851); *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011 (1893).

Where land is devised to a person for life, and at her death to her children, the children are not estopped by a deed with covenant of warranty executed by the life tenant. *Hauser v. Craft*, 134 N.C. 319, 46 S.E. 756 (1904).

Under this section a warranty in a deed of a life tenant does not bar or rebut the claim of heirs who can connect themselves with the outstanding remainder. This is so because such heirs take by purchase, i.e., as remaindermen, and not by descent, i.e., as heirs. *Sprinkle v. Reidsville*, 235 N.C. 140, 69 S.E.2d 179 (1952).

Warranty by Tenant by Curtesy.—Where a tenant by the curtesy sells land belonging to his wife, by deed of bargain

and sale, in fee, with general warranty, the right of the heir of the wife to the land is not rebutted by the warranty. *Johnson v. Bradley*, 31 N.C. 362 (1849).

Warranty to Grantee but Not to Assigns.—Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor. *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902).

Heir Rebutted by Ancestor's Warranty.—Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it, the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. *Olds v. Richmond Cedar Works*, 173 N.C. 161, 91 S.E. 846 (1917).

§ 41-9. **Spendthrift trusts.**—It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant. (1871-2, c. 204, s. 1; Code, s. 1335; Rev., s. 1588; C. S., s. 1742.)

Editor's Note.—For article on the spendthrift trust statute, see 31 N.C.L. Rev. 175 (1953). For article on spendthrift and other restraints in trusts in North Carolina, see 41 N.C.L. Rev. 49 (1962).

Substantial Compliance with Section Necessary.—The provisions of the section should be at least substantially met and complied with to create the trust with its incidents contemplated by the statute. *Gray v. Hawkins*, 133 N.C. 1, 45 S.E. 363 (1903).

Mere Declaration of Intent Insufficient.—A mere declaration that it is the object of the deed, in part, to create a trust under this section, and that the appointment of a trustee is left to the court, does not create such a trust as the court would enforce by the appointment of a trustee.

Gray v. Hawkins, 133 N.C. 1, 45 S.E. 363 (1903).

Trusts Restricted as to Amount and Duration.—A perusal of the law will disclose that such trusts are only permissible for a restricted amount, "an annual income not to exceed \$500 net," and by correct interpretation to be applied to the support of the beneficiary for his life only. *Bank of Union v. Heath*, 187 N.C. 54, 121 S.E. 24 (1924).

Trust Limitations Defeated by Fee Simple Devise.—In a fee simple devise with a subsequent provision that during the life of the devisee the property is to be "managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations

imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. *Vaughan v. Wise*, 152 N.C. 31, 67 S.E. 33 (1910).

Section Does Not Create Personal Property Exemption.—The effect of the spendthrift trust statute, Revisal, s. 1588, now this section, is not to create a personal property exemption in favor of a nonresident cestui que trust in the income from the trust estate. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

Spendthrift Trust Not Executed under Statute of Uses.—A devise creating a spendthrift trust, under this section, for the trustees to receive and pay the profits annually or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, nor is it one executed under the statute of uses. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

A spendthrift trust directing the trustee to collect the rents and profits and pay same over to the beneficiary is, so far as the corpus of the estate is concerned, an active trust upon which § 41-7 does not operate to unite the beneficial and legal interests. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Not Subject to Debts.—The courts cannot, without violating the right of property possessed by the trustor, and the proper discharge of the trust by the trustee, condemn any part of the income for the foreign purpose of paying the debts of the cestui que trust, since the whole idea and purpose of this trust is that the beneficiary is unfit to handle the income of the fund. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

A spendthrift trust created under this section is not subject to the payment of debts created by the cestui que trust, though he is a nonresident of this State. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

The interest of the cestui que trust in a spendthrift trust is not subject to attachment under § 1-440 et seq., since by ex-

press provision of this section the property is not liable for the debts of the cestui que trust in any manner. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Not Subject to Alienation.—In a spendthrift trust the beneficiary cannot exercise the highest right of property, namely, alienation, as to the income, nor will it upon his death be assets. In spendthrift trusts authorized by the statute the beneficiary acquires no interest or property in the income any more than he does in the principal of the fund. He cannot alienate the income, he cannot direct its application in the purchase of any article whatever, or its disposal for any purpose. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

Trustee Makes All Disbursements.—The trustee holds the income just as he holds the principal, to be applied for the designated purposes. It is his duty to make the disbursement, whether for board or clothing or in any other method in his judgment required for the support of the beneficiary. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

Not to Pay Over Income to Cestui Que Trust.—The trustee is not authorized to pay over any part of the income to the beneficiary that he may spend it or use it or disburse it. The cardinal idea is that the cestui que trust is incompetent and cannot be trusted with the handling of the income, which duty is to be discharged by the trustee. *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

Trustee May Defend Action without Appearance of the Cestui.—The trustee of a spendthrift trust may defend an action seeking to attach the interest of the cestui que trust, both in the superior court and in the Supreme Court on appeal, without the appearance of the cestui, the preservation and protection of the property being incumbent upon the trustee under the terms of the trust. *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Cited in *In re Estate of Bulis*, 240 N.C. 529, 82 S.E.2d 750 (1954); *Pilkington v. West*, 246 N.C. 575, 99 S.E.2d 798 (1957).

§ 41-10. Titles quieted.—An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be

granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section. (1893, c. 6; 1903, c. 763; Rev., s. 1589; 1907, c. 888; C. S., s. 1743.)

- I. General Consideration.
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I. GENERAL CONSIDERATION.

Editor's Note. — As to the history and purpose of this section, see McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899); Rumbo v. Gay Mfg. Co., 129 N.C. 9, 39 S.E. 581 (1901); Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909); Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

This section is highly remedial. Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924). This is a remedial statute which has been liberally construed; it is more comprehensive than the old suit in equity to remove a cloud from title. Jacobi Hardware Co. v. Jones Cotton Co., 188 N.C. 442, 124 S.E. 756 (1924); Maynard v. Holder, 216 N.C. 524, 5 S.E.2d 535 (1939).

This section and the amendatory acts thereto, being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will, Stocks v. Stocks, 179 N.C. 285, 102 S.E. 306 (1920), and to advance the remedy and permit the courts to bring the parties to an issue. Asheville Land Co. v. Lange, 150 N.C. 26, 63 S.E. 164 (1908); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955).

The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on the defendant's pleasure as to the time

when the inquiry shall be made, and thus give defendant an unfair advantage over him. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918).

The fact that the plaintiff brings his action under this section deprives the defendant of no right. He has the right to defend the validity of his alleged title on every relevant ground available in any type of action involving recovery or possession of real property. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

If title becomes involved in a processioning proceeding under §§ 38-1 to 38-4, the proceeding becomes in effect an action to quiet title under this section. Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948); Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957). See note to § 38-3.

Restraining Sale under Execution. — Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. Mizell v. Bazemore, 194 N.C. 324, 139 S.E. 453 (1927).

Applied in Doub v. Harper, 234 N.C. 14, 65 S.E.2d 309 (1951); Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Clay v. Clay, 259 N.C. 251, 130 S.E.2d 309 (1963); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

Cited in Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928); Sears v. Braswell, 197 N.C. 515, 149 S.E. 846 (1929); Bechtel v. Bohannan, 198 N.C. 730, 153 S.E. 316 (1930); Hinton v. Whitehurst, 214 N.C. 99, 198 S.E. 579 (1938); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

In General. — This section was designed and intended to afford a remedy

wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And suit should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs. *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369 (1917); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918).

To Leave Lands Unfettered.—The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. *Christman v. Hilliard*, 167 N.C. 4, 82 S.E. 949 (1914); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918); *Plotkin v. Merchants' Bank & Trust Co.*, 188 N.C. 711, 125 S.E. 541 (1924).

To Broaden the Equitable Remedy.—This section, giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. *Southern State Bank v. Sumner*, 187 N.C. 762, 122 S.E. 848 (1924).

The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different

and independent sources. It is highly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and for that reason is entitled to favorable consideration. *Christman v. Hilliard*, 167 N.C. 4, 82 S.E. 949 (1914); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918); *East Carolina Lumber Co. v. Pamlico County*, 242 N.C. 728, 89 S.E.2d 381 (1955).

The General Assembly of 1893 enacted the statute now codified as this section to avoid some of the limitations imposed upon the remedies formerly sought by a bill of peace or a bill quia timet, and to establish an easy method of quieting titles to land against adverse claims. *Wells v. Clayton*, 236 N.C. 102, 72 S.E.2d 16 (1952).

B. Interest Necessary to Bring Action.

Generally.—In *Rutherford v. Ray*, 147 N.C. 253, 61 S.E. 57 (1908), it was held that suit may be instituted by any person against any other person claiming an interest adverse to his title.

An action to quiet title under this section must be based upon plaintiffs' ownership of some title, estate, or interest in real property, and defendants' assertion of some claim adverse to plaintiffs' title, estate, or interest, which adverse claim must be presently determinable. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E.2d 278 (1954).

Plaintiff Need Not Prove Estate in or Title to Land.—In *Plotkin v. Merchants' Bank & Trust Co.*, 188 N.C. 711, 125 S.E. 541 (1924), it was held that the contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land that the claim of the defendant is adverse to him. But see *Johnson v. Kramer Bros. & Co.*, 203 Fed. 733 (E.D.N.C. 1913); *Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956).

The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it; and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest. *Wells v. Clayton*, 236 N.C. 102, 72 S.E.2d 16 (1952).

Remedy Given Whether in or out of Possession.—This section affords the remedy whenever one owns or has an estate

or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affords a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369 (1917); *Vick v. Winslow*, 209 N.C. 540, 183 S.E. 750 (1936). See *Daniels v. Baxter*, 120 N.C. 14, 26 S.E. 635 (1897).

The authorities to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893, c. 6, Revisal, s. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. *Daniels v. Baxter*, 120 N.C. 14, 26 S.E. 635 (1897); *Campbell v. Cronly*, 150 N.C. 457, 64 S.E. 213 (1909); *Speas v. Woodhouse*, 162 N.C. 66, 77 S.E. 1000 (1913).

Under this section, the plaintiff is not required to show that he is either in or out of possession. Nor is the plaintiff required to show that the defendant is an occupant or any more than a claimant of the land in controversy. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

Action Is Maintainable Though Plaintiff Might Have Maintained Ejectment.—This section is broad enough to cover an action to quiet the title to real property though the person sued may be wrongfully in possession and the plaintiff might have maintained ejectment. The complaint would not be demurrable merely for the reason that the allegations might be sufficient to support a possessory action. *Pressly v. Walker*, 238 N.C. 732, 78 S.E.2d 920 (1953).

Adverse Claimant to Execution Debtor.—If real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer to have the cloud removed from his title than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the section. *McLean v. Shaw*, 125 N.C. 491, 34 S.E. 634 (1899).

Judgment Lien.—In *McLean v. Shaw*, 125 N.C. 491, 34 S.E. 634 (1899), it was held that it was not in contemplation of

the act that a judgment lien should be included in the terms "estate" and "interest," as they are used in this section. This case was decided at September term, 1899. The legislature, at its session in 1903, by chapter 763, amended Laws 1893, c. 6, s. 1, by adding thereto the last sentence of the present section. "Estate" and "interest" now expressly embrace a judgment lien. *Crockett v. Bray*, 151 N.C. 615, 66 S.E. 666 (1909).

Correction of Life Estate into Fee Simple.—Defendants have a right, in order to avoid multiplicity of suits, to ask for the correction of a life estate deed, under which they claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under this section. *McLamb v. McPhail*, 126 N.C. 218, 35 S.E. 426 (1900).

When Land Conveyed Pendente Lite.—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite conveys the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest under § 1-57, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. *Plotkin v. Merchants' Bank & Trust Co.*, 188 N.C. 711, 125 S.E. 541 (1924).

Nonpayment of Taxes.—In a suit to remove a cloud on the title to lands, the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, is immaterial, because to do so does not, under any statute in force in this State, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law. *Johnston v. Kramer Bros. & Co.*, 203 Fed. 733 (E.D.N.C. 1913).

C. What Constitutes Cloud.

Includes Any Adverse Interest.—The language of this section is broad and liberal, showing the purpose of the General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. *Plotkin v. Merchants' Bank & Trust Co.*, 188 N.C. 711, 125 S.E. 541 (1924).

Action Lies to Prevent Creation of Cloud.—An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created, and where

the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918).

Defendant Need Only Be Claimant. —

Under Laws 1893, c. 6, now this section, a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. *Duncan v. Hall*, 117 N.C. 443, 23 S.E. 362 (1895).

Adverse Claim Must Be Presently Determinable. — This section applies only to the extent the alleged adverse claims are presently determinable. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E.2d 278 (1954).

Apparent Invalidity of Defendant's Title.

— The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. *Daniels v. Baxter*, 120 N.C. 14, 26 S.E. 635 (1897); *Rumbo v. Gay Mfg. Co.*, 129 N.C. 9, 39 S.E. 581 (1901); *Beck v. Meroney*, 135 N.C. 532, 47 S.E. 613 (1904); *Campbell v. Cronly*, 150 N.C. 457, 64 S.E. 213 (1909); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918).

Obscure Contingent Limitations. — This section enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and the section is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. *Campbell v. Cronly*, 150 N.C. 457, 64 S.E. 213 (1909).

Will of Living Person.—A paper-writing, in form a will, executed by a person now living, is without legal significance either as a transfer of title or as a cloud thereon, until death of the testator and probate of the instrument. *Vandiford v. Vandiford*, 241 N.C. 42, 84 S.E.2d 278 (1954).

Invalid Judgment as Cloud.—A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of this section. *Stocks v. Stocks*, 179 N.C. 285, 102 S.E. 306 (1920).

An action to quiet title or to remove a cloud from title is equitable in its nature, and may now be maintained to remove from the title a cloud created by the apparent lien of an invalid judgment dock-

eted in the county where the land lies. *Holden v. Totten*, 224 N.C. 547, 31 S.E.2d 635 (1944).

In an action to remove a cloud from plaintiff's title, caused by a docket judgment alleged to be invalid, a demurrer to the complaint, as not stating a cause of action, was properly overruled, this section being sufficiently broad to entitle plaintiff to maintain an independent action. *Exum v. Carolina R.R.*, 222 N.C. 222, 22 S.E.2d 424 (1942).

Judgment Obtained by Fraud.—A complaint alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right. The complaint was held sufficient for the plaintiff to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under this section to remove the former judgment as a cloud upon her title. *Stocks v. Stocks*, 179 N.C. 285, 102 S.E. 306 (1920).

Tax Deed.—Where a judgment entered in favor of the county in an action against the owner of land for taxes has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment cancelling the tax deed. *Galer v. Auburn-Asheville Co.*, 204 N.C. 683, 169 S.E. 642 (1933).

Foreclosure of Mortgage Given by Tenant in Common Prior to Partition.—The purchaser of land from one tenant in common, after the land had been allotted to the tenant in a special proceeding for partition, may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition, when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. *Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162, 126 A.L.R. 410 (1939).

Contract without Married Woman's Privy Examination.—A contract to convey the lands of a married woman, signed by her and her husband, but without her privy examination, when recorded is a cloud upon her title to the lands and subject to her

suit to remove the same, within the intent and meaning of this section, though she is and remains in possession of the land. *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369 (1917).

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, under § 24-2, and a suit brought to remove a cloud upon title to the lands under this section to the extent of the usurious charge of interest on the notes cannot be maintained. *Briggs v. Industrial Bank*, 197 N.C. 120, 147 S.E. 815 (1929).

Proof Required of Plaintiff.—In a suit to remove a cloud upon the plaintiff's title under this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. *Ricks v. Brooks*, 179 N.C. 204, 102 S.E. 207 (1920).

III. PLEADING AND PRACTICE.

A. In General.

When Suit Treated as Action of Ejectment.—A suit instituted to determine conflicting claims to real property, under Laws 1893, c. 6, now this section, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant. *Hines v. Moye*, 125 N.C. 8, 34 S.E. 103 (1899); *Baldwin v. Hinton*, 243 N.C. 113, 90 S.E.2d 316 (1955); *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956).

The plaintiff is not bound to show as an independent proposition the invalidity and wrongfulness of the adverse claim. These matters are inseparably interwoven in the two essential elements of the action. The claim of the defendant is necessarily invalid and wrongful if it is adverse to the title, estate or interest of the true owner. *Wells v. Clayton*, 236 N.C. 102, 72 S.E.2d 16 (1952).

The plaintiff is not required to allege or show the specific circumstances giving rise to the defendant's adverse claim, unless it is essential for the plaintiff to overcome such claim in order to establish his own title, estate or interest. Hence, it is ordinarily sufficient for the plaintiff to allege and show in general terms that the defendant is asserting some claim adverse to him. *Wells v. Clayton*, 236 N.C. 102, 72 S.E.2d 16 (1952).

When Court Will Hear and Determine

without Action.—The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein a vendee has refused to accept the title on the ground of its being doubtful, either in the exercise of their equitable jurisdiction, treating the controversy as a bill for specific performance, or under the provisions of this section, for the purpose of removing clouds upon obscure titles. *Campbell v. Cronly*, 150 N.C. 457, 64 S.E. 213 (1909).

When Adverse Claim Invalid.—Under Laws 1893, c. 6, now this section, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed, but the court should enter its decree removing the cloud upon the title. *Rumbo v. Gay Mfg. Co.*, 129 N.C. 9, 39 S.E. 581 (1901).

No defense bond is required in an action to quiet title under this section. *Roberts v. Sawyer*, 229 N.C. 279, 49 S.E.2d 468 (1948).

A judgment binds parties and privies only. *Hines v. Moye*, 125 N.C. 8, 34 S.E. 103 (1899).

Costs.—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of this section. *Clemmons v. Jackson*, 183 N.C. 382, 111 S.E. 609 (1922).

In an action for trespass and for damages, the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. *Clemmons v. Jackson*, 183 N.C. 382, 111 S.E. 609 (1922).

B. Pleadings.

Sufficiency of Bill of Complaint.—Where a bill asserts that the complainant is the owner of certain designated lands, sets forth the chain of title, and alleges that the defendant claims an adverse interest in the said lands, which claim renders sale impossible and otherwise casts a cloud over complainant's title, it sufficiently states a cause of action to quiet title under this section. *North Carolina Mining Co. v. Westfeldt*, 151 Fed. 290 (W.D.N.C. 1907).

A complaint, which alleged that defendant city claimed, without legal right thereto, a right-of-way on and over plaintiff's land, and that such claim was a cloud on his title, was sufficient to state a cause of action within the purview of this sec-

tion. *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955).

In an action to remove a cloud on title, a complaint alleging that defendants claimed under a receiver's deed and that the trustee in a prior deed of trust executed by the debtor was not a party to the receivership proceedings, is demurrable, since the mere fact that the trustee in the deed of trust was not a party does not in itself render the receiver's deed ineffectual. *East Carolina Lumber Co. v. Pamlico County*, 250 N.C. 681, 110 S.E.2d 278 (1959).

Unnecessary to Allege Possession.—This section removed the necessity for alleging that the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim, the plaintiff pays the cost, and the title as between them is settled. *Asheville Land Co. v. Lange*, 150 N.C. 26, 63 S.E. 164 (1908).

When Occupation Is Alleged.—But where the plaintiff alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. *Duncan v. Hall*, 117 N.C. 443, 23 S.E. 362 (1895).

Answer Sufficient to Raise Issue.—Where the complaint in a suit to remove a cloud upon plaintiff's title to land alleges that the plaintiff is the owner of the locus in quo, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed is sufficient to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. *Brinson v. Morris*, 192 N.C. 214, 134 S.E. 453 (1926).

Issue as to Delivery of Deed.—Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery under this section the court's refusal to submit an issue thereon entitles appellant to a new trial. *Ferguson v. Ferguson*, 206 N.C. 483, 174 S.E. 304 (1934).

Pleadings Sufficient for Determination of Damages as in Condemnation.—Where, in addition, to the fact that general relief was prayed, the parties specifically asked

that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiffs owned mineral interests in derogation of plaintiffs' right of access, it was held that the damages resulting to plaintiffs from such floodings must be ascertained as in a suit for condemnation. *Duke Power Co. v. Toms*, 118 F.2d 443 (4th Cir. 1941).

C. Jurisdiction of Courts.

Advisory Jurisdiction of Courts.—The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. And such jurisdiction is not sustained under this section, when the suit is not brought by the plaintiff against some person claiming an adverse estate or interest. *Heptinstall v. Newsome*, 146 N.C. 503, 60 S.E. 416 (1908).

Concurrent Jurisdiction of State and Federal Courts.—The remedy given by statutes of this character may be enforced in the federal court when the parties are inhabitants of different states. *Johnston v. Kramer Bros. & Co.*, 203 Fed. 733 (E.D.N.C. 1913).

Where there is an action pending in the State courts to try the title to lands under this section, the State courts have thereby acquired jurisdiction over the property, and the federal courts will not entertain a suit in equity on the same facts and for the same relief. *Westfeldt v. North Carolina Mining Co.*, 166 Fed. 706 (4th Cir. 1909).

This section does not enlarge the jurisdiction of federal courts of equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be considered as creating an equitable right, it would not authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the reason that in such action the defendant is entitled under the federal Constitution to a trial by jury. *Wood v. Phillips*, 50 F.2d 714 (4th Cir. 1931).

In an action under this section, while it is true that a federal court of equity lacks jurisdiction of a suit brought against a number of defendants claiming severally different portions of the land in dispute, that ground may oust the court's jurisdiction only in respect to those defendants who raise the objection, and, where title and possession in the complainant is sufficiently alleged, it is error to dismiss the suit as to those defendants who have made no defense, but submitted themselves and

their interests to the jurisdiction of the court. *New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co.*, 178 Fed. 772 (4th Cir. 1910).

§ 41-10.1. Trying title to land where State claims interest.—Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the superior court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings. (1957, c. 514.)

Suit May Be Brought to Determine Extent of Easement Granted by State.—A controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the superior court under § 1-253,

since such suit involves title to realty within the purview of this section. *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963).

Applied in East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959).

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other special proceedings, as provided by § 1-94, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproduc-

tive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made. The approval by the resident judge of the district may be made by him either in term or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either in term or at chambers are hereby ratified and validated.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or State bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall

pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interests and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (1903, c. 99; 1905, c. 548; Rev., s. 1590; 1907, cc. 956, 980; 1919, c. 17; C. S., s. 1744; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; 1947, c. 377; 1951, c. 96.)

- I. General Consideration.
- II. Action in Superior Court for Sale.
- III. Sale and Reinvestment.
- IV. Illustrative Cases.

Cross References.

As to constitutional restriction against perpetuities, see North Carolina Const., Art. I, § 31. As to partition sales of real property generally, see §§ 46-22 to 46-34. As to vagueness of description of land in pleadings, see § 8-39; in conveyance, see § 39-2. As to sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse, see § 41-11.1.

I. GENERAL CONSIDERATION.

Editor's Note.—For comment on the 1941 amendment, see 19 N.C.L. Rev. 506. For brief discussion of the 1947 amendment, see 25 N.C.L. Rev. 390.

Constitutionality and Validity.—Revisal, s. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. *Smith v. Miller*, 151 N.C. 620, 66 S.E. 671 (1910).

This section does not interfere with the essential rights of ownership, but, operating in addition to those already possessed, is constitutional and valid. *Pendlen v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918).

Retroactive Effect.—Chapter 99, Laws 1903, Rev., s. 1590, now this section, is valid, even when allowed to reach back and affect estates already created by will, though only so far as it is permitted to apply to interests not yet vested. *Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906). See *Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903).

The decision in *Springs v. Scott* was approved in *Hodges v. Lipscomb*, 133 N.C. 199, 45 S.E. 556 (1903), a case in which it appeared that the will was made prior to the passage of Laws 1903, c. 99. It was there held that the act of 1903 operated retrospectively, so as to apply to contingent interest created by a will which had already taken effect by the death of the

testator. *Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906).

Purpose of Section.—To prevent any possible doubt of the existence of the power of the court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, and to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the act of 1903, now this section, was passed. *McAfee v. Green*, 143 N.C. 411, 55 S.E. 828 (1906).

The remedial purpose of this section may be served where there are contingent remainders over to persons not in being, or the contingency has not happened which will determine who the ultimate remaindermen are, but to achieve the desired result the provisions of the statute must be observed. *Barnes v. Dortch*, 245 N.C. 369, 95 S.E.2d 872 (1957).

Section Does Not Destroy Interest of Remote Contingent Remaindermen. — It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. *Poole v. Thompson*, 183 N.C. 588, 112 S.E. 323 (1922). See *Lancaster v. Lancaster*, 209 N.C. 673, 184 S.E. 527 (1936).

It will be noted that this section does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, and, subject to the right to use a reasonable portion of the amount for the improvement of the remainder, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

When Section Applicable.—This section [before the 1927 amendment] and § 41-12 apply only to a sale of property in which there are or have been contingent interests. *Waddell v. United Cigar Stores*, 195 N.C. 434, 142 S.E. 585 (1928).

The 1927 amendment, where the land is unproductive, etc., extends the right of action to include life estates where there are vested remaindermen and reversioners without their joinder. The section therefore had reference only to contingent remainders. *Stepp v. Stepp*, 200 N.C. 237, 156 S.E. 804, 76 A.L.R. 536 (1931).

A sale under this section can be ordered only in a "special proceeding," which must be instituted before the clerk of the superior court, and the section has no application to an action for waste under § 1-533. *Parrish v. Parrish*, 247 N.C. 584, 101 S.E.2d 480 (1958).

Strict Compliance Required. — In order that a valid conveyance of the land in fee simple be made pursuant to this section, it is essential that the provisions of the statute be strictly complied with. *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

Applied to Charitable and Other Trusts.—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estate in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. *Middleton v. Rigsbee*, 179 N.C. 437, 102 S.E. 780 (1920).

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. *Middleton v. Rigsbee*, 179 N.C. 437, 102 S.E. 780 (1920).

Section Does Not Limit Power of Court over Trusts.—This section, authorizing those who have a vested interest in land with contingent remainders over to persons not in being to petition for and procure the sale of the land for reinvestment, does not limit the power of the court to supervise the administration of trust estates and to enter such orders and decrees in respect thereto as circumstances may require, so that the interest of contingent remaindermen and other beneficial owners may be sold to preserve the trust estate from destruction. *First-Citizens Bank & Trust Co. v. Rasberry*, 226 N.C. 586, 39 S.E.2d 601 (1946).

Power of Court Independent of Section.—The court, without regard to the act of 1903, now this section, has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, and upon failure thereof, over to persons, all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. *Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903).

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there is a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine who the remaindermen are, under the procedure therein laid down. *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

Decree May Be Binding on Persons Not in Esse.—A lease authorized by the decree of a court of chancery may be binding upon beneficiaries not in esse, when their interests are the same as those of persons in being who are subjected by due process to the jurisdiction of the court. *Waddell v. United Cigar Stores*, 195 N.C. 434, 142 S.E. 585 (1928), wherein a lease of trust property was held valid over the objection that it might extend beyond the term of the trust.

Status of Remainders.—Contingent remainders are no longer considered mere

possibilities which cannot be transferred, but a remainderman whose estate is contingent may convey it. 2 N.C.L. Rev. 126; *Beacon v. Amos*, 161 N.C. 357, 77 S.E. 407 (1913).

Cited in *Smith v. Witter*, 174 N.C. 616, 94 S.E. 402 (1917); *Hines v. Williams*, 198 N.C. 420, 152 S.E. 39 (1930); *Greene v. Stadiem*, 198 N.C. 445, 152 S.E. 398 (1930); *Cole v. Cole*, 229 N.C. 757, 51 S.E.2d 491 (1949); *Davis v. Griffin*, 248 N.C. 539, 103 S.E.2d 728 (1958); *Menzel v. Menzel*, 250 N.C. 649, 110 S.E.2d 333 (1959).

II. ACTION IN SUPERIOR COURT FOR SALE.

General Requirements for Sale.—Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so requires, and those living and in present interest are represented in person, and unborn children by guardian ad litem. *McLean v. Caldwell*, 178 N.C. 424, 100 S.E. 888 (1919).

Jurisdiction Cannot Be Conferred by Consent.—Jurisdiction of the superior court of an action by owner of a vested estate against contingent remaindermen to sell land cannot be conferred by consent, and this section, authorizing such an action, must be strictly complied with. *Watson v. United States*, 34 F. Supp. 777 (M.D.N.C. 1940).

Jurisdiction on Appeal from Proceedings Improperly Brought before Clerk.—Lands subject to contingent limitations may be sold by order of the judge of the superior court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. *Ryder v. Oates*, 173 N.C. 569, 92 S.E. 508 (1917).

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. *Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903).

Authority of Clerk.—It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the superior court in ordinary special proceedings without approval or confirmation by a judge of the superior court. *Ray v. Poole*, 187 N.C. 749, 123 S.E. 5 (1924).

Proceedings Brought under § 46-3.—

A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of § 46-3, and these proceedings so brought cannot be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements for the protection of contingent remaindermen, which must be strictly followed; and, though under §§ 46-23, 46-24 a sale is provided when the land is affected with a contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. *Ray v. Poole*, 187 N.C. 749, 123 S.E. 5 (1924).

Life Tenant May Not Have Partition under § 46-24.—A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds under § 46-24, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of this section. *Smith v. Suitt*, 199 N.C. 5, 153 S.E. 602 (1930).

Who May Institute Suit.—Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

The life beneficiary of a trust estate has a vested equitable estate therein so as to entitle her to institute proceedings for the sale of lands of the estate for reinvestment, and the trustees are proper parties to the proceeding. *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

Plaintiff Must Have Vested Interest.—In a proceeding under this section to sell real property in which there is a contingent interest, plaintiff must be a person having a vested interest in the property to be sold, and the sale must be passed upon by the judge of the superior court. The contingent interest alone cannot be sold. *Butler v. Winston*, 223 N.C. 421, 27 S.E.2d 124 (1943).

Where one who had no vested estate in

land brought action in the superior court against contingent remaindermen to sell land, the court lacked jurisdiction of the action, and hence the judgment ordering sale of the land was void and could be collaterally attacked. *Watson v. United States*, 34 F. Supp. 777 (M.D.N.C. 1940). See *Barnes v. Dortch*, 245 N.C. 369, 95 S.E.2d 872 (1957).

Necessary Parties.—Where timber growing upon lands was devised to testator's daughter for her life, and at her death to such of her children and grandchildren then living as she might have appointed in her will, or, upon her failure to exercise the power of appointment, to her children and grandchildren then living, objection to proceedings brought by the devisee and her children and grandchildren then living on the ground that no one having a vested interest in the land had been made a party could not be sustained. *Midyette v. Lycopomg Timber & Lumber Co.*, 185 N.C. 423, 117 S.E. 386 (1923). See *Thompson v. Humphrey*, 179 N.C. 44, 101 S.E. 738 (1919).

In proceedings under this section certain contingent interests in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired under the original deed in trust by the trustee had become passive in him, and it was held that as, under the statute of uses, the legal and equitable title had merged in the same person, neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit. *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

Construing the statute, as amended, in *Hodges v. Lipscomb*, 133 N.C. 199, 45 S.E. 556 (1903), the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could have their interest represented and protected by a guardian ad litem as the statute provides. *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

A special proceeding under this section to authorize the sale for reinvestment of certain land in which there are contingent interests must be brought by a person having a vested interest in the land and those, who on the happening of the con-

tingency would presently have an estate in the property at the time the proceeding is commenced, made parties and served with summons. *Barnes v. Dortch*, 245 N.C. 369, 95 S.E.2d 872 (1957).

Effect of Omission of Persons Having Contingent Interests.—An order of sale and judgment of confirmation will not be vacated on the ground that certain contingent remaindermen were not made parties to the proceedings to sell, where the interest of the contingent remaindermen has, since the sale, been extinguished by failure of the contingency. *Beam v. Gilkey*, 225 N.C. 520, 35 S.E.2d 641 (1945).

Setting Aside Sale for Failure to Serve Summons on Infant.—Where in proceedings to sell lands affected with contingent interests the provisions of this section have been observed, and the clerk has appointed a guardian ad litem for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale void and a nullity. However, on a proper showing, the sale may be set aside as to all the parties except an innocent purchaser without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. *Welch v. Welch*, 194 N.C. 633, 140 S.E. 436 (1927).

Where Guardian Appointed after Sale.—In a proceeding under this section to sell all the contingent interest in certain lands of minors and unborn children, where petitioners were represented by a guardian, judgment of sale signed on the day before the guardian's appointment was void. *Butler v. Winston*, 223 N.C. 421, 27 S.E.2d 124 (1943).

When Action Abates.—An action against a contingent remainderman to sell the lands under this section abates upon the death of the remainderman prior to the termination of the life estate, when his limitation over is made to depend upon his surviving the life tenant. *Redden v. Toms*, 211 N.C. 312, 190 S.E. 490 (1937).

Estoppel by Judgment.—Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee

to make sale of the lands as fully as the executor under the will was therein authorized to make. *Hayden v. Hayden*, 178 N.C. 259, 100 S.E. 515 (1919).

Preliminary Judgment for Payment of Betterments.—Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918).

Judgment under Former Law Does Not Work Estoppel.—A former action determined before the enactment on the subject by the legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested unite in the decree, cannot estop the parties to proceedings thereafter brought under the provisions of this section. *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918).

Irregularities in Judgment against Person Having No Interest.—Irregularity of entering a consent judgment against testator's minor grandson without investigation and approval of the court may be disregarded where the minor had no interest. *Beam v. Gilkey*, 225 N.C. 520, 35 S.E.2d 641 (1945).

III. SALE AND REINVESTMENT.

Public or Private Sale Permissible.—The sale of estates affected with contingent interests, under the provision of this section, may, in the sound discretion of the trial judge and subject to his approval, be made either at public auction or by private negotiation, as the best interests of the parties may require. *Middleton v. Rigsbee*, 179 N.C. 437, 102 S.E. 780 (1920). See *McAfee v. Green*, 143 N.C. 411, 55 S.E. 828 (1906).

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. *Poole v. Thompson*, 183 N.C. 588, 112 S.E. 323 (1922).

Where the provisions of this section have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when

it is properly made to appear that the best interests of the parties so require. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N.C. 423, 117 S.E. 386 (1923).

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. *DeLaney v. Clark*, 196 N.C. 282, 145 S.E. 398 (1928). See *Ryder v. Oates*, 173 N.C. 569, 92 S.E. 508 (1917).

Bond Required.—Where the court decrees a sale of trust property for reinvestment, the trustees should be required to give bond, or other legal provision should be made, to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustees should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

Decree Must Provide for Reinvestment.—Where real estate is sold under order of the court, the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests. *Springs v. Scott*, 132 N.C. 548, 44 S.E. 116 (1903).

Discretion of Court and Clerk in Reinvestment.—Before the 1923 amendment, which inserted the first sentence of the third paragraph of this section, it was held that the preservation of the proceeds of the sale of lands, under this section, was referred to the sound discretion of the trial judge, and no error was found to an order requiring the funds to be paid into the office of the clerk of the superior court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, it appearing that they were given the usufruct of the land. *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918).

Time of Reinvestment.—In Laws 1905, c. 548, the reinvestment in realty was required to be within two years, but such

requirement was removed by the later Laws 1907, cc. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered. *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

Effect of Omitting Bond Required by § 1-407.—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by § 1-407 that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the superior court. *Poole v. Thompson*, 183 N.C. 588, 112 S.E. 323 (1922).

Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc., under § 1-407; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N.C. 423, 117 S.E. 386 (1923).

Purchaser's Liability Ends When Money Paid into Court.—A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of this section, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. *McLean v. Caldwell*, 178 N.C. 424, 100 S.E. 888 (1919).

Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the fund, its safety being taken care of by the court in its final decree. *DeLaney v. Clark*, 196 N.C. 282, 145 S.E. 398 (1928).

Purchaser Takes Fee Simple Title.—A purchaser at a sale of land with contingent interests allowed under the provisions of this section acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without

being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 550 (1918).

Commissioner Held without Authority to Insert Restrictions in Deed.—Where a commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of this section, and there were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase no authority to restrict the use of the property was asked, and none granted in the order of the court, it was held that the commissioner was without authority to insert restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the distribution of the proceeds of sale. *Southern Real Estate Loan & Trust Co. v. Atlantic Ref. Co.*, 208 N.C. 501, 181 S.E. 633 (1935).

IV. ILLUSTRATIVE CASES.

Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made to appear that the interest of all parties requires, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. *Poole v. Thompson*, 183 N.C. 588, 112 S.E. 323 (1922).

Complaints Held Good on Demurrer.—A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would enable her to make improve-

ments on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc., that the property as it stood was rapidly depreciating, and that there were no available funds, otherwise, to meet the necessary and insistent demands. It was held that a demurrer was bad, and properly overruled. *Middleton v. Rigsbee*, 179 N.C. 437, 102 S.E. 780 (1920).

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause for action. *Stepp v. Stepp*, 200 N.C. 237, 156 S.E. 804 (1931).

Suit Regarding Management of Trust Estate.—In a suit regarding the management of a trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. *Spencer v. McCleneghan*, 202 N.C. 662, 163 S.E. 753 (1932).

Where the grantors in a deed have erroneously assumed that they had title to the lands which they conveyed in fee, but which were affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, and in these proceedings have protected the interest of the remote remaindermen by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment authorizing and confirming the sale, being had in conformity with the provisions of the statute, perfects the title, and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. *Myer v. Thompson*, 183 N.C. 543, 112 S.E. 328 (1922).

Testator devised land to his five brothers and sisters and a nephew "for their lives and then to their children." The life tenants partitioned the land into equal shares, and the lot partitioned to a surviving brother, aged 75 without children, was conveyed by the children of the four

deceased life tenants and the other surviving life tenant and her children to the wife of the surviving brother. The petitioners who purchased the lot from the surviving brother and his wife were not entitled to sell it by virtue of a proceeding under this section where the heirs of the testator living at the time of the proceeding were not made parties, since upon the death of the brother without issue the land would revert to the heirs of the testator living at that time. *Barnes v. Dortch*, 245 N.C. 369, 95 S.E.2d 872 (1957).

A will devised a life estate to daughter with remainder to her children but she renounced her life estate and it was adjudicated that the renunciation of the life estate accelerated the vesting of title in members of the class in esse at the time. It was held that the acceleration of the estate of the remaindermen did not change the date when the final roll call will be made to ascertain members of the class, and although members of the class in esse are not required to account for rents and profits pending the birth of other members of the class, after-born children must be let in, and the fee simple title to the land cannot be conveyed prior to the death of the life tenant except for reinvestment pursuant to judicial decree. *Neill v. Bach*, 231 N.C. 391, 57 S.E.2d 385 (1950).

A devise of an estate in trust with provision that the income therefrom should be paid to a designated beneficiary for life and, upon her death, the corpus should be divided among her children, with further provision that the child or children of any deceased child of the life tenant should take such child's share, requires that the remaindermen be ascertained upon the falling in of the life estate, who then take under the will and not as heirs of the life tenant, so that this section is applicable. *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

Foreclosure of Tax Lien.—Where land held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant, was mortgaged by the life tenant and the mortgage was foreclosed upon default, it was held that in an action to foreclose the lien for taxes against the land under § 105-414, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen were made parties, and the minor contingent remaindermen, the unknown contingent remaindermen and those not in esse were represented by guardian ad litem under this section, and the provi-

sions of both statutes were fully and accurately followed, the purchaser at the commissioner's sale acquired the fee simple title. *Rodman v. Norman*, 221 N.C. 320, 20 S.E.2d 294 (1942).

Sale of Growing Timber. — The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, was affected by the contingencies contemplated by this section. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N.C. 423, 117 S.E. 386 (1923).

Order of Sale Held Invalid.—The proceeding in which an order for the sale of a lot was made was not instituted and was not conducted in accordance with this section. The power of sale was not exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors were not represented by guardian ad litem appointed by the judge, but by a next friend appointed by the clerk. The order or sale was signed, not during the term of the superior court in Haywood County, but by the judge holding the courts of the twentieth district (which includes Haywood County), at Sylva, in Jackson County, in said district. The order of sale could not, therefore, be held valid. *Lide v. Wells*, 190 N.C. 37, 128 S.E. 477 (1925).

Effect of Invalid Decree for Sale and Reinvestment.—In an action brought under the provisions of this section, to sell certain lands devised to E. for life with a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but the funds being only sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a

desirable investment, especially in the unfurnished condition in which it then would be left. It was held: (1) That the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interests involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived to a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or materialmen of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner should sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of materialmen, etc. *Smith v. Miller*, 151 N.C. 620, 66 S.E. 671 (1910).

Mortgage for Permanent Improvements Held Improper. — The locus in quo was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements upon the property, and instituted this proceeding against their children, in esse or which might thereafter be born, seeking to have a mortgage in the sum of \$20,900 placed on the property to refinance an existing mortgage on the property in the sum of \$10,000, and also unsecured notes executed by the life tenant representing a part of the moneys used in making said improvements. It was held that since the remaindermen were in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court that the execution of the mortgage to refinance the indebtedness would materially enhance the interest of the remaindermen was erroneous, and judgment directing the execution of the mortgage to refinance the indebtedness should be reversed. *Hall v. Hall*, 219 N.C. 805, 15 S.E.2d 273 (1941).

§ 41-11.1. **Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.**—Wherever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility in law that the membership of the class may later be increased by

one or more members not then in esse, a special proceeding may be instituted in the superior court for the sale, lease or mortgage of such real or personal property, or both, as provided in this section.

All petitions filed under this section wherein an order is sought for the sale, lease or mortgage of real property, or of both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real property is situated. If the order sought is for sale, lease or mortgage of personal property, the petition may be filed in the office of the clerk of the superior court of the county in which any or all of such personal estate is situated.

All members of the class in esse shall be parties to the proceeding, and where any of such members are under legal disability, their duly appointed general guardians or their guardians ad litem shall be made parties. The clerk of the superior court shall appoint a guardian ad litem to represent the interests of the possible members of the class not in esse, and such guardian ad litem shall be a party to the proceeding.

Upon a finding by the clerk of the superior court that the interests of all members of the class, both those in esse and those not in esse, would be materially promoted by a sale, lease or mortgage of any such property, he shall enter an order that the sale, lease or mortgage be made, and shall appoint a trustee to make such sale, lease or mortgage, in such manner and on such terms as the clerk may find to be most advantageous to the interests of the members of the class, both those in esse and those not in esse; but no sale, lease or mortgage shall be made, or shall be valid, until approved and confirmed by the resident judge of the district, or the judge holding the courts of the district. As a condition precedent to receiving the proceeds of the sale, lease or mortgage, the trustee shall be bonded in the same manner as a guardian for minors.

In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided, the trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until the occurrence of the event which will finally determine the identity of all members of the class; all such investments and reinvestments shall be made in accordance with the laws of North Carolina relating to the investment of funds held by guardians or minors; and all the provisions of G.S. § 36-4, relating to the reduction in bonds of guardians or trustees upon investment in certain registered securities and the deposit of the securities with the clerk of the superior court, shall be applicable to the trustee appointed hereunder.

In the event the proceeds of sale shall be paid over to a trustee and invested by him as authorized above, the entire income actually received by the trustee from such investment shall be paid by said trustee periodically, and not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment, or to the duly appointed guardians of any such living members under legal disability.

In the event the court orders a lease of the property, the proceeds from the lease shall be first used to defray the expenses, if any, of the upkeep and maintenance of the property, and the discharge of taxes, liens, charges and encumbrances thereon, and any remaining proceeds shall be paid over by the trustee in their entirety, not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment or to the duly appointed guardians of any such members under legal disability.

Payments of income to the living members of the class as aforesaid shall constitute a full and final acquittance and disposition of the income so paid, it being the intent of this section that only the living members of the class (as they may

be constituted at the time of each respective income payment) shall be entitled to the income which is the subject of the respective payment, and that possible members of the class not in esse shall not share in, or become entitled to the benefit of any income payment made prior to the time that such members are born and become living members of the class.

In the event that there has been a sale of any of the property, and the proceeds of sale are being held, managed, invested and reinvested by a trustee as provided above, any member of the class who is of legal age and who is not otherwise under legal disability may sell, assign and transfer his entire right, title and interest (both as to principal and income) in the funds or investments so held by the trustee. Upon receiving written notice of such sale, assignment or transfer, the trustee shall recognize the purchaser, assignee and transferee as the lawful successor in all respects whatsoever to the right, title and interest (both as to principal and income) of the seller, assignor and transferor; but no such sale, transfer or assignment shall divest the trustee of his legal title in, or possession of, said funds or investments or (except as provided above) affect his administration of the trusts for which he was appointed.

The court shall order a mortgage of the property only for one or more of the following purposes:

- (1) To provide funds for the costs and expenses of court incurred in carrying out any of the provisions of this section;
- (2) To provide funds for the necessary upkeep and maintenance of the property;
- (3) To make reasonable improvements to the property;
- (4) To pay off taxes, other existing liens, charges and encumbrances on the property.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. As used in this section, references to mortgages shall also apply to deeds of trust executed for loan security purposes.

Every trustee appointed pursuant to the provisions of this section shall file with the clerk of the superior court an inventory and annual accounts in the same manner as is now provided by law with respect to guardians.

The superior court shall allow commissions to the trustee for his time and trouble in the effectuation of a sale, lease or mortgage, and in the investment and management of the proceeds, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators, and collectors.

Provided, however, this section shall not be applicable where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of the creation of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restrictions as to the use, form, investment, leasing, mortgage, or other disposition of the property.

And provided further, this section shall not alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. But where, under the laws and legal principles existing without regard to this section, a gift, devise, bequest, transfer or conveyance has the legal effect of being made to all members of a class, some of whom are in esse and some of whom are in posse, the procedures authorized hereby may be utilized for the purpose of promoting the best interests of all members of the class, and this section shall be liberally construed to effectuate this intent. The remedies and procedures herein specified shall not be exclusive, but shall be cumulative, in addition to, and without prejudice to, all other remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

The provisions of this section shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after April 5, 1949. (1949, c. 811, s. 1.)

Editor's Note.—Section 3 of the act inserting this section made it effective upon its ratification on April 5, 1949. For discussion of this section, see 27 N.C.L. Rev. 415.

Section Limited to Proceedings Invol-

ing Sale, Lease or Mortgage. — This section appears to be limited to actions or proceedings involving the sale, lease or mortgage of property. *McPherson v. First & Citizens Nat'l Bank*, 240 N.C. 1, 81 S.E.2d 386 (1954).

§ 41-12. Sales or mortgages of contingent remainders validated.— In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court has been rendered authorizing the sale or mortgaging, including execution of deeds of trust, of such property discharged of such contingent remainder, executory devise, or other limitations in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being or whose estates had not then vested: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (1905, c. 93; Rev., s. 1591; C. S., s. 1745; 1923, c. 64; 1935, c. 36.)

Cross Reference. — As to revocation of deeds of future interests made to persons not in esse, see § 39-6.

Editor's Note. — The 1923 amendment reenacted this section, validating sales of property under a judgment of the superior court, where the property has been conveyed by deed or devised by will, upon contingent remainder, executory devise, or other limitation, and the judgment has authorized a sale of the property discharged of the contingent remainder or other limitation. The section was enacted in 1905, validating such sales made before that date, and the 1923 amendment extends to such sales made since 1905 and up to March 6, 1923. 1 N.C.L. Rev. 285.

By the 1935 amendment this section was made to apply to mortgages and deeds of trust. The amendment also added the clause just preceding the proviso, reading "or whose estates had not then vested."

Constitutionality and Validity. — This section is a valid exercise of legislative power. *Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906).

This section, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Planters Cotton-Seed Oil*, 165 N.C. 63, 80 S.E. 972 (1914).

So long as the interest remains contingent only, the legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an

uncertain event is within its control, not being a vested right which is protected by constitutional guaranties. *Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906).

Partition Sale Not Authorized. — This section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. *Ray v. Poole*, 187 N.C. 749, 123 S.E. 5 (1924).

Application.—A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition. It was held that the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the Validating Act of 1905 (Revisal, s. 1591, now this section). *Bullock v. Planters Cotton-Seed Oil Co.*, 165 N.C. 63, 80 S.E. 972 (1914).

Cited in *Hines v. Williams*, 198 N.C. 420, 152 S.E. 39 (1930); *Watson v. United States*, 34 F. Supp. 777 (M.D.N.C. 1940).

§ 41-13. Freeholders in petition for special taxes defined.—In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of

taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement. (1915, c. 22; C. S., s. 1746.)

Former Law. — “Freeholders,” used in Laws 1911, c. 135, s. 1, amending Revisal, s. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, did not include females. *Gill v. Board of Comm’rs*, 160 N.C. 176, 76 S.E. 203 (1912).

Women Now Included.—In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, women freeholders must be counted, under the provisions of this section. *Chitty v. Parker*, 172 N.C. 126, 90 S.E. 17 (1916).

Chapter 42.

Landlord and Tenant.

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- 42-37. Forms sufficient.

ARTICLE 1.

General Provisions.

§ 42-1. **Lessor and lessee not partners.**—No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (1868-9, c. 156, s. 3; Code, s. 1744; Rev., s. 1982; C. S., s. 2341.)

Agreement Not Constituting Agricultural Partnership.—The lessor and lessee are not partners. *State v. Keith*, 126 N.C. 1114, 36 S.E. 169 (1900). Thus, where

B. was to furnish land, farming implements, feed and team and W. was to do the work, and the crops were to be equally divided, it was held that this was not an

agricultural partnership. *Lawrence v. Week*, 107 N.C. 119, 12 S.E. 120 (1890). See *Day v. Stevens*, 88 N.C. 83 (1883), explaining and correcting *Curtis v. Cash*, 84 N.C. 41 (1881). See also *Keith v. Lee*, 246 N.C. 188, 97 S.E.2d 859 (1957).

Applied in *Moss v. Hicks*, 240 N.C. 788, 83 S.E.2d 890 (1954).

Quoted in *Perkins v. Langdon*, 231 N.C. 386, 57 S.E.2d 407 (1950); *Johnson v. Gill*, 235 N.C. 40, 68 S.E.2d 788 (1952).

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.—Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17; Code, s. 1764; Rev., s. 947; C. S., s. 2342.)

Lessee Becomes Tenant of Grantee.—When title passes, lessee ceases to hold under the grantor. He then becomes a tenant of grantee, and his possession is grantee's possession. *Pearce v. Gay*, 263 N.C. 449, 139 S.E.2d 567 (1965).

Rent Follows Reversion.—Rent due under a lease follows reversion. *Perkins v. Langdon*, 231 N.C. 386, 57 S.E.2d 407 (1950).

§ 42-3. Term forfeited for nonpayment of rent.—In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease. (1919, c. 34; C. S., s. 2343.)

Purpose of Section.—This section was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reentry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Written into Leases.—The section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Forfeiture for Benefit of Lessor.—The forfeiture implied by this section is for the benefit of the lessor, and to be declared only at his application. *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12 (1928), holding section not applicable to facts of case.

Necessity of Demand for Rent.—Where lease contains no forfeiture clause for failure to pay rent, and lessee, after lessor's death, pays rent to lessor's personal representative to the knowledge of les-

sor's heir, the heir, who made no demand for the rent, may not declare the lease forfeited, since in the absence of a forfeiture clause, this section applies, and forfeiture under it is not effective until the expiration of ten days after demand. *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946).

Where the lease contains no forfeiture clause for failure to pay rent, lessors may assert forfeiture for nonpayment of rent only after ten days from demand upon lessees for payment. *Reynolds v. Earley*, 241 N.C. 521, 85 S.E.2d 904 (1955).

Forfeiture Denied upon Tender of Rent and Costs.—Where, during the hearing and before judgment on a petition for forfeiture of a lease under this section, all rents and costs lawfully incurred are tendered to the petitioner, the petition is properly denied. *Coleman v. Carolina Theatres*, 195 N.C. 607, 143 S.E. 7 (1928).

Where lessee waives all notice to vacate in the lease he cannot claim the benefit of this section. *Tucker v. Arrowood*, 211 N.C. 118, 189 S.E. 180 (1937).

Construed with § 42-33.—This section and § 42-33 are in *pari materia*, and should be construed together. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Cited in *Duke v. Davenport*, 240 N.C. 652, 83 S.E.2d 668 (1954).

§ 42-4. Recovery for use and occupation.—When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation. (1868-9, c. 156, s. 5; Code, s. 1746; Rev., s. 1986; C. S., s. 2344.)

Lease Void under Statute of Frauds. — for the time the premises were occupied. Where a lease was void under the statute Harty v. Harris, 120 N.C. 408, 27 S.E. of frauds, the lessors could only recover 90 (1897).

§ 42-5. Rent apportioned, where lease terminated by death.—If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (1868-9, c. 156, s. 6; Code, s. 1747; Rev., s. 1987; C. S., s. 2345.)

§ 42-6. Rents, annuities, etc., apportioned, where right to payment terminated by death.—In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event. (1868-9, c. 156, s. 7; Code, s. 1748; Rev., s. 1988; C. S., s. 2346.)

Not Applicable to Certain Annuities. — This section providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision for successive owners, but the right to payment terminates upon the death of insured. Wells v. Guardian Life Ins. Co., 213 N.C. 178, 195 S.E. 394, 116 A.L.R. 130 (1938).

Rents Payable on Days Tenants Sell Crops Are Payable at "Fixed Periods".—Where the rents reserved were $\frac{1}{3}$ of the sale price of the tobacco crops and were to be paid "at the warehouse" on the days the tenants sold tobacco, these sale days could not, of course, be designated in the lease, but they were no less "fixed periods" within the meaning of this section and "periodic payments" within the mean-

ing of § 37-4. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Section Provides for Successive Owners under Same Instrument.—This section by its terms makes provision for successive owners under the same instrument. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Owner of Fee Does Not Own under Instrument Subsequently Executed.—Where the predecessor owner had the fee prior to the execution of the instrument under which the successive owners take, the former cannot be said to own by the instrument, i.e., the deed, will or trust indenture, by which the latter owners take. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.—When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be

entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession. (1868-9, c. 156, s. 8; Code, s. 1749; Rev., s. 1990; C. S., s. 2347; 1931, c. 173, s. 1.)

Editor's Note.—See 9 N.C.L. Rev. 379, as to 1931 amendment.

Section Reasonable and Constitutional.—This section is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate and is constitutional. *King v. Foscue*, 91 N.C. 116 (1884).

Protection of Remainderman.—This section was passed to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate and before the surrendering of possession to the remainderman. See *King v. Foscue*, 91 N.C. 116 (1884); *Hayes v. Wrenn*, 167 N.C. 229, 83 S.E. 356 (1914); *Collins v. Bass*, 198 N.C. 99, 150 S.E. 706 (1929).

Section Apportions Rents When Life Tenant Dies during Lease Year.—This section apportions rents on farm leases which it extends in lieu of emblements, when the life tenant dies during the lease year. *Wells v. Planters Nat'l Bank &*

Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

But Only Applies If Such Death Determines Lease.—This section applies only to farm leases which are determined, *inter alia*, by the death of a life tenant. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Where a settlor of a trust terminating on the death of the income recipient authorizes the trustee to make leases beyond the term of the duration of the trust, the leases so made do not terminate with the life tenant's death and this section does not apply. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Lease Continued.—A lease of land made by a tenant for life terminates at his death, but by this section the lease is continued to the end of the current lease year so that the tenant's representatives may gather his crop. *King v. Foscue*, 91 N.C. 116 (1884).

Lease for One Year Included.—The phrase "any lease for years" is used in a technical sense, and it embraces a lease for a single year. *King v. Foscue*, 91 N.C. 116 (1884).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.—The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; Code, s. 1765; Rev., s. 1989; C. S., s. 2348.)

Grantor Must Reserve Right If He Is to Collect Rents after Conveyance.—If the grantor is to collect rents accruing subsequent to the effective date of the conveyance, he must, by reservation in his deed, provide that grantee shall not be entitled to possession prior to the expiration of the term fixed in the lease, or otherwise expressly reserve his right to collect subsequently accruing rents. *Pearce v. Gay*, 263 N.C. 449, 139 S.E.2d 567 (1965).

Substitution of Note or Bond before Sale Relieves Lessee of Obligation to Pay Rent.—If lessee pays the rent before a sale, or executes a note or bond for the

rent in substitution of his contract to pay the rent, and such note or bond is accepted by the then owner in discharge of lessee's obligation to pay rent, such substitution relieves the lessee of his obligation to pay rent. Since he has no obligation to pay rent, he is not obligated to pay the purchaser; his obligation is to the holder of the note or bond. *Pearce v. Gay*, 263 N.C. 449, 139 S.E.2d 567 (1965).

Cited in *Perkins v. Langdon*, 237 N.C. 159, 74 S.E.2d 634 (1953); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

§ 42-9. Agreement to rebuild, how construed in case of fire.—An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (1868-9, c. 156, s. 11; Code, s. 1752; Rev., s. 1985; C. S., s. 2349.)

Changes Made by Section.—This section was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to

more than half its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. *Chambers v. North River Line*, 179 N.C. 199, 102 S.E. 198 (1920).

§ 42-10. Tenant not liable for accidental damage.—A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (1868-9, c. 156, s. 10; Code, s. 1751; Rev., s. 1991; C. S., s. 2350.)

Lessee Is under Implied Obligation to Use Reasonable Diligence Not to Injure Premises.—In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use reasonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to the lessor undeteriorated by the wilful or negligent act of the lessee. The lessee's obligation is based upon the maxim *sic utere tuo ut alienum non laedas*. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

Thus, lessee is not liable for accidental damage by fire. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

But he is liable if the buildings are damaged by his negligence. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

When Lessor Liable for Injuries.—While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to

keep the premises in repair, the liability may be extended to the owner, where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it at the solicitation of the tenant. *Knight v. Foster*, 163 N.C. 329, 79 S.E. 614 (1913).

Lessor and Lessee Both Liable.—Where a landlord has leased the lower floor of his building as a store and has rented an office above, which has defective plumbing, to a dentist, in an action by the lessee of the store for water damages to his stock of goods, evidence that the lessor had contracted to repair, but for years had failed to inspect or repair the plumbing, and that the dentist had approved an insufficient outlet for the water flowing from his cuspidor and had negligently left his cuspidor turned on during the night, is sufficient, if believed by the jury, to sustain a verdict against the landlord and the dentist jointly, the negligence of each being the proximate cause of the injury. *Rucker & Sheely Co. v. Willey*, 174 N.C. 42, 93 S.E. 379 (1917).

Cited in *Rountree v. Thompson*, 226 N.C. 553, 39 S.E.2d 523 (1946).

§ 42-11. Willful destruction by tenant misdemeanor.—If any tenant shall, during his term or after its expiration, willfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor. (1883, c. 224; Code, s. 1761; Rev., s. 3686; C. S., s. 2351.)

Cross References.—As to burning or destroying crops, see § 14-141. As to larceny of ungathered fruit and crops, see § 14-78. As to local regulations of landlord and tenant, see §§ 14-358, 14-359.

Meaning of "Willful".—The word "will-

ful" as used in this section means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law,

and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute. *State v. Whitener*, 93 N.C. 590 (1885).

If the defendants reasonably and bona fide believe that they have the right to remove the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. *State v. Rowland Lumber Co.*, 153 N.C. 610, 69 S.E. 58 (1910).

Right to Remove Certain Fixtures.—It is intimated that an away-going tenant has the right to remove fixtures put on the premises by himself for his own convenience. *State v. Whitener*, 93 N.C. 950 (1885), approved in *State v. Morgan*, 136 N.C. 628, 48 S.E. 670 (1904).

Houses Covered by Section.—For meaning of "tenement house," "uninhabited house" and "outhouse" as used in this section, see *State v. Rowland Lumber Co.*, 153 N.C. 610, 69 S.E. 58 (1910).

Corporation Liable.—A corporation is

indictable for the acts of its officers and agents under this section. *State v. Rowland Lumber Co.*, 153 N.C. 610, 69 S.E. 58 (1910).

Indictment.—An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within this section. *State v. Graham*, 121 N.C. 623, 28 S.E. 409 (1897).

Burden of Proof.—In an indictment under this section the burden of proof is upon the State to establish, first, that the relation of landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement house. *State v. Godwin*, 138 N.C. 582, 50 S.E. 277 (1905).

Admissibility of Evidence.—In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offense is inadmissible. *State v. Graham*, 121 N.C. 623, 28 S.E. 409 (1897).

§ 42-12. Lessee may surrender, where building destroyed or damaged.—If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage or destruction occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged or destroyed was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage or destruction, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage or destruction, proportionate to the time between the last period of payment and the occurrence of the damage or destruction, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease. (1868-9, c. 156, s. 12; Code, s. 1753; Rev., s. 1992; C. S., s. 2352.)

The modification of the common-law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common-law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. *Miles v. Walker*, 179 N.C. 479, 102 S.E. 884 (1920).

Section Not Applicable.—See *Chambers v. North River Line*, 179 N.C. 199, 102 S.E. 198 (1920).

Where the terms of a lease fully provide

for the rights of the parties upon destruction of the property by a fire such rights will be determined in accordance with the written agreement, without reference to this section. *Grant v. Borden*, 204 N.C. 415, 168 S.E. 492 (1933).

Damage Insufficient to Enable Lessee to Surrender Premises.—See *Carolina Mortgage Co. v. Massie*, 209 N.C. 146, 183 S.E. 425 (1936).

Time Allowed Lessee for Repairs.—Where a monthly rental to be paid by the lessee of a building, and an obligation to make certain repairs by him, are specified as the consideration for the lease, with forfeiture of the lease upon the nonpayment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent

obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if no time is stated in the lease. *Miles v. Walker*, 179 N.C. 479, 102 S.E. 884 (1920).

When Landlord Restores Building. — Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for a breach the landlord may be held responsible. *Miles v. Walker*, 179 N.C. 479, 102 S.E. 884 (1920).

Repairs by Lessor within Reasonable Time. — Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time when the extent of the damage is insufficient to

terminate the lease under its written terms, evidence that three days had elapsed, between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. *Archibald v. Swaringen*, 192 N.C. 756, 135 S.E. 849 (1926).

Same—Crack in Swimming Pool. — Where a swimming pool is leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use, it was held that a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. *Archibald v. Swaringen*, 192 N.C. 756, 135 S.E. 849 (1926).

§ 42-13. Wrongful surrender to other than landlord misdemeanor. — Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor. (1883, c. 138; Code, s. 1760; Rev., s. 3682; C. S., s. 2353.)

§ 42-14. Notice to quit in certain tenancies. — A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. (1868-9, c. 156, s. 9; Code, s. 1750; 1891, c. 227; Rev., s. 1984; C. S., s. 2354.)

Local Modification. — Forsyth: 1935, c. 119; Halifax: 1935, c. 22; Hertford: 1939, c. 367; Montgomery: 1925, c. 196, s. 2; Perquimans: 1935, c. 472; Pitt: 1925, c. 196, s. 2; Randolph: 1925, c. 196, s. 2; Wake: 1931, c. 20.

Notice Must Be Given. — A tenant from year to year is entitled to a written or verbal notice to quit, and a mere demand for possession is insufficient. *Vincent v. Corbin*, 85 N.C. 108 (1881).

A landlord has no right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice. *Fayetteville Waterworks Co. v. Tillinghast*, 119 N.C. 343, 25 S.E. 960 (1896).

Verbal Notice Sufficient. — A verbal notice by landlord to tenant is sufficient. Section 1-585 applies to a different class of notices. *Poindexter v. Call*, 182 N.C. 366, 109 S.E. 26 (1921).

Insufficient Notice. — In an action in summary ejectment under § 42-26 proof of notice given the fourteenth of the month

to quit the premises on or before the first of the following month is insufficient to show the statutory notice terminating the term, when it appears that the original occupancy was taken on the eighteenth of the month and plaintiff offers no evidence as to the date of the month the term began or when the monthly rentals became due. *Stafford v. Yale*, 228 N.C. 220, 44 S.E.2d 872 (1947).

On May 18, 1897, a landlord gave a tenant from month to month notice "to get out within 30 days." The landlord had received the rent for May. It was held that such notice was invalid as to May, as the rent had been paid, and as to June, because not ending with the month. *Simmons v. Jarman*, 122 N.C. 195, 29 S.E. 332 (1898).

Tenancies at Will. — Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to notice to quit as provided

in this section. *Humphries v. Humphries*, 25 N.C. 362 (1843).

Where a tenancy is from year to year, and, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time. *Williams v. Bennett*, 26 N.C. 122 (1843).

Where one occupied land as his own and refused to quit when possession was demanded, it was held that he could not afterwards insist upon the statutory notice. *Head v. Head*, 52 N.C. 620 (1860).

Effect of Holding Over.—When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. *Stedman v. McIntosh*, 26 N.C. 291 (1844); *Scheelky v. Koch*, 119 N.C. 80, 25 S.E. 713 (1896); *Harty v. Harris*, 120 N.C. 408, 27 S.E. 90 (1897); *Holton v. Andrews*, 151 N.C. 340, 66 S.E. 212 (1909); *Murrill v. Palmer*, 164 N.C. 50, 80 S.E. 55 (1913). But it is competent to rebut the presumption that he is a tenant from year to year by

proof of a special agreement. *Harty v. Harris*, 120 N.C. 408, 27 S.E. 90 (1897).

Same—Tenant Entitled to Notice.—It was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days' (now seven days') notice to quit. *Branton v. O'Briant*, 93 N.C. 99 (1885).

But the fact that a tenant, who entered into the occupation of premises under an express lease from month to month, continued the occupation for more than two years, is no reason why he should be considered a tenant from year to year, and entitled to the one month's notice to quit. *Jones v. Willis*, 53 N.C. 430 (1862).

Effect of Leaving Premises after Waiver of Notice.—A tenant from year to year, who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises. *Torrans v. Stricklin*, 52 N.C. 50 (1859).

Different Agreement Not Prohibited.—This section does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy. *Cherry v. Whitehurst*, 216 N.C. 340, 4 S.E.2d 900 (1939).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.—When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article *Agricultural Liens*, in the chapter *Liens*.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal

government, or any of its agencies, making said advances. (1876-7, c. 283; Code, s. 1754; Rev., s. 1993; 1917, c. 134; C. S., s. 2355; 1933, c. 219.)

- I. In General.
- II. Lien of Lessor.
- III. Possession and Title to Crop.
- IV. Advancements.
- V. Remedy of Lessor to Enforce Lien.

Cross References.

As to agricultural liens for advances, see § 44-52 et seq. As to laborer's crop lien date, see § 44-41. As to short form for lien in certain counties, see § 44-62.

I. IN GENERAL.

Editor's Note. — For summary of the 1933 amendment, see 11 N.C.L. Rev. 265.

For article on agricultural tenancies in the southeastern states, see 26 N.C.L. Rev. 274.

A Statutory Remedy.—In *Howland v. Forlaw*, 108 N.C. 567, 13 S.E. 173 (1891), the court held that the common-law remedy of lessors by distress does not obtain in this State; and that, except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907).

Applies Only to Lease for Agricultural Purposes. — This statutory lien is only given when lands are rented or leased for agricultural purposes. *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907).

What "Crops" Include. — The words "crops raised" mean simply the crops grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding sections, only the word "crops" is used. The legislature had in mind no distinction between *fructus industriales* (products obtained by labor and cultivation) and *fructus naturales* (products which emanate from the power of nature alone), and there was no need of any. *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

The section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut or gathered" in that season from his land. *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

The landlord's lien under this section does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnished to the tenant. *Brooks v. Garrett*, 195 N.C. 452, 142 S.E. 486 (1928).

The operation of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the

instrument. *Wooten v. Hill*, 98 N.C. 49, 3 S.E. 846 (1887).

Same—Hay.—Hay is ordinarily embraced in the word "crop" as used in this section. But not, it seems, when it is merely a spontaneous growth, as crab-grass, which springs up after another crop is housed. *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

What Constitutes One a Cropper. — An agreement by him who cultivates land that the owner who advances "guano, seed wheat," etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. *State v. Burwell*, 63 N.C. 661 (1869).

A cropper has no estate in the land, and his possession is that of the landlord. *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898).

When Lessee Has Lien.—When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor. *Moore v. Faison*, 97 N.C. 322, 2 S.E. 169 (1887); and therefore holds a prior lien to a mortgagor of the crops. *Perry v. Perry*, 127 N.C. 23, 37 S.E. 71 (1900). The lien of the original landlord is not, however, impaired. See note under succeeding analysis line, catchline "Effect of Subrenting."

Agreements between Tenants.—Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant between the parties. *Medlin v. Steele*, 75 N.C. 154 (1876).

Tenant's Liability.—If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. *Jordan v. Bryan*, 103 N.C. 59, 9 S.E. 135 (1889).

Action against Tenant by Third Party. — In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the

crop at the tenant's request. *Lee v. Melton*, 173 N.C. 704, 91 S.E. 697 (1917).

Cited in *Jennings v. Keel*, 196 N.C. 675, 146 S.E. 716 (1929); *Never Fail Land Co. v. Cole*, 197 N.C. 452, 149 S.E. 585 (1929).

II. LIEN OF LESSOR.

Landlord's Lien Superior. — The landlord's lien is made superior to all other liens. *Ledbetter v. Quick*, 90 N.C. 276 (1884); *Wooten v. Hill*, 98 N.C. 49, 3 S.E. 846 (1887); *Brewer v. Chappell*, 101 N.C. 251, 7 S.E. 670 (1888); *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907); *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941).

Under this section, a landlord has a preferred lien on the entire crop until the rent and all advancements made and expenses incurred in making and saving the crop are paid. *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

Any lien created by subordinate contract made by tenant was subject to the primary and paramount lien in favor of landlord by virtue of this section. *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

Subtenant's Lien for Labor. — Landlord's lien for rent and advancements held superior to subtenant's lien for labor under separate contract with tenant. *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

Sale of Crop by Tenant. — The tenant, who owns the crop subject to the landlord's rights and lien, has the right to sell the crop but in the same plight in which he holds it, that is, the purchaser from the tenant takes subject to the landlord's lien and, where the crop remains on the land, the purchaser can remove the crop only by consent of the landlord until the rent is paid. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

Lien of Third Party for Advances. — The lien of a landlord takes precedence to that of a third party for advances, notwithstanding the priority of the latter in time. *Spruill v. Arrington*, 109 N.C. 192, 13 S.E. 779 (1891); *Crinkley v. Egerton*, 113 N.C. 444, 18 S.E. 669 (1893). And this precedence is to the extent of the advances made. *Wooten v. Hill*, 98 N.C. 49, 3 S.E. 846 (1887). See *Wise Supply Co. v. Davis*, 194 N.C. 328, 139 S.E. 599 (1927).

The statutory landlord's lien under this section is superior to that of one furnishing supplies to the cropper under § 44-52, but where the cropper under a separate contract with the landlord raises a certain crop, the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate

contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. *Glover v. Dail*, 199 N.C. 659, 155 S.E. 575 (1930).

A contract expressed and purporting to be a lease of lands for agricultural purposes does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce his lien under this section in priority to the lien, under § 44-52, of one furnishing advancements for the cultivation of the crop. *Wise Supply Co. v. Davis*, 194 N.C. 328, 139 S.E. 599 (1927).

Rights of Purchaser. — The landlord's lien may be enforced as against the purchaser of the crop. *Burwell v. Coopers Cop. Warehouse Co.*, 172 N.C. 79, 89 S.E. 1064 (1916).

Third Person Charged with Notice. — Every person who makes advancements to a tenant or cropper of another does so with notice of the rights of the landlord, and that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. *Thigpen v. Leigh*, 93 N.C. 47 (1885); *Thigpen v. Maget*, 107 N.C. 39, 12 S.E. 272 (1890). See *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

The landlord's lien exists by virtue of this section. No written instrument is required or contemplated. The registration acts, which apply only to written instruments capable of registration, have no significance relative to a landlord's lien. This section itself gives notice to all the world of the law relative to a landlord's lien. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

Same—Caveat Emptor. — This section gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to a judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule caveat emptor applies. *Belcher v. Grimsley*, 83 N.C. 88 (1880).

The landlord's lien remains intact until

the rent is paid, and all who deal with a tenant with reference to the crop are charged with notice thereof. Nothing short of an actual payment or a complete satisfaction of the lessor's demands, meets the words of this section or will serve to determine his lien, or title. Neither can the fact that purchasers of the crop had no notice of the landlord's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant can convey no better right to the property than he himself was possessed of. The principle of caveat emptor applies with full force to the case. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

Liability to Other Lienholders.—A landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of his lien. *Crinkley v. Egerton*, 113 N.C. 142, 18 S.E. 341 (1893).

Liability of Landlord for Marketing of Tenant's Tobacco.—The Landlord and Tenant Act (this section) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. *Tobacco Growers Co-op. Ass'n v. Bissett*, 187 N.C. 180, 121 S.E. 446 (1924). For article discussing effect of landlord's lien upon co-operative marketing, see 2 N.C.L. Rev. 188.

Effect of Subrenting.—The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. *Montague v. Mial*, 89 N.C. 137 (1883); *Moore v. Faison*, 97 N.C. 322, 2 S.E. 169 (1887); *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

Antecedent Debts Not Included.—It was not intended to confer a lien upon the landlord for antecedent debts which the lessee might stipulate to pay, and give them a preference over the agricultural lien, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in *Thigpen v. Maget*, 107 N.C. 39, 12 S.E. 272 (1890), and is undoubtedly in harmony with the policy of the law in securing the

landlord his rent, and at the same time enabling the tenant to obtain advances from third parties. *Ballard v. Johnson*, 114 N.C. 141, 19 S.E. 98 (1894).

Although under this section and §§ 44-52 and 44-60 the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard v. Johnson*, 114 N.C. 141, 19 S.E. 98 (1894).

Assignee of Tenant's Rent Note.—The assignee of a note, given by a tenant for rent, has a landlord's lien on the crop. *Avera v. McNeill*, 77 N.C. 50 (1877).

Where a landlord furnishes advancements for the making of crops, the liens for the rent and for advancements are in equal degree, and now attach, since the 1925 amendment of § 44-52, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. *Brooks v. Garrett*, 195 N.C. 452, 142 S.E. 486 (1928).

Lien Conferred upon Mortgagee.—An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. *Cooper v. Kimbell*, 123 N.C. 120, 31 S.E. 346 (1898).

Lien Does Not Attach to Proceeds of Hail Insurance Policy.—Where a tenant procures and pays for a policy of hail storm insurance, nothing else appearing, the landlord's statutory crop lien for advancements under this section does not extend to the fund paid by insurer under the policy after damage to the crop by the risk covered. *Peoples v. United States Fire Ins. Co.*, 248 N.C. 303, 103 S.E.2d 381 (1958).

Waiver of Lien.—It is not to be understood that a landlord cannot by agreement, express or implied, waive his lien, or by his acts and conduct be estopped from asserting his lien. The gist of such affirmative defense is allegation and proof of such facts and circumstances as will establish the proposition that the landlord in effect constituted the tenant his agent to sell the crop for their joint benefit and account to the landlord for his share out of the proceeds of sale. It is an affirmative defense which must be pleaded with certainty and particularity and established by the greater weight of the evidence. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

Lien of Vendor after Default.—After default by a vendee of land to pay the purchase money, the vendor may by con-

tract become landlord of the vendee so as to avail himself of the landlord's lien given by this section. *Jones v. Jones*, 117 N.C. 254, 23 S.E. 214 (1895); *Ford v. Green*, 121 N.C. 70, 28 S.E. 132 (1897).

Certain Costs Included.—The landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and, as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption as against such costs. *Slaughter v. Winfrey*, 85 N.C. 159 (1881).

Judgment for Rent.—This section makes a judgment for rent a lien on the crop. *Hargrove v. Harris*, 116 N.C. 418, 21 S.E. 916 (1895).

Estoppel of Landlord to Assert Claim.—Where a landlord, who retained a lien on tobacco grown by his tenant, gave his AAA marketing card to his tenant in order that he might sell the tobacco in a warehouse, the landlord clothed the tenant with authority or apparent authority to receive payment for the tobacco and is now estopped to assert a claim against the warehouse for the amount of his lien on the tobacco. *Adams v. Growers' Warehouse, Inc.*, 230 N.C. 704, 55 S.E.2d 331 (1949).

III. POSSESSION AND TITLE TO CROP.

Common-Law Provision. — Before this section was passed, the title to the whole of the crop was, in contemplation of law, vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. *Deaver v. Rice*, 20 N.C. 567 (1839); *Gordon v. Armstrong*, 27 N.C. 409 (1845); *Ross v. Swaringer*, 31 N.C. 481 (1849); *Biggs v. Ferrell*, 34 N.C. 1 (1851); *Howland v. Forlaw*, 108 N.C. 567, 13 S.E. 173 (1891).

Section Applies Only to Landlord and Tenant.—Except in the case of landlord and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third person before the rent is ascertained and set apart conveys a good title. *Howland v. Forlaw*, 108 N.C. 567, 13 S.E. 173 (1891).

Where the occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop,

under the provisions of this section, is vested in the landlord. *Taylor v. Taylor*, 112 N.C. 27, 16 S.E. 924 (1893).

Vested in Lessor.—All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. *Durham v. Speeke*, 82 N.C. 87 (1880); *Smith v. Tindall*, 107 N.C. 88, 12 S.E. 121 (1890); *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898); *State v. Keith*, 126 N.C. 1114, 36 S.E. 169 (1900); *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511 (1921); *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941).

Assignee of landlord's lien for rent is the owner of the crops raised to the extent of cash rent due and is entitled thereto as against tenant and third party holder of note for rent. *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941).

Same—For His Protection. — For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. *State v. Higgins*, 126 N.C. 1112, 36 S.E. 113 (1900).

Lessor May Use Force.—An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. *State v. Austin*, 123 N.C. 749, 31 S.E. 731 (1898).

Actual Possession in Tenant.—Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. *Jordan v. Bryant*, 103 N.C. 59, 9 S.E. 135 (1889).

The whole tenor of this and the following sections contemplates the right of the lessee or cropper to hold the actual possession until such time as a division shall be made. *State v. Copeland*, 86 N.C. 691 (1882).

Same — May Maintain Action. — As against third parties the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. *Bridgers v. Dill*, 97 N.C. 222, 1 S.E. 767 (1887). And the ownership of the crop is well charged as his in the indictment. *State v. Higgins*, 126 N.C. 1112, 36 S.E. 113 (1900).

Tenant Has Insurable Interest. — That the possession and title to the crop are deemed vested in the landlord does not

divest the tenant of an insurable interest in the crops before division. *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511 (1921).

When Crop Divided.—Unless otherwise provided by an agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. *Smith v. Tindall*, 107 N.C. 88, 12 S.E. 121 (1890).

Crop Left in Field.—A crop cultivated by a tenant and left standing in the field after the expiration of this term, becomes the property of the landlord. And this is so, whether or not the tenant has assigned the crop. *Sanders v. Ellington*, 77 N.C. 255 (1877).

IV. ADVANCEMENTS.

Purchaser Takes with Knowledge.—A purchaser or mortgagee of a crop takes with full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a preferred lien upon the crop, made by reason of such advances, and this preference shall extend to "existing" liens. *Wooten v. Hill*, 98 N.C. 49, 3 S.E. 846 (1887).

What Included.—The "advancements" referred to in this section embrace anything of value supplied by the landlord to the tenant, or cropper, in good faith, directly or indirectly, for the purpose of making and saving the crop. *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891).

Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances. *Powell v. Perry*, 127 N.C. 22, 37 S.E. 276 (1900).

Supplies necessary to make and save a crop are such articles as are in good faith furnished to and received by the tenant for that purpose. *Ledbetter v. Quick*, 90 N.C. 176 (1884).

Where landlord advanced certain cottonseed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to retain parts of the undivided cottonseed and crops by way of advancement, it was held that the plaintiff had a landlord's lien on such seed and crops. *Thigpen v. Maget*, 107 N.C. 39, 12 S.E. 272 (1890).

Where the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of this section. *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891).

Presumption.—When advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e.g., farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary—e.g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop. *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891).

Question for Jury.—It was proper in the court to leave it to the jury to find whether upon the evidence a mule and wagon, etc., were treated as advancements. *Ledbetter v. Quick*, 90 N.C. 276 (1884).

That the lessee diverts the advancements from the purpose contemplated cannot change their nature and the purpose of them. *Womble v. Leach*, 83 N.C. 84 (1880); *Ledbetter v. Quick*, 90 N.C. 276 (1884); *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891).

Collusion and Fraud.—Where landlord and tenants undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such a transaction will not be sustained. *Ledbetter v. Quick*, 90 N.C. 276 (1884).

Crop of Sublessee.—The original lessor, after his lessee has paid him in full, has no lien under the statute on the crop of the sublessee for advances made by him to the sublessee. *Moore v. Faison*, 97 N.C. 322, 2 S.E. 169 (1887).

V. REMEDY OF LESSOR TO ENFORCE LIEN.

In General.—The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under this section is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. *Livingston v. Farish*, 89 N.C. 140 (1883).

When Action Lies.—The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. *Livingston v. Farish*, 89 N.C. 140 (1883).

The remedy of claim and delivery was designated for the landlord's protection, and it cannot, either by the terms of the

statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this. *Jordan v. Bryan*, 103 N.C. 59, 9 S.E. 135 (1889).

Same—When No Time for Division Fixed.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. *Smith v. Tindall*, 107 N.C. 88, 12 S.E. 121 (1890); *Rich v. Hobson*, 112 N.C. 79, 16 S.E. 931 (1893).

Action for Undivided Portion.—The lessor can maintain an action for recovery of an undivided portion of a crop, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. *Boone v. Darden*, 109 N.C. 74, 13 S.E. 728 (1891).

Denial of Landlord's Title.—Where in his answer in an action of claim and delivery, the defendant tenant denies that the crop, for the possession of which the action is brought, is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the com-

mencement of the action. *Rich v. Hobson*, 112 N.C. 79, 16 S.E. 931 (1893).

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee claiming the crop as a part of his personal property exemption. *Durham v. Speeke*, 82 N.C. 87 (1880).

Remedies for Unauthorized Removal of Crop by Tenant.—This section vests the possession of the crop in the landlord, and, under this right of possession, he has the right to use force, if necessary, to prevent unauthorized removal by the tenant. Moreover, if the tenant, without the consent of the landlord, willfully removes the crop without giving five days' notice of removal, before satisfying the landlord's lien, he is guilty of a misdemeanor under G.S. 42-22. In such case, the tenant is liable both civilly and criminally; for the constructive possession of the crop is in the landlord. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

Liability of Warehouse Purchasing from Tenant or Selling as His Agent.—Nothing else appearing, if a warehouse purchased tobacco from a tenant, or sold the tobacco as agent for the tenant, and paid the tenant therefor, without regard to the landlord's lien, the warehouse would be accountable to the landlord on the basis of money had and received for the proceeds of sale up to the balance due as rent. *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.—Where lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, the landlord or his assigns shall have a lien on all the insurance procured by the tenant or cropper on the crops raised on the lands leased or rented to the extent of any rents due or advances made to the tenant or cropper.

To be entitled to the benefit of the lien herein provided, the landlord must conform as to the prices charged for advances under the provisions of article 10 of chapter 44 relating to agricultural liens.

The lien provided herein shall be preferred to all other liens on said insurance, and the landlord or his assigns shall be entitled to all the remedies at law for the enforcement of the lien. (1959, c. 1291.)

§ 42-16. Right of tenant.—When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in § 42-15, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and accord-

ing to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action. (1876-7, c. 283, s. 2; Code, s. 1755; Rev., s. 1994; C. S., s. 2356.)

In General.—The action allowed to a cropper by this section is given against the lessor or employer, and, also, against any person to whom he may assign, or sell, the crop, or any interest therein as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. *Rouse v. Wooten*, 104 N.C. 229, 10 S.E. 190 (1889).

Purpose of Section.—This section intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, so that he shall certainly reap the just benefit of his toil. *Rouse v. Wooten*, 104 N.C. 229, 10 S.E. 190 (1889).

Creation of Lien.—While one who labors in the cultivation of a crop, under a contract that he shall receive his compensation from the crop when matured and gathered, has no estate or interest in the land, but is simply a laborer—at most, a cropper—his right to receive his share is protected by this section, which for certain purposes creates a lien in his favor, and which will be enforced against the employer or landlord, or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested. *Rouse v. Wooten*, 104 N.C. 229, 10 S.E. 190 (1889).

Lessor Cannot Seize Crop.—The lessor has no right, when there is no agreement to that effect, to take the actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon

the removal of the crop by the lessee or cropper. *State v. Copeland*, 86 N.C. 691 (1882).

Lessee Left to Civil Remedy.—When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy under this section for the breach of trust, should the lessor refuse to account. *State v. Keith*, 126 N.C. 1114, 36 S.E. 169 (1900).

Claim and Delivery.—Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery. *Wilson v. Respass*, 86 N.C. 112 (1882).

Trover Not Proper.—Where a landlord took the crop into his sole possession, and refused to divide when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire, it was held that this did not amount to a conversion, and an action in the nature of trover could not be maintained. *Shearin v. Riggsbee*, 97 N.C. 216, 1 S.E. 770 (1887).

Where Lessor Seizes Too Much.—If a lessor seizes more than enough to satisfy his lien, and refuses "to make a fair division of the crop," the lessee or cropper can compel him to do so in the manner prescribed in this section. *Boone v. Darden*, 109 N.C. 74, 13 S.E. 728 (1891).

When a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. *Parker v. Brown*, 136 N.C. 280, 48 S.E. 657 (1904).

§ 42-17. Action to settle disputes between parties.—When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, or in the superior court of the county where the property is situate if the amount so claimed is more than two hundred dollars. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2357.)

In General.—It is quite apparent that this and the following section contemplate an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is

a method of settling a controversy without resort to the possessory actions authorized in the antecedent sections. *Wilson v. Respass*, 86 N.C. 112 (1882).

Purpose.—The purpose of this and the following section is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the

lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered. *Deloatch v. Coman*, 90 N.C. 186 (1884).

No Application Where Occupant a Vendee or Mortgagor.—This and the following section, like § 42-15, are plainly inapplicable where the occupant of land is a vendee or mortgagor. *Taylor v. Taylor*, 112 N.C. 27, 16 S.E. 924 (1893).

Jurisdiction.—An action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease and cognizable in the court of a justice of the peace. *Deloatch v. Coman*, 90 N.C. 186 (1884).

In an action by a landlord to recover the rent, when neither the sum demanded nor the amount ascertained to be due exceeds two hundred dollars, the superior

court has no jurisdiction. *Foster v. Penny*, 76 N.C. 131 (1877).

Same—Tort Actions.—The special jurisdiction of justices of the peace under this section does not extend to torts, but is confined to actions for enforcing contracts. *Montague v. Mial*, 89 N.C. 137 (1883).

Action by Tenant's Widow.—The widow of a tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord. She is not compelled to resort to the remedy prescribed by this section. She may pursue her remedy by a civil action to recover the value of the crops, subject to such deductions as the lessor is entitled to by reason of advancements, costs of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract. *Parker v. Brown*, 136 N.C. 280, 48 S.E. 657 (1904).

§ 42-18. Tenant's undertaking on continuance or appeal.—In case there is a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C. S., s. 2358.)

§ 42-19. Crops delivered to landlord on his undertaking.—In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in § 42-18, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in § 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (1876-7, c. 283, s. 4; Code, s. 1757; Rev., s. 1996; C. S., s. 2359.)

Court Will Not Restrain Lessor.—Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. In such a case it seems that

the tenant cannot regain possession of the crop under the provisions of § 42-18 since that section contemplates nonintervention on the part of the court and not a removal of possession from one party to another. *Wilson v. Respass*, 86 N.C. 112 (1882).

§ 42-20. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in § 42-18 and § 42-19, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues

pending between the parties. (1876-7, c. 283, s. 5; Code, s. 1758; Rev., s. 1997; C. S., s. 2360.)

§ 42-21. Tenant's crop not subject to execution against landlord.—Whenever servants and laborers in agriculture shall by their contracts, oral or written, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Code, s. 1796; Rev., s. 1998; C. S., s. 2361.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.—If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor. (1876-7, c. 283, s. 6; 1883, c. 83; Code, s. 1759; Rev., ss. 3664, 3665; C. S., s. 2362.)

- I. In General.
- II. Wrongful Act.
- III. Intent.
- IV. Notice.
- V. Indictment.

I. IN GENERAL.

The purpose of this section is to render the statutory provisions and regulations of the preceding sections more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. *State v. Ewing*, 108 N.C. 755, 13 S.E. 10 (1891).

The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890).

Applies Only to Specified Liens.—It will be observed that the section does not extend to, and embrace, all liens the lessor may have on any property of the tenants, but only "all the liens held by the lessor or his assigns on the crop." *State v. Turner*, 106 N.C. 691, 19 S.E. 1026 (1890).

Extends to Receivers.—This section extends to and protects receivers charged with the management of lands. *State v. Turner*, 106 N.C. 691, 10 S.E. 1026 (1890).

The lessor's rights cannot be abridged by any subordinate contracts of the lessee. *Montague v. Mial*, 89 N.C. 137 (1883).

Cited in *Never Fail Land Co. v. Cole*,

197 N.C. 452, 149 S.E. 585 (1929); *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

II. WRONGFUL ACT.

A Misdemeanor Only.—The offense of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. *State v. Powell*, 94 N.C. 920 (1886).

Actual Seizure Unnecessary.—To constitute the offense of an unlawful seizure of crops by the landlord, under this section, it is not essential that the landlord should take forcible or even manual possession of them; the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. *State v. Ewing*, 108 N.C. 755, 13 S.E. 10 (1891).

Possession Important.—An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop, to his own use, even if done with a felonious intent, where he is in the actual possession of the same. *State v. Cope-land*, 86 N.C. 691 (1882).

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. *State v. Webb*, 87 N.C. 558 (1882).

If the crop is in the actual possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord.

State v. King, 98 N.C. 648, 4 S.E. 44 (1887).

Gathering the Crop.—How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. *Varner v. Spencer*, 72 N.C. 381 (1875); *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890).

The gathering and preservation of crops was not the evil intended to be remedied by this section, but the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises, was the evil. *Varner v. Spencer*, 72 N.C. 381 (1875).

Feeding Crop to Stock.—Where a lessee after putting a crop in the crib converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. *Varner v. Spencer*, 72 N.C. 381 (1875).

Removal from Premises.—Where a tenant without the consent of, or notice to, his landlord, and before satisfying the latter's lien, removed a portion of the crop from the land upon which it was produced and stored it in a building upon his (the tenant's) own land, it was held that he was guilty of unlawfully removing crops, notwithstanding he made the removal for the purpose of sheltering the crop, and kept it separate from others. *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890).

Removal of Turpentine Crop.—See note to § 42-24.

Where Tenant Aids Subtenant.—If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor. *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

Damage by Landlord No Defense.—A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904), overruling *State v. Neal*, 129 N.C. 692, 40 S.E. 205 (1901).

III. INTENT.

Intent Is Immaterial.—While the obvious purpose of this section is the protection of the lessor's interest against a

fraudulent disposition or appropriation of the property, inconsistent with his right and tending to defeat the lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offense is sufficiently charged in the substantial words of the act. *State v. Pender*, 83 N.C. 651 (1880).

The intent in making the removal is immaterial. *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890); *State v. Crook*, 132 N.C. 1053, 44 S.E. 32 (1903).

Intent Implied from Act.—The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent to commit the offense. *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890).

IV. NOTICE.

Removal of Crops.—If it shall be necessary, in possible cases, to remove crops from the land for their protection, this should be done on notice, or legal steps taken as contemplated and allowed by the statute. *State v. Williams*, 106 N.C. 646, 10 S.E. 901 (1890).

Lack of Notice Part of Offense.—The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days' notice, for if the notice is given, removing the crop is not an offense. *State v. Crowder*, 97 N.C. 432, 1 S.E. 690 (1887).

"Without Any Notice" Sufficient in Indictment.—An averment in an indictment for removing a crop, "without having given any notice of such intended removal," is equivalent to the averment that the removal was made without giving "five days' notice." *State v. Powell*, 94 N.C. 920 (1886).

Burden of Proof.—In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days' previous notice before the crop had been removed. *State v. Harris*, 161 N.C. 267, 76 S.E. 683 (1912).

How Want of Notice Proven.—The want of such notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee. *State v. Crowder*, 97 N.C. 432, 1 S.E. 690 (1887).

V. INDICTMENT.

Statute Must Be Followed.—An indictment under this section charging the defendant with removing the crop “without satisfying all liens on said crop,” is defective. The words of the statute, “before satisfying all liens held by the lessor or his assigns on said crop,” should have been followed. *State v. Merritt*, 89 N.C. 506 (1883); *State v. Rose*, 90 N.C. 712 (1884).

Sufficient Averment.—In an indictment under this section, it is sufficient to aver, in the words of the statute, that the act was done, “willfully and unlawfully,” leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop. *State v. Pender*, 83 N.C. 651 (1880).

Where an indictment for removing a crop alleged that the defendant did “rent from B,” and subsequently, that he did “remove the crop without satisfying all liens held by said B,” it was held that this, in effect, sufficiently charged the relation of landlord and tenant, and that the “liens held by the lessor” were unpaid at the time of the alleged unlawful removal. *State v. Turner*, 106 N.C. 691, 10 S.E. 1026 (1890).

In this section the word “crop” includes those ungathered as well as those gathered, and an indictment that the landlord seized the “crop growing and unmaturing in the field,” etc., charges an indictable offense, when it is otherwise sufficient. *State v. Townsend*, 170 N.C. 696, 86 S.E. 718 (1915).

§ 42-22.1. Failure of tenant to account for sales under tobacco marketing cards.—Any tenant or share cropper having possession of a tobacco marketing card issued by any agency of the State or federal government who sells tobacco authorized to be sold thereby and fails to account to his landlord, to the extent of the net proceeds of such sale or sales, for all liens, rents, advances, or other claims held by his landlord against the tobacco or the proceeds of the sale of such tobacco, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court. (1949, c. 193.)

Editor's Note.—For brief comment on this section, see 27 N.C.L. Rev. 466.

Averment as to Notice.—See *State v. Powell*, 94 N.C. 920 (1886), cited under preceding analysis line.

Allegation as to Lien.—It is not necessary to allege, in an indictment under this section, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. *State v. Smith*, 106 N.C. 653, 11 S.E. 166 (1890), distinguishing *State v. Merritt*, 89 N.C. 506 (1883). See *State v. Rose*, 90 N.C. 712 (1884).

In an indictment for removing a crop, it is not necessary to negative the fact that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens. *State v. Turner*, 106 N.C. 691, 10 S.E. 1026 (1890).

Variance.—Where an indictment for removal of crops without notice to the landlord charged an agreement by the defendant to raise a crop on the land of G., and on the trial the proof showed the title to be in another, who rented the land to G., it was held that there was no variance. *State v. Foushee*, 117 N.C. 766, 23 S.E. 247 (1895).

Judgment Arrested.—When on the trial it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested. *State v. Sears*, 71 N.C. 295 (1874).

Stated in *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

§ 42-23. Terms of agricultural tenancies in certain counties.—All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in § 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands

leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Alamance, Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Halifax, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Person, Pitt, Robeson, Sampson, Wayne and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136; 1953, c. 499, s. 1; 1955, c. 136; 1959, c. 1076.)

Local Modification.—Columbus: 1947, & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).
c. 783; Harnett: 1955, c. 938.

Cited in *Wells v. Planters Nat'l Bank*

§ 42-24. Turpentine and lightwood leases.—This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter. (1876-7, c. 283, s. 7; Code, s. 1762; 1893, c. 517; Rev., s. 1999; C. S., s. 2363.)

Extension of § 42-22.—This section extends § 42-22 to "all leases or contracts to lease turpentine trees," and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the re-

moval of the crop by an agricultural tenant is made such offense. *State v. Turner*, 106 N.C. 691, 10 S.E. 1026 (1890).

Cited in *Farmville Oil & Fertilizer Co. v. Bourne*, 205 N.C. 337, 171 S.E. 368 (1933).

§ 42-25. Mining and timberland leases.—If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter. (1868-9, c. 156, s. 16; Code, s. 1763; Rev., s. 2000; C. S., s. 2364.)

Not a Lease. — Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be

extended upon payment of a certain sum, this is not a leasehold interest but an estate in fee. *Carolina Timber Co. v. Wills*, 171 N.C. 262, 88 S.E. 327 (1916).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.—Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

- (1) When a tenant in possession of real estate holds over after his term has expired.
- (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
- (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part

of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C. S., s. 2365.)

Local Modification. — Johnston: 1933, c. 390.

I. Application and Scope.

II. Holding Over.

III. Breach of Provision of Lease.

IV. Rights of Parties.

V. The Action.

I. APPLICATION AND SCOPE.

The basis and scope of summary ejectment in actions between landlord and tenant are established by this section. Warren v. Breedlove, 219 N.C. 383, 14 S.E.2d 43 (1941).

Remedy Is Restricted to Cases Enumerated.—The remedy by summary proceedings in ejectment is restricted to those cases expressly provided by this section. Howell v. Branson, 226 N.C. 264, 37 S.E.2d 687 (1946), citing Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907).

Jurisdiction Is Statutory.—Jurisdiction of a justice of the peace in summary ejectment proceedings is purely statutory, and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. Howell v. Branson, 226 N.C. 264, 37 S.E.2d 687 (1946); Goins v. McLoud, 228 N.C. 655, 46 S.E.2d 712 (1948), holding that the remedy does not extend to a tenant at sufferance or at will. As to concurrent jurisdiction, see cases under analysis line V of this note.

Relation of Landlord and Tenant Necessary.—The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. McCombs v. Wallace, 66 N.C. 481 (1872); Hughes v. Mason, 84 N.C. 473 (1881); Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907); McIver v. Seaboard Airline R.R., 163 N.C. 544, 79 S.E. 1107 (1913); Prudential Ins. Co. v. Totten, 203 N.C. 431, 166 S.E. 316 (1932); Simons v. Lebrun, 219 N.C. 42, 12 S.E.2d 644 (1941). See Ford v. Ford Moulding Co., 231 N.C. 105, 56 S.E.2d 14 (1949).

Remedy Not Coextensive with Doctrine of Estoppel.—The remedy by summary proceedings in ejectment given by this

section is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907); McLaurin v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

Some Contract or Lease Required.

This section was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. McCombs v. Wallace, 66 N.C. 481 (1872).

Definite Term Not Necessary.—Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. Simons v. Lebrun, 219 N.C. 42, 12 S.E.2d 644 (1941).

Where Purchase Changed to Lease.

Where one unconditionally surrenders his rights under the contract of purchase, and enters into a contract of lease, he may be evicted by summary proceeding under this section; and it is not necessary that he should actually surrender the possession of the land and receive it again at the hands of the lessor. Riley v. Jordan, 75 N.C. 180 (1876).

Two Classes Excluded.—The construction of this section excludes two classes, viz.: Vendees in possession under a contract for title and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled. McCombs v. Wallace, 66 N.C. 481 (1872).

When Section Does Not Apply.—The remedy by summary ejectment before a justice of the peace, under this and the following sections, is not available when there is a relation of mortgagor and mortgagee, or vendor and vendee. McLaurin

v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

Where a controversy involved the disputed title to real property, out of which certain equities arose, this section does not apply. *McLaurin v. McIntyre*, 167 N.C. 350, 83 S.E. 627 (1914).

When title to the property is in issue, the jurisdiction of the justice of the peace is ousted, and the proceeding is properly dismissed as in case of nonsuit upon appeal to the superior court. *Prudential Ins. Co. v. Totten*, 203 N.C. 431, 166 S.E. 316 (1932); *Home Bldg. & Loan Ass'n. v. Moore*, 207 N.C. 515, 177 S.E. 633 (1935).

Same—Bargainor in Deed of Trust.—A bargainor in a deed of trust containing a stipulation of the retention of the possession of the land conveyed until sold under the terms of the trust, and who holds possession after a sale of the premises by a trustee, is not such a tenant as comes within the purview of this section, and hence proceedings cannot be taken thereunder to evict him. *McCombs v. Wallace*, 66 N.C. 481 (1872).

Same—Entry as Vendee.—Where a party entered land under a contract of purchase, while so possessed a justice of the peace has no jurisdiction to oust him under this section. *McCombs v. Wallace*, 66 N.C. 481 (1872); *McMillan v. Love*, 72 N.C. 18 (1875); *Riley v. Jordan*, 75 N.C. 180 (1876).

Consideration of Equitable Defenses.—A justice of the peace has jurisdiction of a summary action in ejectment, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in a summary ejectment insofar as they relate to the issue of tenancy. *Farmville Oil & Fertilizer Co. v. Bowen*, 204 N.C. 375, 168 S.E. 211 (1933).

As to insufficient notice to quit in action under this section, see *Stafford v. Yale*, 228 N.C. 220, 44 S.E.2d 872 (1947), treated in note to § 42-14.

Applied in *Lassiter v. Stell*, 214 N.C. 391, 199 S.E. 409 (1938).

Cited in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E.2d 220 (1947).

II. HOLDING OVER.

Constitutionality. — Subdivision (1) of this section, as to a tenant holding over, was declared constitutional in *Credle v. Gibbs*, 65 N.C. 192 (1871).

Effect of Recognition.—The landlord may treat his tenant, who holds over, as a trespasser and eject him, or he may recognize him as tenant; but when such rec-

ognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. *Murrill v. Palmer*, 164 N.C. 50, 80 S.E. 55 (1913).

When a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. *Stedman v. McIntosh*, 26 N.C. 191 (1843); *Scheelky v. Koch*, 119 N.C. 80, 25 S.E. 713 (1896); *Harty v. Harris*, 120 N.C. 408, 27 S.E. 90 (1897); *Holton v. Andrews*, 151 N.C. 340, 66 S.E. 212 (1909); *Murrill v. Palmer*, 164 N.C. 50, 80 S.E. 55 (1913).

A mere acceptance of rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery of possession. In an action to recover the possession, as the plaintiff is entitled to damages for the occupation of the premises, the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession. *Vanderford v. Foreman*, 129 N.C. 217, 39 S.E. 839 (1901); *Mauney v. Norvell*, 179 N.C. 628, 103 S.E. 372 (1920).

When Holding Over Allowed. — It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of the tenant or some member of his family, and of such a character that removal could not be presently made without serious danger to the patient. *Murrill v. Palmer*, 164 N.C. 50, 80 S.E. 55 (1913).

Issue as to Holding Over.—The only question the court can try under subdivision (1) in this proceeding is, "Was the defendant the tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" *McDonald v. Ingram*, 124 N.C. 272, 32 S.E. 677 (1899); *McIver v. Seaboard Airline R.R.*, 163 N.C. 544, 79 S.E. 1107 (1913).

Applied in *Stadium v. Harvell*, 208 N.C. 103, 179 S.E. 448 (1935).

Cited in *Texas Co. v. Beaufort Oil & Fuel Co.*, 199 N.C. 492, 154 S.E. 829 (1930).

III. BREACH OF PROVISION OF LEASE.

Condition Must Be in Lease.—A summary proceeding in ejectment begun dur-

ing the lessee's term cannot be maintained where the contract of lease contained no condition, the breach of which would authorize a reentry by the lessor. The mere failure to pay rent upon "a lease at dollars a year, payable monthly," does not warrant such reentry. *Meroney v. Wright*, 81 N.C. 390 (1879).

Suit for Rescission Cannot Be Substituted on Appeal.—Where a verbal lease does not provide for its termination or reserve the right of reentry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, and issues of fraud in procuring the lease and willful breach of the conditions are erroneously submitted in the superior court upon appeal in such action, it not being permissible for a party to substitute on appeal a suit for rescission. *Dees v. Apple*, 207 N.C. 763, 178 S.E. 557 (1935).

When Breach Waived.—After the breach of the tenant of his contract, acceptance of rent by the landlord which has accrued thereafter, will prevent the landlord from insisting on the forfeiture. *Winder v. Martin*, 183 N.C. 410, 111 S.E. 708 (1922).

Where defendant has been partially evicted in order for him, in a summary action of ejectment, to retain possession of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. *Blomberg v. Evans*, 194 N.C. 113, 138 S.E. 593 (1927).

IV. RIGHTS OF PARTIES.

Tenant May Dispute Assignment.—Where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment. *Steadman v. Jones*, 65 N.C. 388 (1871).

Renewal of Lease.—A tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease. *Barnes v. Saleeby*, 177 N.C. 256, 98 S.E. 708 (1919).

Same—Consideration.—An option in the original lease to renew would not be without consideration, but landlord's agreement during the lease, and not constituting part of the lease, not to lease the property without first giving the tenant an opportunity to renew the lease was unenforceable,

being without consideration. *Barnes v. Saleeby*, 177 N.C. 256, 98 S.E. 708 (1919).

Estoppel to Deny Landlord's Title.—A tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. *Lawrence v. Eller*, 169 N.C. 211, 85 S.E. 291 (1915). See *Steadman v. Jones*, 65 N.C. 388 (1871).

Neither the tenant nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. *Callendar v. Sherman*, 27 N.C. 711 (1845).

Where the relation of landlord and tenant is established, and the latter is in possession, the tenant will not be permitted to dispute the title of the landlord during the continuance of the lease. *Hobby v. Freeman*, 183 N.C. 240, 111 S.E. 1 (1922). Before disputing his landlord's title, the tenant must restore possession. *Buckhorn Land & Timber Co. v. Yarbrough*, 179 N.C. 335, 102 S.E. 630 (1920).

Same—Slave at Time of Entry.—See *Wilson v. James*, 79 N.C. 349 (1878).

Subtenant.—Not only the tenant but his sublessee is estopped to deny the title of his immediate landlord. *Bonds v. Smith*, 106 N. S. 553, 11 S.E. 322 (1890).

V. THE ACTION.

Landlord Proper Party to Bring.—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment (authorized by this section) to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. *Shelton v. Clinard*, 187 N.C. 664, 122 S.E. 477 (1924).

Jurisdiction of Justice of the Peace Is Not Exclusive.—Courts of justices of the peace do not have exclusive original jurisdiction of actions in summary ejectment under this section but the superior courts have concurrent jurisdiction of such actions as provided by § 7-63. *Stonestreet v. Means*, 228 N.C. 113, 44 S.E.2d 600 (1947).

A landlord may institute suit in the superior court to eject his tenant, the remedy of summary ejectment before a justice of the peace not being exclusive, and in such

action the superior court acquires jurisdiction where the defendant denies plaintiff's title, controverts the allegations of tenancy, and pleads betterments. *Bryan v. Street*, 209 N.C. 284, 183 S.E. 366 (1936).

Third Party as Defendant.—When, in an action for the recovery of real estate, both the plaintiff and a third party claim to be the landlord of the defendant, the latter has a right, upon affidavit, to be let in as a party defendant to the action. *Rollins v. Rollins*, 76 N.C. 264 (1877).

Estoppel.—In a proceeding before a justice of the peace under this section, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. *Heyer v. Beatty*, 76 N.C. 28 (1877).

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. *Shuford v. Greensboro Joint-Stock Land Bank*, 207 N.C. 428, 177 S.E. 408 (1934).

Provision for Renewal as Defense.—While a provision of renewal of a lease is not itself a renewal so as to vest an

estate, yet it gives an equity which may be set up as defense in a summary proceeding in ejectment. While the court allows this equitable defense to the summary proceedings, the defendants must pay the accrued rent. *McAdoo v. Callum Bros. & Co.*, 86 N.C. 419 (1882).

Burden of Proof.—In an action of ejectment, the burden of proving that the tenancy has terminated is on the plaintiff. *Poindexter v. Call*, 182 N.C. 366, 109 S.E. 26 (1921).

Evidence that the relationship of landlord and tenant existed between the parties and that defendants were holding over after the expiration of the term was sufficient to take the case to the jury and support judgment for plaintiff in summary ejectment, and defendants' claim in respect to improvements is outside the scope of the proceeding and not justiciable therein. *Ford v. Ford Moulding Co.*, 231 N.C. 105, 56 S.E.2d 14 (1949). See *Hargrove v. Cox*, 180 N.C. 360, 104 S.E. 757 (1920).

Appeal Where Defendant Has Surrendered Possession.—In a summary ejectment proceeding, under this and the following sections of this article, where the subject of the litigation, the right of plaintiffs to immediate possession of premises, had been disposed of by the surrender of same by defendants to plaintiffs and no other question was raised in the court below, appeal was dismissed. *Cochran v. Rowe*, 225 N.C. 645, 36 S.E.2d 75 (1945).

§ 42-27. Local: Refusal to perform contract ground for dispossession.—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Warren, Washington, Wayne, Wilson, Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C. S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; 1951, c. 279; 1953, c. 271; c. 499, s. 2; 1955, c. 93; 1961, c. 25.)

§ 42-28. Summons issued by justice on verified complaint.—When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in § 42-26 and § 42-27, and describing the premises and asking to be put in possession there-

of, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367.)

The "oath in writing" required by this section must allege facts essential to confer jurisdiction. *Howell v. Branson*, 226 N.C. 264, 37 S.E.2d 687 (1946); *Allen v. Allen*, 235 N.C. 554, 70 S.E.2d 505 (1952).

Question of jurisdiction.—The question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. *Hahn v. Latham*, 87 N.C. 172 (1882). As to jurisdiction generally, see note to § 42-26.

If the defense involved the title to real estate, a justice of the peace has no jurisdiction thereof, and should dismiss the proceeding. *Forsythe v. Bullock*, 74 N.C. 135 (1876).

Equitable Defense.—The tenant may set up in his answer any equitable defense which he may have to his landlord's claim. *Forsythe v. Bullock*, 74 N.C. 135 (1876).

Effect of Failure to Set Up Defense.—Where a defendant failed to set up the defense that he was not a tenant, but held under an agreement to purchase, and it was decided that he was a tenant he cannot be heard to question the validity of the judgment nor can he restrain its execution except in a direct proceeding to set it aside for fraud, etc. *Isler v. Hart*, 161 N.C. 499, 77 S.E. 681 (1913).

§ 42-29. Service of summons.—The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368.)

§ 42-30. Judgment by default or confession.—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due

When Defendant Denies Tenancy.—In a proceeding before a justice of the peace under this section, where the defendant denies the alleged tenancy, it is the duty of the justice to proceed and try the issue of tenancy. *Foster v. Penry*, 77 N.C. 160 (1877).

Effect of Provision for Renewal.—A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. *McAdoo v. Callum Bros. & Co.*, 86 N.C. 419 (1882).

Section Not Exception to Requirement of § 1-57.—While this section clearly provides that the agent or attorney of the lessor may make the oath in writing required in actions in summary ejectment, it does not provide an exception to the requirement of § 1-57, that "every action must be prosecuted in the name of the real party in interest." *Choate Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609 (1936).

And the same applies to suits for the collection of rents. *Home Real Estate, Loan & Ins. Co. v. Locker*, 214 N.C. 1, 197 S.E. 555 (1938).

Applied in *Rogers v. Hall*, 227 N.C. 363, 42 S.E.2d 347 (1947).

Cited in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E.2d 220 (1947).

and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369.)

Tenant May Hold after Adverse Judgment.—Where both plaintiff and an interpleading third party claim to be landlords of the defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant. *Rollins v. Rollins*, 76 N.C. 264 (1877).

Same—When Evicted.—If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is

entitled to be restored to possession until the determination of the controversy between the plaintiff and the interpleading defendant. *Rollins v. Bishop*, 76 N.C. 268 (1877).

Same—Appeal.—Upon an appeal when the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the justice's court until the determination of the controversy between the plaintiff and interpleading defendant. *Rollins v. Henry*, 76 N.C. 269 (1877).

Cited in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E.2d 220 (1947).

§ 42-31. **Trial by justice; jury trial; judgment; execution.**—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370.)

Cross Reference.—As to jury trial in the court of a justice of the peace, see § 7-150 et seq.

Where Injunction Issues.—Where a person has been enjoined from bringing actions on each installment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease. *Featherstone v. Carr*, 134 N.C. 66, 46 S.E. 15 (1903).

Effect of Judgment.—A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from showing in a subsequent action advancements made prior to

eviction to which he was entitled. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904).

Same—Matter Is Res Judicata as to Tenancy.—Where in proceedings in summary ejectment on final judgment entered in the superior court it has been adjudicated that A was the tenant of B, which judgment was not appealed from, the matter in res judicata, and A cannot maintain a suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. *Isler v. Hart*, 161 N.C. 499, 77 S.E. 681 (1913).

§ 42-32. **Damages assessed to trial.**—On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796.)

Damages upon Appeal.—Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff which he is entitled

thereto from the time of the unlawful detention to the time of the trial in the superior court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Same—Liability of Surety.—The surety on a bond to stay execution on appeal from judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the superior court. *Dunn v. Patrick*, 156 N.C. 248, 72 S.E. 220 (1911).

Effect of Emergency Price Control Act. 347, 42 S.E.2d 220 (1947).

§ 42-33. Rent and costs tendered by tenant.—If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26; Code, s. 1773; Rev., s. 2007; C. S., s. 2372.)

This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and costs before judgment or get out. This section was to protect the tenant from hasty eviction, at the same time the landlord obtained his rent and costs. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Only Rents Due Included.—Under the provisions of this section the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed; and the exception of the lessor that all rents, whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Same—Cannot Demand Other Debts.—Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the

—Where rental value of premises was fixed by rent control office, local statutes authorizing collection of double rents or other damages did not entitle plaintiff to collect an amount exceeding maximum rent fixed by O.P.A. *McGuinn v. McLain*, 225 N.C. 750, 36 S.E.2d 377 (1945).

The fact that landlord obtained permission from rent control office of O.P.A. to institute action under local law for the possession of his property, did not release property from the provisions of the Emergency Price Control Act of 1942. *McGuinn v. McLain*, 225 N.C. 750, 36 S.E.2d 377 (1945).

Cited in *Seligson v. Klyman*, 227 N.C.

sand he may thus have used, under the provision of this section, as a part of the rental due by him, the contract being construed separately as to the two provisions. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925).

Effect of Tender by Tenant.—A tender by the tenant of rent accrued after termination of the lease does not preclude the landlord from recovering possession. *Vanderford v. Foreman*, 129 N.C. 217, 39 S.E. 839 (1901).

Where, in an action in ejectment against a tenant for nonpayment of rent, the answer denies default and pleads tender of the rent, under this section, judgment on the pleadings in plaintiff's favor is properly denied, and the term not having expired, the tender of rent in arrears before judgment would bar the cause. *Hoover v. Crotts*, 232 N.C. 617, 61 S.E.2d 705 (1950).

Effect of Tender upon Proceedings for Forfeiture.—Where during the hearing and before judgment on a petition under § 42-3 for the forfeiture of a lease held by an insolvent corporation in the hands of a receiver, the receiver tendered to the petitioner all rents due, together with all costs lawfully incurred, as provided in this section, it was held that petition was prop-

erly denied. *Coleman v. Carolina Theatres*, 195 N.C. 607, 143 S.E. 7 (1928).

Effect of Acceptance of Rent.—Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude the landlord from recovery. *Vanderford v. Foreman*, 129 N.C. 217, 39 S.E. 839 (1901).

Where Tender of Rents Does Not Prevent Forfeiture.—Where the lease provides that the landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives

notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial. *Tucker v. Arrowood*, 211 N.C. 118, 189 S.E. 180 (1937).

Section Does Not Apply to Actions under § 42-26.—This section applies to actions to recover possession of demised premises "upon a forfeiture for the non-payment of rent" and not to actions to recover possession of property for one of the causes enumerated in § 42-26. *Seligson v. Klyman*, 227 N.C. 347, 42 S.E.2d 220 (1947).

§ 42-34. Undertaking on appeal; when to be increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159.)

Local Modification.—Burke: Pub. Loc. 1927, c. 57; Cabarrus, Craven, Davie, Granville, Iredell, Mecklenburg, Swain, Watauga: 1921, c. 90; Ex. Sess. 1921, c. 17.

Justice Has Discretion as to Surety.—On an application to a justice of the peace for a suspension of execution after a recovery by a landlord against his tenant, the justice has a discretion as to the sufficiency of the surety, which a judge will not review, in the absence of any suggestion that the justice acted dishonestly or capriciously. *Steadman v. Jones*, 65 N.C. 388 (1871).

Power to Increase Bond.—If the bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under this section the superior court can require additional security. *Featherstone v. Carr*, 132 N.C. 800, 44 S.E. 592 (1903).

Not only is it within the jurisdiction and power of the superior courts to have the bonds increased or strengthened, but under their general powers in equity, outside of that statute or any other statute, they would have the right to take such

action. *Featherstone v. Carr*, 132 N.C. 800, 44 S.E. 592 (1903).

Judgment Prior to Action on Bond.—A bond, with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining of such a judgment must be shown by proper averment and proof, or an action against the sureties will be premature. *Blackmore*

v. Winders, 144 N.C. 212, 56 S.E. 874 (1907).

Precedence in Trial.—An appeal from the judgment of a justice of the peace in a summary ejectment has precedence over all other cases except those involving exceptions to homesteads, and is properly called upon demand at the beginning of the term of the superior court commencing next after the docketing of the appeal. *Roediger v. Sapos*, 217 N.C. 95, 6 S.E.2d 801 (1940).

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.—If the proceedings before the justice are brought before a superior court and quashed, or judgment is given against the plaintiff, the superior or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose. (1868-9, c. 156, s. 27; Code, s. 1774; Rev., s. 2009; C. S., s. 2374.)

When Writ Given.—When a party is put out of possession of land, or compelled to pay money, under a judgment which is afterwards reserved or set aside, the court will restore the party to the possession of the land, and give him a remedy for the money thus paid. *Lytle v. Lytle*, 94 N.C. 522 (1886).

The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment or process therein. *Durham & N.R.R. v. North Carolina R.R.*, 108 N.C. 304, 12 S.E. 983 (1891).

Part of Judgment.—Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment. *Perry v. Tupper*, 70 N.C. 538 (1874); *Meroney v. Wright*, 84 N.C. 336 (1881).

Where on trial of summary ejectment before a justice of peace, judgment was rendered for the plaintiff, who was put into possession, and on appeal the superior court decided against the plaintiff, upon the ground that the lease had not terminated, the defendant is entitled to a writ of restitution as a part of the judgment in his favor. *Meroney v. Wright*, 84 N.C. 336 (1881).

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.—If, by order of the justice, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (1868-9, c. 156, s. 30; Code, s. 1776; Rev., s. 2010; C. S., s. 2375.)

Sufficient Allegation.—A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904).

Assessment of Damages.—Under this

section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904).

Recovery by Landlord.—Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction. *Burwell v. Brodie*, 134 N.C. 540, 47 S.E. 47 (1904).

ARTICLE 4.

Forms.

§ 42-37. **Forms sufficient.**—The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

OATH OF PLAINTIFF

North Carolina, County.

A. B., plaintiff,	}	Summary proceedings in ejectment.
against		
C. D., defendant.		

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the day of, 19.... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims dollars for rent of the premises from the day of, 19...., to the....day of....., 19...., and alsodollars for the occupation of the premises since theday of, 19....., to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this day of, 19....
J. K., J. P.

SUMMONS

North Carolina, County.

A. B., plaintiff,	}	Summary proceedings in ejectment.
against		
C. D., defendant.		

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the..... day of, 19....., at, then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this day of, 19....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them to the officer, and makes the following entry on his docket, or varies it according to the facts:

DOCKET ENTRIES

A. B., plaintiff,	}	Summary proceedings in ejectment for (describe the premises).
against		
C. D., defendant.		

Oath of plaintiff (his agent or attorney) filed on theday of....., 19....

Plaintiff claimsdollars for rent from to....., and.....dollars for occupation from..... to.....

Summons issued the....day of....., 19...., to....., constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

RETURN OF OFFICER

On this day I served the within summons on the defendant, C. D., by delivering to him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and of the oath of A. B., annexed, at the usual place of residence of the defendant, C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

Theday of....., 19....

RECORD TO BE ENTERED ON DOCKET

A. B., plaintiff,	} Summary proceedings in ejectment.
against	
C. D., defendant.	

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendantdollars for rent from the.... day of 19...., to theday of....., 19...., and.....dollars for damages for occupation of the premises from theday of 19...., to this day, and.....dollars for his costs; the....day of....., 19....

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: Follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*)). If either party demands a jury, the record will proceed from the asterisk (*) as follows:

And where as the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled), who find (here state the verdict of the jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*)).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

RECORD OF APPEAL

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

EXECUTION ON JUDGMENT FOR PLAINTIFF

A. B., plaintiff, }
 against } County
 C. D., defendant. }

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out of the goods and chattels, lands and tenements, of said defendant.....dollars, with interest from the....day of, 19...., to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of.....dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, thisday of....., 19....
 (Seal.)

BOND TO STAY EXECUTION

We, the undersigned,.....and....., acknowledge ourselves indebted to.....in the sum of.....dollars:

Witness our hands and seals, this the....day of....., A. D. 19....

Whereas on the....day of....., A. D. 19...., before..... a justice of the peace for.....County, A. B. recovered a judgment against C. D. for.....and for.....dollars damages for the detention of said real estate from the....day of....., A. D. 19...., to the....day of, A. D. 19....; and whereas the said.....ha....prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said.....shall pay any judgment which, in this or in any other action, the said.....may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

..... (Seal.)
 (Seal.)
 (Seal.)

STAY OF EXECUTION

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment signed by

The defendant having given bond to me, as required by law, on his appeal to the superior court of.....County, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this.... day of....., 19....
 C. D., defendant....., J. P. (Seal.)

CERTIFICATE ON RETURN OF APPEAL

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant.

....., J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)

(All the papers must be attached.) (Code, s. 1780; Rev., s. 2011; C. S., s. 2376.)

Cited in *Massenburg v. Fogg*, 256 N.C. 703, 124 S.E.2d 868 (1962).

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ARTICLE 1.

Nature of Proceeding.

§ 43-1. **Jurisdiction in superior court.** — For the purpose of enabling all persons owning real estate within this State to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the State shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1; C. S., s. 2377.)

Editor's Note.—This chapter is known generally as the Torrens Law. The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. For a discussion of the history and development of the law, see *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914); 10 N.C.L. Rev. 329.

Chapter to Be Liberally Construed. — This statute is of a remedial character, and should be liberally construed according to its intent. *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914); *Dillon v. Broucker*, 178 N.C. 65, 100 S.E. 191 (1919); *Perry v. Morgan*, 219 N.C. 377, 14 S.E.2d 46 (1941).

The purpose of a proceeding under the Torrens Law is to remove clouds from title and resolve controversies with regard thereto, not to validate title to lands which under the law of the State, which everyone is presumed to know, are not subject to private ownership. *Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).

The judge of the superior court is given authority over the whole proceedings before the clerk, and may require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file an-

swers. *Empire Mfg. Co. v. Spruill*, 169 N.C. 618, 86 S.E. 522 (1915).

Registered land is subject to the jurisdiction of the courts, except as otherwise specially provided in this chapter, in the same manner as if not so registered. *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943).

Determining Value of Improvements.—There is nothing in this chapter, known as the Torrens Law, which prevents the courts from proceeding to determine the value of improvements claimed by defendants, who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party and ascertained by a consent reference. *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943).

Court Has No Jurisdiction to Render Judgment Affecting Title to Lands under Navigable Waters.—In a Torrens proceeding the court is without jurisdiction to render any judgment affecting title to land covered by navigable waters, and with respect to such lands such a decree is a nullity, and subject to collateral attack, although valid with respect to other lands therein embraced. *Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).

Cited in *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965).

§ 43-2. **Proceedings in rem; vests title.** — The proceedings under any petition for the registration of land, and all proceedings in the court in relation

to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter. (1913, c. 90, s. 2; C. S., s. 2378.)

Proceeding Is in Rem. — A proceeding under the Torrens Law is a proceeding in rem. *Davis v. Morgan*, 228 N.C. 78, 44 S.E.2d 593 (1947).

Consolidation of Proceedings. — A proceeding for the purpose of registering ti-

tle and an injunction to prevent trespass, involving the same land and the same parties, may be consolidated. *Blount v. Sawyer*, 189 N.C. 210, 126 S.E. 512 (1925).

Cited in *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-3. Rules of practice prescribed by Attorney General. — The Attorney General, with the approval of the Supreme Court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the Attorney General, who, with the approval of the Supreme Court, shall prescribe a rule covering such case. (1913, c. 90, s. 31; C. S., s. 2379.)

Cited in *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943).

ARTICLE 2.

Officers and Fees.

§ 43-4. Examiners appointed by clerk.—The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the State of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63; C. S., s. 2380.)

§ 43-5. Fees of officers.—The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided,

and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S., s. 2381.)

ARTICLE 3.

Procedure for Registration.

§ 43-6. **Who may institute proceedings.**—Any person, firm, or corporation, including the State of North Carolina or any political subdivision thereof, being in the peaceable possession of land within the State and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the State, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C. S., 2382; 1963, c. 946, s. 1.)

Editor's Note. — The 1963 amendment inserted near the beginning of this section the words "firm, or corporation, including the State of North Carolina or any political subdivision thereof."

Cited in *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-7. **Land lying in two or more counties.**—In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this State for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1; C. S., s. 2383.)

§ 43-8. **Petition filed; contents.** — Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple

in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey. (1913, c. 90, s. 5; C. S., s. 2384.)

Attacking Proceedings Because Clerk Did Not Sign Jurat. — Where the petitioner, to have his title to land registered under the provisions of the Torrens Law has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of this section upon the ground that the clerk of the court had not signed

the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. *Morgan v. Beaufort & W.R.R.*, 197 N.C. 568, 150 S.E. 30 (1929).

Cited in *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-9. Summons issued and served; disclaimer. — The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the State of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C. S., s. 2385.)

Cited in *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914).

§ 43-10. Notice of petition published.—In addition to the summons issued, prescribed in the foregoing section [§ 43-9], the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other

cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the *lis pendens* docket of his office and cross-index same as other notices of *lis pendens* and shall also certify a copy thereof to the superior court of each county in which any part of said land lies, and the clerk thereof shall record and cross-index same in the *lis pendens* records of his office as other notices of *lis pendens* are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; C. S., s. 2386; 1925, c. 287.)

Sufficiency of Publication. — Where the summons in proceedings to register lands has been issued and served under the provisions of § 43-9, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for eight successive weeks, as directed by this section. *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914).

Waiver of Objection to Publication. — In proceedings to register a title to lands, a party claiming an interest in the lands waives his right to object on the grounds of the irregularity in the publication of notice by appearing and answering the petition. *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914).

Cited in *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-11. Hearing and decree.—(a) Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

(b) Examiner's Report. — The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

(c) Exceptions to Report. — Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the Supreme Court, as in other special proceedings.

(d) No Judgment by Default. — No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same for registration, as hereinbefore provided, after approval by the judge of the superior court. (1913, c. 90, s. 8; C. S., s. 2387.)

Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by this section under the same rules for proving title as apply in actions of ejectment and other actions involving the establishment of land titles. *West Virginia Pulp & Paper Co. v. Richmond Cedar Works*, 239 N.C. 627, 80 S.E.2d 665 (1954).

Evidence Sufficient for Jury. — Defendants' evidence of claim under a prior State grant and parol evidence in explanation of

a latent ambiguity as to the location of the land embraced in the grant, was sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to whether petitioners were the owners of the land and entitled to have title thereto registered was properly sustained. *Perry v. Morgan*, 219 N.C. 377, 14 S.E.2d 46 (1941).

§ 43-12. Effect of decree; approval of judge. — Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decrees shall not be binding on and include the State of North Carolina or the State Board of Education unless notice of said proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education severally and personally. Such decrees shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; C. S., s. 2388; 1925, c. 263.)

Cited in *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

ARTICLE 4.

Registration and Effect.

§ 43-13. **Manner of registration.** — The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinafter provided, the decree of title before mentioned and the copy of the plot contained in the petition, and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. If the title be subject to trust, condition, encumbrance or the like, the words “in trust,” “upon condition,” “subject to encumbrance,” or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction. (1913, c. 90, s. 10; 1919, c. 236, s. 1; C. S., s. 2389.)

§ 43-14. **Cross-indexing of lands by registers of deeds.**—Where any land is brought into the Torrens System and under said System is registered in the public records of the register’s office, said register shall cross-index the registration in the general cross index for deeds in his office. (1931, c. 286, s. 2.)

§ 43-15. **Certificate issued.**—Upon the registration of such decree the register of deeds shall issue an owner’s certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina—County of
The certificate of
I hereby certify that the title is registered in the name of
to and situate in said county and State, described as follows: (Here describe land as in decree.)
Estate (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to encumbrance, and the like).
Under decree of the land court of county,
entitled
Registered No., Book No., page
Witness my hand and seal, at office at this
day of, A. D. 19.....
(Seal)
Register of Deeds

(1913, c. 90, s. 10; C. S., s. 2390.)

§ 43-16. **Certificates numbered; entries thereon.** — All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner’s certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11; C. S., s. 2391.)

§ 43-17. **New certificate issued, if original lost.**—Whenever an owner’s certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition

shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be appropriately designated and take the place of the original, but at least thirty full days shall elapse between the filing of the petition and making the decree for such new certificate. (1913, c. 90, s. 24; C. S., s. 2392.)

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee. — Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person—whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified.

Like procedure may be followed as herein set forth upon the dissolution of any corporation which is the registered owner of any estate or interest in the land which has been brought under this chapter.

In the event the registered certificate of title has been lost and after due diligence cannot be found, and this fact is made to appear by allegation in the petition, such registered certificate of title need not be attached to the petition as hereinabove required, but the legal representatives of the deceased registered owner shall be made parties to the proceeding. If such persons are unknown or, if known cannot after due diligence be found within the State, service of summons upon them may be made by publication of the notice prescribed in § 43-17.2. In case the registered owner is a corporation which has been dissolved, service of summons upon such corporation and any others who may have or claim any interest in such land thereunder shall be made by publication of the notice containing appropriate recitals as required by § 43-17.2.

If any registered owner has by writing conveyed or attempted to convey a title to any registered land without the surrender of the certificate of title issued to him, the person claiming title to said lands under and through said registered owner by reason of his or its conveyance may file a petition with the clerk of the superior court of the county in which the land is registered and in the proceeding under which the title was registered praying for the cancellation of the original certificate and the issuance of the new certificate. Upon the filing of such petition notice shall be published as prescribed in § 43-17.2. The clerk of the superior court with whom said petition is filed shall by order determine what additional notice, if any, shall be given to registered owners. If the registered owner is a natural person, deceased, or a corporation dissolved the court may direct what additional notice, if any, shall be given. The clerk shall hear the evidence, make

findings of fact, and if found as a fact that the original certificate of the registered owner has been lost and cannot be found, shall enter his order directing the register of deeds to cancel the same and to issue a new certificate to such person or persons as may be entitled thereto, subject to such claims or liens as the court may find to exist.

Any party within ten days from the rendition of such judgment or order by the clerk of superior court of the county in which said land is registered may appeal to the superior court in term time, where the cause shall be heard *de novo* by the judge, unless a jury trial be demanded, in which event the issues of fact shall be submitted to a jury. From any order or judgment entered by the superior court in term time an appeal may be taken to the Supreme Court in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44.)

§ 43-17.2. Publication of notice; service of process.—Upon the filing of such duly verified petition, the petitioner shall cause to be published once a week for four weeks, in some newspaper having a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified, which shall be at least thirty days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall cause the summons, with a copy of the petition, to be served upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the State of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.3. Answer by person claiming interest.—Any person asserting a claim or any interest in such registered land may, at any time prior to the hearing provided for in § 43-17.4, file such answer or other pleadings as may be proper, asserting his rights or claims to the property referred to in the petition. (1943, c. 466, s. 1.)

§ 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.—The clerk of the superior court shall hear and determine all matters presented upon the petition and such pleadings as may be filed in this proceeding, and shall make such orders and decrees therein as may be found to be proper from the facts as ascertained and determined by the court. The court is authorized and empowered to order and direct that the outstanding registered certificate of title to the land shall be surrendered and cancelled in the office of the register of deeds, and that a new certificate of title shall be issued, showing therein the owner or owners of the land described in the original certificate and the nature and character of such ownership: Provided, the clerk of the superior court shall not authorize the issuance of the new certificate of title until the fees provided in § 43-49 have been paid. Upon the surrender and cancellation by the register of deeds of the outstanding certificate of title, the new certificate of title shall be registered and cross-indexed in the same manner provided for the registration of the original certificate, and the register of deeds shall issue a new certificate of title in the same manner and form as provided for the original certificate. The said new certificate shall have the same force and effect as the original certificate of title and shall

be subject to the same provisions of law with reference thereto. (1943, c. 466, s. 1.)

§ 43-17.5. Issuance of new certificate validated.—Whenever heretofore any registered certificate of title has been surrendered by the heirs or devisees of any deceased registered owner of any registered title and the registered certificate of title of such deceased owner has been surrendered and canceled and a new certificate of title issued to a purchaser or to such heirs or devisees, the same is hereby validated and confirmed and made effectual to the same extent as though such new certificate had been issued in compliance with the provisions of this chapter. (1943, c. 466, s. 1.)

§ 43-18. Registered owner's estate free from adverse claims; exceptions.—Every registered owner of any estate or interest in land brought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except

- (1) Liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of this State cannot require to appear of record under registry laws;
- (2) Taxes and assessments thereon due the State or any county, city or town therein, but not delinquent;
- (3) Any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25; C. S., s. 2393.)

This section modifies the common-law rule of *lis pendens*. Its purpose is to stabilize titles by requiring recordation of all deeds, mortgages, or other paper-writings which transfer or encumber the title to land. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

§ 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.—Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25; C. S., s. 2394.)

§ 43-20. Decree and registration run with the land.—The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof. (1913, c. 90, s. 26; C. S., s. 2395.)

§ 43-21. No right by adverse possession.—No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27; C. S., s. 2396.)

§ 43-22. Jurisdiction of courts; registered land affected only by registration.—Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28; C. S., s. 2397.)

No Distinction between Original Parties and Purchasers. — The statute draws no distinction between the original parties to deeds or contracts affecting title of lands registered under its provisions and

creditors or purchasers, and in respect to such registration they stand upon the same footing. *Dillon v. Broeker*, 178 N.C. 65, 100 S.E. 191 (1919).

§ 43-23. Priority of right.—In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29; C. S., s. 2398.)

§ 43-24. Compliance with this chapter due registration.—When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances. (1913, c. 90, s. 32; C. S., s. 2399.)

§ 43-25. Release from registration. — Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, desires to have such estate released from the provisions of said chapter insofar as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we),, being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter forty-three of the General Statutes of North Carolina insofar as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered." Which

said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40.)

Editor's Note. — The effect of this section is summarized in 3 N.C.L. Rev. 19.

ARTICLE 5.

Adverse Claims and Corrections after Registration.

§ 43-26. **Limitations.**—No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree. (1919, c. 236, s. 1; C. S., s. 2400.)

§ 43-27. **Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation.**—Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the

county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his post-office address, and, if a nonresident, he shall designate or appoint the said register of deeds to receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1; C. S., s. 2401.)

§ 43-28. Suit to enforce adverse claim; summons and notice necessary. — Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this State.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this State. (1919, c. 236, s. 1; C. S., s. 2402.)

§ 43-29. Judgment in suit to enforce adverse claim; register to file. — The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner's certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1; C. S., s. 2403.)

§ 43-30. Correction of registered title; limitation of adverse claims. — Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this sec-

tion shall be construed to authorize any such court to open any original decree of registration which was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1; C. S., s. 2404.)

ARTICLE 6.

Method of Transfer.

§ 43-31. When whole of land conveyed.—Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A. B. and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of dollars, sell and convey to C. D. (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided: that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall be canceled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12; C. S., s. 2405.)

Necessity of Affidavit and Notation. — A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. *Dillon v. Broeker*, 178 N.C. 65, 100 S.E. 191 (1919).

§ 43-32. Conveyance of part of registered land.—The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument or transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred. (1919, c. 82, s. 4; C. S., s. 2406.)

§ 43-33. Duty of register of deeds upon part conveyance. — Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the

original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached. (1919, c. 82, s. 4; C. S., s. 2407.)

§ 43-34. Subdivision of registered estate.—Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C. S., s. 2408.)

§ 43-35. References and cross references entered on register. — In all cases the register of deeds shall place upon the registry of title books and upon the certificate of title of such registered estate therein, references and cross references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C. S., s. 2409.)

§ 43-36. When land conveyed as security.—(a) Whole Land Conveyed.—Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A. B. and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No. in registration of titles book for County, a certificate for the title for same being hereto attached, to secure a debt of dollars, due to, of County and State, on the day of, 19...., evidenced by bond (or otherwise as the case may be) dated the day of, 19.... In case of default in payment of said debt with accrued interest, days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

(b) Part of Land Conveyed.—When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

(c) Effect of Transfer.—All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper

published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

(d) Other Encumbrances Noted.—All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

(e) Other Forms of Conveyance May Be Used.—Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book.

(f) Sale under Lien; New Certification.—Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land, so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C. S., s. 2410.)

§ 43-37. **Owner's certificate presented with transfer.** — In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15; C. S., s. 2411.)

§ 43-38. **Transfers probated; partitions; contracts.**—All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C. S., s. 2412.)

§ 43-39. **Certified copy of order of court noted.**—In voluntary transactions a certificate from the proper State, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C. S., s. 2413.)

Applied in *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943).

§ 43-40. **Production of owner's certificate required.** — Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpoena duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17; C. S., s. 2414.)

§ 43-41. **Registration notice to all persons.** — Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon any registered land in the county of such registration. (1913, c. 90, s. 18; C. S., s. 2415.)

§ 43-42. **Conveyance of registered land in trust.**—Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C. S., s. 2416.)

§ 43-43. **Authorized transfer of equitable interests registered.**—No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20; C. S., s. 2417.)

§ 43-44. **Validating conveyance by entry on margin of certificate.**—In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, has before August 21, 1924, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and

make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41.)

Editor's Note.—The effect of this section is summarized in 3 N.C.L. Rev. 19.

ARTICLE 7.

Liens upon Registered Lands.

§ 43-45. **Docketed judgments.**—Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor. (1913, c. 90, s. 22; C. S., s. 2418.)

Cited in *In re Wallace*, 212 N.C. 490, 193 S.E. 819 (1937).

§ 43-46. **Notice of delinquent taxes filed.** — It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including the penalty therefor, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon. (1913, c. 90, s. 21; C. S., s. 2419.)

§ 43-47. **Sale of land for taxes; redemption.** — Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the sheriff or other officer making such sale to file forthwith a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after date of such sale; but a note shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if

an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed. (1913, c. 90, ss. 22, 23; C. S., s. 2420.)

§ 43-48. Sale of unredeemed land; application of proceeds.—If there be no redemption of land under the preceding section [§ 43-47], in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the State, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23; C. S., s. 2421.)

ARTICLE 8.

Assurance Fund.

§ 43-49. Assurance fund provided; investment. — Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one tenth of one percent of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the State Treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this State, or of counties and other municipalities within the State. Such investment shall be made upon the advice and concurrence of the Governor and Council of State, and he shall make report of such funds and the investment thereof to the General Assembly biennially. When registration involves the State of North Carolina or any political subdivision thereof, the local tax collector shall assess the value of the land involved as if for tax purposes and the amount to be paid to the clerk shall be an amount equal to one tenth of one percent (0.1%) of such assessed value; provided, however, that no taxes shall be levied upon such land while title thereto remains in the State of North Carolina or any political subdivision thereof. (1913, c. 90, s. 33; C. S., s. 2422; 1963, c. 946, s. 2.)

Editor's Note. — The 1963 amendment added the last sentence of this section.

§ 43-50. Action for indemnity. — Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any

entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the State Treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34; C. S., s. 2423.)

Negligence of Plaintiff Barring Recovery.—A proceeding under this chapter duly commenced prior to the enactment of Public Laws 1919, c. 31 (§ 1-117 and § 1-118), constituted a "lis pendens." Such proceeding while pending was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to pro-

tect himself under the provisions of the statute, and the title to the land was assured by the State, and a holder thereof by proper transfer acquired the title, the negligence of the mortgagee was a complete defense in the mortgagee's action to recover damages against the State thereunder. *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-51. Satisfaction by third person or by Treasurer.—If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Auditor, who shall issue his warrant therefor upon the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C. S., s. 2424.)

§ 43-52. Payment by Treasurer, if assurance fund insufficient.—If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the Treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the Treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36; C. S., s. 2425.)

§ 43-53. Treasurer subrogated to right of claimant.—In every case of payment by the Treasurer from the assurance funds under the provisions of this chapter the Treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37; C. S., s. 2426.)

§ 43-54. Assurance fund not liable for breach of trust; limit of recovery.—The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38; C. S., s. 2427.)

§ 43-55. **Statute of limitation as to assurance fund.** — Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39; C. S., s. 2428.)

ARTICLE 9.

Removal of Land from Operation of Torrens Law.

§ 43-56. **Proceedings.**—Any land brought under the provisions and operation of this chapter before April 16, 1931, may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the clerk of the superior court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said clerk of the superior court may enter a decree in said cause removing and excluding said land from the provisions and operation of this chapter, and transfer and conveyance of said land may be made thereafter as other common-law conveyances. (1931, c. 286, s. 1.)

Editor's Note.—For discussion of section, see 9 N.C.L. Rev. 392.

§ 43-57. **Existing liens unaffected.**—Nothing in § 43-56 shall be construed to impair or remove any lien or encumbrance existing against said land. (1931, c. 286, s. 3.)

Chapter 44.

Liens.

Article 1.

Mechanics', Laborers', and Materialmen's Liens.

Sec.

- 44-1. On buildings and property, real and personal.
- 44-2. On personal property repaired.
- 44-3. Laborer's lien on lumber and its products.
- 44-4. Lien for processing certain goods.
- 44-5. Sale of goods at public auction.

Article 1A.

Wage Liens.

- 44-5.1. Wages for two months' lien on assets.

Article 2.

Subcontractors', etc., Liens and Rights against Owners.

- 44-6. Lien given subcontractors, etc., on real estate.
- 44-7. [Repealed.]
- 44-8. Statement of contractor's indebtedness to be furnished to owner; effect.
- 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.
- 44-10. Sums due by statement to constitute lien.
- 44-11. Where sums due contractor from owner insufficient; payment pro rata.
- 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.
- 44-13. Laborer for railroad contractor may sue company; conditions of action.
- 44-14. Contractor on municipal building to give bond; action on bond.

Article 3.

Liens on Vessels.

- 44-15. For towage and for supplies at home port.
- 44-16. For labor in loading and unloading.
- 44-17. Filing lien; laborer's notice to master.
- 44-18. Enforcement of lien.
- 44-19. Judgment against contractor binds master and vessel.
- 44-20. Liens not to exceed amount due contractor.
- 44-21. Owner to see laborers paid.

Sec.

- 44-22. Owner may refuse to settle with contractor until laborers paid.
- 44-23. Owner may pay orders for wages.
- 44-24. Laborer's right of action against owner.
- 44-25. Stevedore's false oath punishable as perjury.
- 44-26. Stevedores to be licensed; omission misdemeanor.
- 44-27. Tax and bond on procuring license.

Article 4.

Warehouse Storage Liens.

- 44-28. Liens on goods stored for charges.
- 44-29. Enforcement by public sale.

Article 5.

Liens of Hotel, Boarding and Lodginghouse Keeper.

- 44-30. Lien on baggage.
- 44-31. Baggage may be sold.
- 44-32. Notice of sale.

Article 6.

Liens of Livery Stable Keepers.

- 44-33. Lien for ninety days' keep on animals in possession.
- 44-34. Enforcement by public sale.
- 44-35. Notice of sale to owner.

Article 7.

Liens on Colts, Calves and Pigs.

- 44-36. Season of sire a lien.
- 44-37. Colts, etc., not exempt from execution for season price.
- 44-37.1. Further as to lien on colt, calf or pig for service of sire.

Article 8.

Perfecting, Recording, Enforcing and Discharging Liens.

- 44-38. Claim of lien to be filed; place of filing.
- 44-38.1. Liens on personal property created in another state.
- 44-39. Time of filing notice.
- 44-40. Date of filing fixes priority.
- 44-41. Laborer's crop lien dates from work begun.
- 44-42. Duly filed claims of prior creditors not affected.
- 44-43. Action to enforce lien; perfection of lien by filing claim with receiver.

Sec.

- 44-44. When attachment available to plaintiff.
 44-45. Defendant entitled to counterclaim.
 44-46. Execution.
 44-47. No justice's execution against land.
 44-48. Discharge of liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

- 44-49. Lien created; applicable to persons non sui juris.
 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.
 44-51. Disputed claims to be settled before payments.

Article 10.

Agricultural Liens for Advances.

- 44-52. Lien on crops for advances.
 44-53. Contract for advances to mortgagor in possession.
 44-54. Price to be charged for articles advanced limited.
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 44-56. Person advanced not estopped by agreement.
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 44-62. Local: Short form of liens.
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Sec.

- 44-64. Local: Commissioners to furnish blank records.

Article 11.

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- 44-65. Filing notice of lien.
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Article 12.

Liens on Leaf Tobacco and Peanuts.

- 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.
 44-69.1. Effective period for lien on peanuts.

Article 13.

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- 44-70. Definitions.
 44-71. Factors' liens; filing notice of lien.
 44-72. Registration.
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 44-75. Common-law lien.
 44-76. Construction.

Article 14.

Assignment of Accounts Receivable and Liens Thereon.

- 44-77. Definitions.
 44-78. Filing of notice of assignment; cancellation.
 44-79. Filing of notices of discontinuance of assignment.
 44-80. Protected assignments.
 44-81. Statement of accounts assigned or of balance due.
 44-82. Rights between debtor and assignee.
 44-83. Validity as to third person; acts of assignor; dominion and control.
 44-84. Returned goods.
 44-85. Short title.

ARTICLE 1.

Mechanics', Laborers', and Materialmen's Liens.

§ 44-1. On buildings and property, real and personal.—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. (1869-70, c. 206, s. 1; Code, s. 1781; 1901, c. 617; Rev., s. 2016; C. S., s. 2433.)

- I. General Consideration.
- II. Material and Services Contracted.
- III. Persons Entitled to Lien.
- IV. Property Covered.
- V. Public Buildings, etc.
- VI. Waiver of Lien, Homestead, and Miscellaneous Matters.

I. GENERAL CONSIDERATION.

Editor's Note.—For note on a husband's power to charge his wife's property with a contractor's or materialman's lien, see 29 N.C.L. Rev. 477. For note on acquisition and priorities of mechanics', laborers' and materialmen's liens, see 29 N.C.L. Rev.

480. For article on mechanics' liens in North Carolina, see 41 N.C.L. Rev. 173 (1963).

Historical Background of This and Following Sections. — See *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

This and following sections under the topic of liens are remedial, and their clear purpose is to give contractors, subcontractors and laborers liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or material supplied on or about the same. To that end their language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions, and, in the absence of them, exceptions and limitations affecting such liens cannot be allowed unless by necessary implication. The object is to give a lien on particular property deriving particular benefit in favor of classes of persons whose claims are supposed to have particular merit. *Chadbourn v. Williams*, 71 N.C. 444 (1874); *Wooten v. Hill*, 98 N.C. 48, 3 S.E. 846 (1887); *Burr v. Maulsby*, 99 N.C. 263, 6 S.E. 108 (1888); *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

Lien Is Dependent upon Contract with Owner.—Soon after the enactment of the statute from which this section was derived, it was held in *Wilkie v. Bray*, 71 N.C. 205 (1874), that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor, and, as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of the statute relative to the subcontractor's lien. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914), citing *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888). See § 44-6.

Contractor's Lien Not Superseded by Statute Giving Lien to Subcontractors, etc.—The effect of the ruling in *Wilkie v. Bray*, 71 N.C. 205 (1874) makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract. This ruling was followed by the enactment of the statute giving liens to subcontractors, etc., which was not in-

tended to supersede the lien of the contractor for it in direct terms gives the lien in favor of subcontractors, laborers and materialmen a preference over "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888).

"Mechanics'" and "Laborers'" Liens Distinguished.—When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" embraces the entire outlay, whether in labor or material, being for "work done on the premises," i.e., for betterments on it. The "laborer's lien" is solely for labor performed. The mechanic's lien is broader and includes the "work done," i.e., the "building built" or superstructure placed on the premises. *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

Property Subject to the Lien Must Be Sold First.—The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's claim, and hence it must be sold before other property may be resorted to. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

When Itemized Statement Unnecessary.—When a materialman's lien under this section is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

Sufficiency of Itemized Statement.—Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material which he has furnished the owner of the building upon which he claims his lien under this section, showing on several specific dates "money advanced for payroll," "furnace contract, etc.," each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

Statement Presumed Correct.—Where a lien filed under the provisions of this section gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

Affidavit.—An affidavit to a lien filed under this section that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract," was held sufficient to show a complete contract for the furnace at the price itemized in the statement. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

Priority of the Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

The lien for labor and material furnished to the owner of a building under the provisions of this section and notice filed as required by § 44-38, and § 44-39, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

The lien of a contractor for work or material furnished in the construction of a railroad has precedence over a mortgage registered after the work was commenced. *Dunavant v. Caldwell & N.R.R.*, 122 N.C. 999, 29 S.E. 837 (1898).

A laborers' and materialmen's lien on property takes priority over all the property conveyances to purchasers for value and without notice subsequent to the time when labor and materials are furnished, provided notice of the lien is filed for record within the statutory time, and action to enforce the lien is instituted within the statutory time. *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

The doctrine of relation back is inherent in the very statutes which give the contractor the lien upon the property improved by his labor or materials, and allow him six months after the completion of the labor or the final furnishing of the materials in which to claim it; for it is plain that unless the contractor's lien when filed relates back to the time at which the contractor commenced the performance of the work or the furnishing of the materials, the object of the statutes can be defeated at the will of the owner of the property, by his selling or encumbering his estate. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Where a lien claimant files notice of a laborers' and materialmen's lien against a building and the lot on which it stands in the office of the clerk of the superior court in the county in which the property is situate, for work done and materials furnished by him in building and improving the building under contract with the owner of the lot, within six months after the completion of the work and a final furnishing of the material, and commences an action to enforce the lien within six months from the date of filing the notice of the lien in the county where the lot is situate, the lien relates back to the time when the lien claimant began the performance of the work and the furnishing of the materials, and takes precedence by reason of such relationship back over an intervening recorded deed of trust made by the owner of the lot since then, or other liens created by the owner since then. *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

Inchoate and Perfected Lien. — This section gives a contractor an inchoate lien upon a building and the lot on which it is situated for work done and materials furnished by him in constructing, improving, or repairing such building pursuant to a contract with the owner. When the contractor perfects such inchoate lien in compliance with the requirements of article 8 of this chapter, the resulting judgment creates this twofold lien: (1) A special lien on the building and the lot upon which it is situated; and (2) a general lien on the other real property of the owner in the county where the judgment is docketed. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Priority of Purchase Money Deed of Trust over Material Lien. — A purchase money deed of trust stands upon the same footing as a purchase money mortgage, and its lien is superior to the lien for material which was begun to be furnished the purchaser while he was in possession under a lease with option to purchase, since no lien against the purchaser could attach prior to the lien of the deed of trust, the execution of the deed of trust being regarded as but one transaction. *Smith Builders Supply v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949).

Jurisdiction. — Where materials of a value in excess of two hundred dollars are furnished under an entire and indivisible contract, and the material furnisher institutes suit in a justice's court to recover for part of the materials furnished and

also institutes suit in the superior court on the same cause of action, defendant's motion to dismiss the action instituted in the justice's court for want of jurisdiction should be allowed, since plaintiff may not split up his cause of action for jurisdictional purposes and try it piecemeal in both courts. *Allison v. Steele*, 220 N.C. 318, 17 S.E.2d 339 (1941).

Finding That Contract Entire.—Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" was interpreted to mean that the contract referred to was entire. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929).

Estoppel.—By electing to assert a lien as a subcontractor under § 44-6, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under this section and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher. *Doggett Lumber Co. v. Perry*, 212 N.C. 713, 194 S.E. 475 (1938).

When plaintiff is estopped, by its election in asserting a lien under § 44-6, from asserting a lien under this section, and its action brought solely under this section is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under § 44-6. *Doggett Lumber Co. v. Perry*, 213 N.C. 533, 196 S.E. 831 (1938).

Where plaintiff alleges a contractual relationship with the defendants in both the lien notice and the complaint, and seeks to enforce the alleged lien pursuant to the provisions of this section, he is estopped from asserting any lien as a subcontractor pursuant to the provisions of §§ 44-6, 44-8, and 44-9. *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E.2d 257 (1958).

Cited in *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91 (1930); *First & Citizens Nat'l Bank v. Sawyer*, 218 N.C. 142, 10 S.E.2d 656 (1940); *Cline Paving Co. v. Southland Speedways, Inc.*, 250 N.C. 358, 108 S.E.2d 641 (1959); *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960); *Williams v. Denning*, 260 N.C. 539, 133 S.E.2d 150 (1963).

II. MATERIAL AND SERVICES CONTRACTED.

Meaning of "Material Furnished".—The lien arises in favor of and to secure the payment of "all debts contracted for work done on the same or material furnished." By the term "material furnished" is meant something furnished to be appropriated, used and pertinently applied on the land, devoted to some purpose no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for material furnished on or about or connected with the land in connection with the purpose to which it is devoted in whole or in part. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

Engine Furnished Vessel as "Material Furnished".—Under this section, one who furnished an engine to be installed in a vessel, relying on the credit of the vessel, is entitled to a lien therefor as "material furnished," on compliance with the requirement as to recording; and it is immaterial that by the contract title to the engine was reserved until paid for. *The Pearl*, 189 Fed. 540 (E.D.N.C. 1911).

No Lien upon Material as Distinct from Building.—No lien can be acquired upon materials furnished for a building, etc., as distinct from the building, etc., but only upon the building, etc., in the construction or repairing of which they are used. *Lanier v. Bell*, 81 N.C. 337 (1879).

Under this section the "material furnished," must be such material as enters into and becomes a part of the property and adds to its value. *Pocahontas Coal Co. v. Henderson Elec. Light & Power Co.*, 118 N.C. 232, 24 S.E. 22 (1896).

Plans and specifications of an architect are not "material" within the meaning of this section. *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

Supervision by an architect of work done upon a building is not the character of work which falls within the intent of this section. *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

Service or Labor Must Have Bettered the Property.—This section is construed in *Tedder v. Wilmington & W.R.R.*, 124 N.C. 342, 32 S.E. 714 (1899), as meaning that the "legislature has provided a lien only when the service or labor is for the betterment of property on which it is bestowed, leaving the laborer in all other cases to secure himself as at common law"—i.e., by retaining in his possession any property on which he makes repairs until paid for the same. *Glazener v. Gloucester*

Lumber Co., 167 N.C. 676, 83 S.E. 696 (1914).

The existence of a debt arising out of contract, due by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942); *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist. Mere knowledge that work is being done or material furnished does not enable the person furnishing the labor or material to obtain a lien. *General Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E.2d 828 (1954).

Meaning of Term "Contracted".—The lien is given for the amount due upon debts contracted. But in this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905).

Work Done and Materials Furnished under Same Contract.—Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount. *Isler v. Dixon*, 140 N.C. 529, 53 S.E. 348 (1906).

III. PERSONS ENTITLED TO LIEN.

Contractor Need Not Himself Perform the Labor.—The constitutional provision for giving to mechanics' and laborers' liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors, who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others. *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888).

Mechanics and Laborers.—The provision of the Constitution requiring the General Assembly to provide liens for mechanics and laborers, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers. *Whitaker v. Smith*, 81 N.C. 340 (1879). See *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888), where it is held that the contractor or materialmen need

not themselves furnish the labor or the materials.

A mechanic or laborer, within the meaning of the lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. *Whitaker v. Smith*, 81 N.C. 340 (1879); *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

Overseer—Superintending Installation of Machinery.—In *Whitaker v. Smith*, 81 N.C. 340 (1879), it was held that an overseer is not a mechanic or laborer under the lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed, for the price or value of his services. See *Tommey v. Spartanburg & A.R.R.*, 7 Fed. 429 (W.D.N.C. 1881). The case of *Cook v. Ross*, 117 N.C. 193, 23 S.E. 252 (1895), is also to the same effect. There it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute, a mechanic or laborer. *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

Architect Not a Laborer or Mechanic.—An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of this article and he has no lien thereon for the same. *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

IV. PROPERTY COVERED.

Any Real Property.—The phraseology of this section and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated "a lot or farm," or a storehouse site, a mill site, a water reservoir site, or the like. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

Ownership of Land.—The debt contracted becomes a lien, a charge upon the land, and that land may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by and constituting the ground of the lien. It makes no difference as to the ownership of the land if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the costs of the

benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures or any "material furnished" for such purpose. This is a just and reasonable interpretation of the statute. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

House and Lot. — Where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the country, the mechanic's lien attaches to the whole tract, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value. The fact that a house and improvements, built by a contractor upon a tract of 80 acres belonging to the owner, are enclosed by a fence including about three acres is not a segregation or division of the house from the tract so as to confine the mechanic's lien to the enclosure. In such case, though the lien is upon the whole tract, it should be divided, if practicable and desired by the defendant, in making the sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be discharged without exhausting the entire tract. *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

Railroad Property. — The provision that "any kind of property, real or personal, not herein enumerated shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished," is broad enough to confer upon a contractor the right to file a lien against the property of a railroad company for the construction of its road-bed and for laying crossties and rails thereon. *Dunavant v. Caldwell & N.R.R.*, 122 N.C. 999, 29 S.E. 837 (1898). For contrary intimation, see *Tommey v. Spartanburg & A.R.R.*, 7 Fed. 429 (W.D.N.C. 1881), citing *Whitaker v. Smith*, 81 N.C. 340 (1879). For remedy of laborer for railroad contractor, see § 44-13.

Lien on Personalty Is Dependent upon Possession. — While this section provides for a lien not only upon buildings and lots, but also upon "any kind of property, real or personal," other sections of the lien law provide the conditions upon which the lien is to come into existence and continue; and in case of personal property the lien is dependent upon possession and cannot be obtained by the filing of notice. *Elk Creek Lumber Co. v. Hamby*, 84 F.2d 144 (4th Cir. 1936).

V. PUBLIC BUILDINGS, ETC.

Not Applicable to Public Buildings, etc.

—The lien laws were not intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the State or any public or quasi public corporation in the exercise of its delegated sovereign powers. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien, such as public buildings, etc., no duty or obligation is imposed upon the owner in respect to such claimants. *Noland Co. v. Board of Trustees*, 190 N.C. 250, 129 S.E. 577 (1925).

Same—Courthouse. — A courthouse cannot be made subject to any lien for labor or materials. *Snow v. Board of Comm'rs*, 112 N.C. 335, 17 S.E. 176 (1893), cited in *Pratt Lumber Co. v. T. H. Gill Co.*, 278 Fed. 783 (E.D.N.C. 1922).

A building used for graded school purposes is a public building upon which no lien can be acquired, except with legislative sanction. *Snow v. Board of Comm'rs*, 112 N.C. 335, 17 S.E. 176 (1893); *Gastonia v. McEntee-Peterson Eng'r Co.*, 131 N.C. 363, 42 S.E. 858 (1902); *Morganton Hardware Co. v. Morganton Graded Schools*, 151 N.C. 507, 66 S.E. 583 (1909).

Highways. — One contracting to construct a highway has, under this section, no lien on the highway; nor have the subcontractors, laborers or materialmen. *Pratt Lumber Co. v. T. H. Gill Co.*, 278 Fed. 783 (E.D.N.C. 1922).

Reason of Rule. — The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, cannot be sold under execution or other final process, and this reason applies with peculiar force to materials furnished or labor performed in the construction or repair of public highways. *Pratt Lumber Co. v. T. H. Gill Co.*, 278 Fed. 783 (E.D.N.C. 1922).

VI. WAIVER OF LIEN, HOME-STEAD, AND MISCELLANEOUS MATTERS.

Waiver of Lien.—In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties and agreed to accept three notes secured by a second mortgage on the vessel as security. It was held that such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. *Kornegay v. Styron*, 105 N.C. 14, 11 S.E. 153 (1890).

It is doubtful whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim a lien under the provisions of this section. But his failure to enforce his asserted lien under the provisions of § 44-43, deprives him of whatever right thereto he may have had. *Norfleet v. Tarboro Cotton Factory*, 172 N.C. 833, 89 S.E. 785 (1916).

Lien Lost if Not Perfected. — A contractor's lien on real property is inchoate until perfected by compliance with legal requirements, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

The homestead right is not affected by a lien for materials furnished and used in improvements upon land covered by homestead, and a statute which gives such lien is unconstitutional. *Cumming v. Bloodworth*, 87 N.C. 83 (1882). See also *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

Priority of Homestead over Material Lien.—The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption. *Cumming v. Bloodworth*, 87 N.C. 83 (1882); *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

Mechanic or Materialman Must Apply Payment as Intended If He Knows Source and Purpose.—The general rule as to application of payments is subject to the

qualification that where money is paid by a contractor or the seller of property to a mechanic or materialman out of funds received by the contractor or seller of property from an owner or purchaser whose property is subject to a mechanics' or materialmen's lien, or both, and the purpose of the payment to the contractor or seller was to discharge the indebtedness against a specific house, the mechanic or materialman must apply the payment to discharge the indebtedness if he had knowledge of the source and purpose of the payment. *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

Contractor Agent of Owner—Rights of Materialman. — Where one has furnished the owner at the request of the contractor materials to be used in his building, and by the terms of the written contract the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of this section and §§ 44-38 and 44-39. *North Carolina Lumber Co. v. Spear Motor Co.*, 192 N.C. 377, 135 S.E. 115 (1926).

Claim of Contractor to Proceeds of Insurance Policy.—The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee. *Healey Ice Mach. Co. v. Green*, 181 Fed. 890 (E.D.N.C. 1910).

Fraudulent Misrepresentation That All Bills Paid.—In a prosecution for obtaining a mortgage loan by misrepresenting that bills for all labor and materials for the renovation of the building on the premises had been paid, such misrepresentation is material in view of the statutory liens of laborers and materials furnishers, and the fact that the mortgagee had the property appraised and obtained an attorney's certificate of title does not show that the mortgagee did not rely upon the misrepresentation, there being no notice of any unpaid bills for labor and materials on file of public record and there being testimony of the president of the mortgagee that it relied upon the misrepresentation. *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941).

§ 44-2. On personal property repaired.—Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it

does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, after first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the county in which the work may have been done; provided, however, the last publication shall be within seven days prior to the date of sale, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Provided, that in selling any motor vehicle under the provisions of this section, a twenty day notice in advance of such sale shall be given the Commissioner of Motor Vehicles. (1869-70, c. 206, s. 3; Code, s. 1783; Rev., s. 2017; C. S., s. 2435; 1945, c. 224; 1961, c. 282.)

Cross Reference. — As to requirement that Commissioner of Revenue be given thirty days' notice of sale of motor vehicle under mechanic's or storage lien, see § 20-77, subsec. (c).

This section is within the police power of the State. Johnson v. Yates, 183 N.C. 24, 110 S.E. 603 (1922).

This section simply affirms the common-law lien given to artisans who have altered or repaired articles of personal property and are in possession of same, with the superadded right of foreclosure by sale in order to make the lien effective. Johnson v. Yates, 183 N.C. 24, 110 S.E. 603 (1922); Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957).

Lien Arises Not by Contract but by Implication of Law.—A common-law possessory lien, to which this section relates, arises by implication of law, not by contract. Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957), holding that even though there was an entire and indivisible contract for repairs in the instant case, it had no bearing on the loss of possessory lien arising by operation of law.

To Whom Section Applies. — The requirement of this section, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where such repairs are made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. Johnson v. Yates, 183 N.C. 24, 110 S.E. 603 (1922).

Same—Mortgagor in Possession with Consent of Mortgagee.—A mortgagor, in possession of an automobile with the con-

sent of the mortgagee, is "the owner or legal possessor" thereof within the meaning of this section and has implied authority from the mortgagee to contract for repairs; when authorized by such mortgagor, the mechanic who makes such repairs has a lien on the automobile and may retain possession thereof until his just and reasonable charges are paid; and if he preserves his lien thereon by retaining possession of the automobile, the mechanic's lien is superior to the lien of a duly recorded prior mortgage on the automobile. Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957).

Same—Vendee of Car with Mortgage to Vendor.—Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at the vendee's instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. Johnson v. Yates, 183 N.C. 24, 110 S.E. 630 (1922).

Retention of Possession Essential.—The lien on personal property given by this section applies when possession is retained by the mechanic or artisan. If he surrenders possession of the property, he loses his lien. McDougall v. Crapon, 95 N.C. 292 (1886); Block v. Dowd, 120 N.C. 402, 27 S.E. 129 (1897); Tedder v. Wilmington & W.R.R., 124 N.C. 342, 32 S.E. 714 (1899); Glazener v. Gloucester Lumber Co., 167 N.C. 676, 83 S.E. 696 (1914); Elk Creek Lumber Co. v. Hamby, 84 F.2d 144 (4th Cir. 1936).

And the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since

these rights are incident to and dependent on possession. *McDougall v. Crapon*, 95 N.C. 292 (1886).

Thus, where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, it was held that the laborer had no lien on the wagon for his work done and materials furnished in making the repairs. *McDougall v. Crapon*, 95 N.C. 292 (1886).

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable for the reasonable value of the repairs, this section being applicable only where the mechanic retains possession of the property. *Broadfoot Iron Works v. Bugg*, 208 N.C. 284, 180 S.E. 62 (1935).

Since the lien referred to and affirmed in this section is the common-law possessory lien, it is indispensable that the party claiming it have an independent and exclusive possession of the property. The moment that possession is voluntarily surrendered, the lien is gone. Nothing else appearing, even as between the mechanic and the owner of the chattel, the lien is lost if and when the mechanic voluntarily and unconditionally surrenders possession to the owner. *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957).

Where possession of an automobile was relinquished by a mechanic under an agreement that the owner would return it for completion of repairs, the common-law possessory lien of the mechanic set out in this section was lost and could not be revived upon reacquisition by the mechanic. *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957).

Compliance with § 44-38 et seq. Not Required. — Where an asserted lien is created and exists solely by statute, it must be perfected ordinarily in the manner prescribed by § 44-38 et seq. But this section "is a self-executing enactment"; hence, compliance with § 44-38 et seq. is not required to perfect the lien referred to therein. *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957).

A laborer who engages in the manufacture of lumber has a lien thereon under this section for his just and reasonable charges so long as he retains possession of the lumber. *Elk Creek Lumber*

Co. v. Hamby, 84 F.2d 144 (4th Cir. 1936).

Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, the second lienor is not the owner or legal possessor of the car within the intent and meaning of this section, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor. *Willis v. Taylor*, 201 N.C. 467, 160 S.E. 487 (1931).

Possession of Automobile Obtained from Mechanic by Fraudulent Representations. — Under the common law and the provisions of this section, one who repairs personal property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him. *Reich v. Triplett*, 199 N.C. 678, 155 S.E. 573 (1930).

Filing Notice Not Required.—This section is a self-executing enactment, conferring upon the mechanic or artisan the means of making his debt out of the property by his own act, in selling after thirty days' retention without the intervention of judicial proceeding, either in the superior court or that of a justice of the peace; and § 44-39, which, for the preservation of the lien, requires notice of it to be filed within six months after completing the labor, cannot have been intended for a case in which as under this section a resort to any court is unnecessary, and a complete and efficient measure of relief is committed to, and may be obtained by, the party's own act. *McDougall v. Crapon*, 95 N.C. 292 (1886).

The enactments as to filing notice must have been intended for cases where possession is not in the mechanic or artisan, and where an action is necessary for his relief. *McDougall v. Crapon*, 95 N.C. 292 (1886).

Lien on Timber Manufactured into Lumber, etc. — Under this section, one who cuts timber and manufactures it into lumber for a corporation before a receiver is appointed therefor has the right to retain the possession of such lumber until his lien is discharged by payment. *Huntsman Bros. & Co. v. Linville River Lumber Co.*, 122 N.C. 583, 29 S.E. 838 (1898). See § 44-3.

One who enters into a contract to cut, haul and raft logs after the standing timber upon lands has been felled for the purpose, has, while the logs are in his possession, a lien thereon for the services thus performed, under the provisions of this section, the timber after its severance from the land being regarded as personalty. *Thomas v. Merrill*, 169 N.C. 623, 86 S.E. 593 (1915). See § 44-3.

Sale Restrained Where Mechanic's Claim Controverted.—Where one, who has the right under this section to retain possession of and to sell personal property for

the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner in which the nature and amount of claimant's debt are in dispute, he will be restrained from making a sale of the property until such contentions are settled. *Huntsman Bros. & Co. v. Linville River Lumber Co.*, 122 N.C. 583, 29 S.E. 838 (1898).

Priority of Lien.—The lien created by this section is superior to a vendor's lien, or to a mortgage lien. *Johnson v. Yates*, 183 N.C. 24, 110 S.E. 603 (1922).

A mechanic's lien is given preference under this section to a mortgage lien though the latter be prior in point of time. *Johnson v. Yates*, 183 N.C. 24, 110 S.E. 603 (1922). See 1 N.C.L. Rev. 127.

Cited in *Goodrich Silvertown Stores v. Caesar*, 214 N.C. 85, 197 S.E. 698 (1938); *Dillingham v. Blue Ridge Motors*, 234 N.C. 171, 66 S.E.2d 641 (1951); *Rick v. Murphy*, 251 N.C. 162, 110 S.E.2d 815 (1959).

§ 44-3. Laborer's lien on lumber and its products.—Every person doing the work of logging or of cutting or sawing logs into lumber, or of getting out wood pulp, acid wood or tan bark, has a lien upon the said logs or lumber for the amount of wages due him, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof: Provided, any such laborer whose wages for thirty or less number of days performed are due and unpaid shall file notice of such claim before the nearest justice of the peace in the county in which said work has been done, stating the number of days of labor performed, the price per day, and the place where the lumber is situate, and the person for whom said labor was performed, which said statement shall be signed by the said laborer or his attorney and the said laborer shall also give to the owner thereof, within five days after the lien has been filed with the justice of the peace, as aforesaid, a copy of said notice as filed with the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said lumber or logs, wood pulp, acid wood or tan bark after such notice has been filed with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided. (1913, c. 150, s. 6; C. S., s. 2436; 1929, c. 69.)

Local Modification. — *Avery, Mitchell, Yancey*: 1941, c. 129.

Editor's Note. — The 1929 amendment made this section applicable to logging. Prior to the amendment, persons who cut and logged timber to a mill under a contract to do so at a fixed price were not entitled to a lien for such services. *Graves v. Dockery*, 200 N.C. 317, 156 S.E. 506 (1931).

Reason for Enactment of Section. — It was because a lien could not be obtained

for labor performed in the manufacture of lumber unless the party claiming it retained possession, that the legislature enacted this section. *Elk Creek Lumber Co. v. Hamby*, 84 F.2d 144 (4th Cir. 1936).

Work Done Directly by Claimant and in Betterment of Property.—Under this section the work must have been done directly by the claimant in betterment of the property upon which the lien is alleged to rest, thus one who aided in making the lumber by taking the boards from

the saw as they were cut is entitled to a lien, but one who is employed in the blacksmith shop as repairer of cars used as part of the plant, and one who worked on the car track and repaired the bridges, are not so entitled. *Thomas v. Merrill*, 169 N.C. 623, 86 S.E. 593 (1915).

Compliance with Statutory Requirements Necessary.—In an action to establish a laborer's lien upon manufactured lumber, under the provisions of this section, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found. *Bryson v. Gennett Lumber Co.*, 171 N.C. 700, 89 S.E. 26 (1916).

This section gives to laborers engaged in logging, sawing, etc., a lien on the lumber of their manufacture, which is superior to all other claims thereon, except that of a purchaser for value without notice. It gives this preferred lien, however, only on condition that the provisions of this section be strictly complied with. A laborer, even though he does not retain possession, is entitled to the lien for wages if he gives the notice required by this section. *Elk Creek Lumber Co. v. Hamby*, 84 F.2d 144 (4th Cir. 1936).

Right of Employee of Contractor against the Owner. — Where a laborer in the manufacture of lumber employs another

laborer to assist him in his work, and the latter seeks to enforce the lien given by this section, for the value of the work he has done, it must be made to appear that the owner owed his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a bona fide purchaser for value, without notice of the lien. *Bryson v. Gennett Lumber Co.*, 171 N.C. 700, 89 S.E. 26 (1916).

Repairing Railroad Track or Equipment. —Under contract, one of the defendants agreed to operate a large lumber plant, including railroad equipment for handling the logs owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. It was held that work done in repairing the track, equipment, etc., was not in contemplation of this section, so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor was a lien upon the plant held, for the material had not been used in its construction as betterments. *Glazener v. Gloucester Lumber Co.*, 167 N.C. 676, 83 S.E. 696 (1914).

Priority of Lien.—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by this section is superior to the lien given to the contractor therefor, or any other person. *Glazener v. Gloucester Lumber Co.*, 167 N.C. 676, 83 S.E. 696 (1914).

§ 44-4. Lien for processing certain goods.—All persons, firms, partnerships and corporations engaged in the business of finishing, bleaching, mercerizing, manufacturing, dyeing, weighing and printing or otherwise processing cotton, wool, silk, artificial silk or goods of which cotton, wool, silk, or artificial silk forms a component part, shall be entitled to a lien upon the property and goods of others, which may come into their possession for work, labor, and materials furnished in any of said processing and said lien shall extend to any unpaid balance on account for work, labor and materials furnished in the course of any of said processing in respect to any of said goods of the same owner whereof the lienor's possession is terminated. The word "owner," as used in this and the following sections shall include a factor, consignee, or other agent entrusted with the possession of the goods held under said lien or with the bill of lading consigning the same to him with authority to sell the same or to deliver them to the lienor for the purpose of being processed. (1931, c. 48, s. 1.)

§ 44-5. Sale of goods at public auction.—If any part of the amount for which goods are held under said lien remains unpaid for a period of sixty days after the earliest item of said amount became due and payable the lienor may sell such goods at public auction first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the town,

if any, otherwise in the county, in which the said goods are situated, or if no newspaper is published in said county then in a newspaper published in an adjoining county and having general circulation in the county where the sale is to take place, and at the courthouse door, the last publication not to be less than five days prior to the sale, and also giving five days' notice of said sale by posting in five or more public places in said county, one whereof shall be in the town or city ward in which said goods are situated, and, if the residence or past address of owner of said goods is known or can be established, sending by registered mail a copy of said notice to said owner at said address at least five days before the date of sale: Provided, that if said goods are readily divisible no more thereof shall be so sold than is necessary to discharge the underlying indebtedness and to cover the expenses of the sale. The proceeds of sale shall be applied to payment of said indebtedness and said expenses, and the balance, if any, shall be paid to the owner or person entitled thereto. The remedy herein provided to enforce said lien shall be in addition to any other provided by law. (1931, c. 48, s. 2; 1943, c. 543.)

ARTICLE 1A.

Wage Liens.

§ 44-5.1. **Wages for two months' lien on assets.**—In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to multiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling. (1901, c. 2, s. 87; Rev., s. 1206; C. S., s. 1197; 1937, c. 223; 1943, c. 501; 1955, c. 1345, s. 4.)

Editor's Note. — The 1937 amendment inserted the words "partnership or individual" twice in this section. Before this amendment it had been held that the section did not apply to the employee of an insolvent individual but only to the employee of an insolvent corporation. See *In re Reade*, 206 N.C. 331, 173 S.E. 342 (1934).

The 1955 amendment transferred this section from § 55-136. The cases cited in the note to this section were decided prior to the transfer of the section.

Section Gives Ancillary Remedy.—This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. *Union Trust Co. v. Southern Sawmills & Lumber Co.*, 166 Fed. 193 (4th Cir. 1908).

What Creditors Favored. — The creditors favored by this section are laborers and workmen and all persons doing labor

or service of whatever character in the regular employment of certain corporations. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N.C. 512, 86 S.E. 184 (1915).

Contractor Not Included. — A contractor, furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation, within the two months next preceding the date of the institution of proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N.C. 512, 86 S.E. 184 (1915).

Agent Having Authority to Deduct Salary from Collections.—Under this section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary earned and expenses incurred before his appointment to the position and more than two months before the appointment of a receiver. *Cummer Lumber Co. v. Seminole Phosphate Co.*, 189 N.C. 206, 126 S.E. 511 (1925).

Claim Based on Contract for Single Piece of Work.—The claim of an independent company which repaired machinery belonging to the insolvent partnership on a single occasion at a contract price fixed by mutual agreement could not constitute a preferred claim under this section, since the claim was for the unpaid contract price—not wages. Moreover, the claim was based on a single piece of work, the company was not hired to do permanent or steady work in the usual course of the occupation of another, and, this being true, it did not render the service in the regular employment of another. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Severance Pay Not Wages Earned. — Employees under a contract providing for severance pay are not entitled to a lien for such pay against the receiver, since severance pay is not wages earned. In re *Port Publishing Co.*, 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Prior Lien Holders Protected. — Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lien holders. *Roberts v. Bowen Mfg. Co.*, 169 N.C. 27, 85 S.E. 45 (1915).

But Not One Taking Mortgage on Corporate Property.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts does so with the knowledge that the lien of his mortgage is subject to be displaced in favor of laborers' liens in case of insolvency. *Humphrey Bros. v. Buell-Crocker Lumber Co.*, 174 N.C. 514, 91 S.E. 971 (1917).

Lien against Receiver.—Employees under a contract providing for paid vacations have a lien against the receiver of the employer for 1/6 of their vacation pay, since this amount was earned during the two months next preceding the institution of insolvency proceedings. In re *Port Publishing Co.*, 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Service after Receivership.—Claims of laborers for wages due them for work done for the receiver of an insolvent partnership during the receivership cannot qualify for a preferred status under this section. *National Sur. Corp. v. Sharpe*, 236 N.C. 35,

72 S.E.2d 109 (1952).

This section does not apply to any wages except those due "for labor, work, and services rendered within," i.e., inside the limits of, "two months next preceding the date when proceedings in insolvency were actually instituted and begun." *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 57, 72 S.E.2d 109 (1952), wherein the court said: "We cannot accept as valid the suggestion contained in *Walker v. Linden Lumber Co.*, 170 N.C. 460, 87 S.E. 331 (1915), that the word 'within' means 'subsequent,' and that the statute, therefore, gives laborers 'a first lien' for all their wages accruing 'after 60 days prior to the insolvency,' notwithstanding the supervening receivership."

The lien of the employees arises upon the sequestration of the property of the insolvent for the purpose of liquidation, or rather the institution of a proceeding for that purpose. The lien does not exist so long as the property remains in the hands of the insolvent. It arises when the property is taken in custodia legis for the purpose of distribution among the creditors. *Leggett v. Southeastern People's College*, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

Priority of Claims of Federal Government.—While this section creates what is denominated a lien, it, in practical effect, grants to the employees of the insolvent a right of payment of the designated wages prior to the payment of any other claim, secured or unsecured. This preference is subordinate to the right of the United States under the provisions of 31 U.S.C.A. § 191, giving priority to debts due the United States. *Leggett v. Southeastern People's College*, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

The lien of the employees under this section is not specific or preferred in the sense necessary to give it precedence over the claim of the federal government for taxes under the provisions of 26 U.S.C.A. § 3672. *Leggett v. Southeastern People's College*, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. *Walker v. Linden Lumber Co.*, 170 N.C. 460, 87 S.E. 331 (1915).

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ 44-6. **Lien given subcontractors, etc., on real estate.**—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given. (1880, c. 44, ss. 1, 3; Code, ss. 1801, 1803; Rev., s. 2019; C. S., s. 2437.)

Editor's Note.—For note on subcontractors' liens, see 30 N.C.L. Rev. 83 (1951).

In General.—Soon after the enactment of § 44-1 et seq., it was held in *Wilkie v. Bray*, 71 N.C. 205 (1874), that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor, and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of this and the following sections relative to the subcontractor's lien. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914).

The injustice of permitting the labor and material of one man to be used to enhance the value of the property of another without compensation, and also that the owner ought not to be required to pay the contractor and then have to pay for labor and material when he had not agreed to do so, led to the enactment of this and the following sections in an effort to adjust the rights of the parties along lines that would be just to both. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

Definition of Subcontractor.—A subcontractor is one who has entered into a contract for the performance of an act with the person who has already contracted for its performance. *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888).

Persons employed by an agent of the principal contractor to perform certain work on the premises may not under this section recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. *Price*

v. Asheville Gas Co., 207 N.C. 796, 178 S.E. 567 (1935).

The lien given by this section was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and materialmen a preference over "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enables them to secure the payment of what is due them, indebtedness due from the debtor to the contractor. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914), citing *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888).

The Contractor's Lien though Subordinated Is Not Lost.—It is quite manifest that our statute gives to the contractor, under whom his employees and agents work, the lien provided in § 44-1 and though subordinated to the lien of the latter under this section, and only displaced when its enforcement would be prejudicial to them, when these are paid the contractor's lien becomes absolute and unconditional. *Lester v. Houston*, 101 N.C. 605, 8 S.E. 366 (1888).

No privity of contract between the owner and the subcontractor is established by this section, so as to enable the former to sue the latter for a debt; but it merely confers upon the materialman a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to him when he fails to protect his own interests in the way prescribed by the statute. *Morganton Hardware Co. v. Mor-*

ganton Graded Schools, 151 N.C. 507, 66 S.E. 583 (1909).

Statute Furnishes Double Security.—The statute (this section and § 44-11) furnishes a double security to those furnishing material, etc., to the contractor, and who give the statutory notice to the owner in giving them a lien upon the property if enforced by suit within six months, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among the claimants thereto entitled, the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

Subcontractor Substituted to the Rights of Contractor.—Where the lien arises under the provisions of this section, it does so by substituting the claimant to the rights of the contractor, enforceable against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment pro tanto of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant. *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918).

Where the lien arises under the provisions of this section it does so by substituting the claimant to the rights of the contractor limited as therein stated. *Widenhous v. Russ*, 234 N.C. 382, 67 S.E.2d 287 (1951); *Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co.*, 259 N.C. 649, 131 S.E.2d 487 (1963).

Defenses of Owner.—While there is no privity of contract between the subcontractor and the owner, the rights of a subcontractor to a lien arises under this section substituting it to the rights of the contractor as against the owner, and therefore in a subcontractor's suit to enforce its lien the owner may set up as defenses the failure of the principal contractor to construct the building in accordance with the contract and the failure of the subcontractor to perform its contract with the principal contractor, and may contest the balance, if any, due the subcontractor on its contract with the principal contractor. *Michael Flynn Mfg. Co. v. J. L.*

Coe Constr. Co., 259 N.C. 649, 131 S.E.2d 487 (1963).

Lien Enforceable though Principal Contractor's Contract Not Completed.—A subcontractor may enforce his lien for labor or materials against the owner of the property though the contract with the principal contractor has not been completed, or even if it has been abandoned. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

Lien Enforceable Regardless of State of Accounts between Contractor and Subcontractor.—Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by this section, and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's demand regardless of the state of accounts between the contractor and the subcontractor. *Borden Brick & Tile Co. v. Pulley*, 168 N.C. 371, 84 S.E. 513 (1915); *Powell v. King Lumber Co.*, 168 N.C. 632, 84 S.E. 1032 (1915).

Time and How Subcontractor's Right Determined.—The right of one, who furnishes materials to a subcontractor, to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required. *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918).

Amount Due from Owner a Trust Fund for Subcontractor.—The amount due the contractor and subject to the claims of materialmen who have filed their statutory notice is not a debt due by the owner to the materialmen in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the materialmen have not filed the required notice or acquired their lien accordingly. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

Priority over Subsequent Liens.—The lien of the subcontractor, when duly filed, has precedence over all other liens attaching to the property subsequent to the time the work was commenced or the material furnished. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

As to priority of subcontractor's lien over railroad mortgages registered after

work commenced on roadbed, see *Dunavant v. Caldwell & N.R.R.*, 122 N.C. 999, 29 S.E. 837 (1898).

Elements Essential to Recovery.—To recover under this section, plaintiff must prove: (1) His subcontract; (2) work done and labor performed in fulfillment thereof; (3) a balance due; (4) notice to the owner as required by statute prior to payment of the contract price to the principal contractor; and (5) a balance due the contractor. Upon such showing the law requires the owner to apply the unexpended contract price due the contractor to the payment of amounts due subcontractors and materialmen of whose claims the owner has received notice, pro rata if necessary. *Schnepf v. Richardson*, 222 N.C. 228, 22 S.E.2d 555 (1942).

In order for a subcontractor to recover against the owner, the subcontractor must show its subcontract with the contractor, material furnished and labor performed in substantial fulfillment thereof, a balance due it, notice to the owner prior to payment of the contract price by the owner to the principal contractor, and a balance due the principal contractor by the owner. *Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co.*, 259 N.C. 649, 131 S.E.2d 487 (1963).

Lien of Subcontractor Is Preferred to That of General Contractor.—This section expressly created a lien for the protection of subcontractors which is preferred to that arising in favor of the general contractor. *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 1285, 4 L. Ed. 2d 1371 (1960).

The lien is enforceable to the extent of the amount due from the owner to the contractor. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E.2d 287 (1951).

Determination of Amount Due to Contractor.—It is material to ascertain and determine what amount, if any, was due by the owner to the contractor at the time of notices given. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E.2d 287 (1951).

For the purpose of ascertaining the amount due by the owner to the contractor at the time of notice given to the owner by a subcontractor or materialman, the owner may, in a suit by such subcontractor or materialman, set up, as a defense, any actual damages caused by the failure of the contractor to complete the building in accordance with the terms of the contract. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E.2d 287 (1951).

The principal contractor is a necessary party to an action to enforce the lien of a

subcontractor, but a trustee in a conveyance subject to the lien is not an essential party. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

No Lien on Public School Buildings.—Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of the legislature to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes. *Morganton Hardware Co. v. Morganton Graded Schools*, 151 N.C. 507, 66 S.E. 583 (1909).

No Lien on Highway.—Under this section subcontractors and materialmen have no lien upon a highway they have constructed. *Pratt Lumber Co. v. T. H. Gill Co.*, 278 Fed. 783 (E.D.N.C. 1922).

Liability of Municipality — No Lien against It.—Though no lien can be filed against a municipality, yet it will be liable to laborers and materialmen, and for labor done and material furnished to the extent of any balance due the contractor and unpaid at the time of the notice. *Scheffow v. Pierce*, 176 N.C. 91, 97 S.E. 167 (1918). See § 44-14.

Seizure by the United States under a tax lien of the claim of the general contractor cannot extinguish the statutory rights and obligations of a subcontractor and a North Carolina owner as between each other. *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 1285, 4 L. Ed. 2d 1371 (1960).

Estoppel to Assert Lien under This Section.—Where plaintiff alleges a contractual relationship with the defendants in both the lien notice and in the complaint, and seeks to enforce its alleged lien pursuant to the provisions of this section, he is estopped from asserting any lien as a subcontractor pursuant to the provisions of this section and §§ 44-8, and 44-9. *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E.2d 257 (1958).

Estoppel to Assert Lien under § 44-1.—By electing to assert a lien as a subcontractor under this section, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnish under § 44-1, and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnish. *Doggett Lumber Co. v. Perry*, 212 N.C. 713, 194 S.E. 475 (1938).

When plaintiff is estopped by its elec-

tion in asserting a lien under this section, from asserting a lien under § 44-1, and its action brought solely under § 44-1 is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under this

section. *Doggett Lumber Co. v. Perry*, 213 N.C. 533, 196 S.E. 831 (1938).

Cited in *Piedmont Elec. Co. v. Vance Plumbing & Elec. Co.*, 197 N.C. 495, 149 S.E. 858 (1929); *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955); *Love v. Snellings*, 246 N.C. 674, 100 S.E.2d 65 (1957).

§ 44-7: Repealed by Session Laws 1943, c. 543.

Editor's Note.—The provisions of the repealed section are now included in § 44-9.

§ 44-8. **Statement of contractor's indebtedness to be furnished to owner; effect.**—When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. (1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478; Rev., s. 2021; C. S., s. 2439.)

Section Is Directed against Contractor.—This section and § 44-12 are directed against, not the owner, but the contractor. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Purpose of Section — Owner Cannot Force Contractor to Supply Statement.—The purpose of this section is to compel the contractor to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. There is no liability created on the part of the owner if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. *Pinkston v. Young*, 104 N.C. 102, 10 S.E. 133 (1889); *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Elements Essential to Recovery.—See same catchline in note to § 44-6.

For Whose Benefit Section Enacted.—This section while enacted primarily for

the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N.C. 417, 100 S.E. 597 (1919).

Statement Required Before General Contractor Receives Any Payment from Owner.—The general contractor, before receiving any payment from the owner, is required by this section to file with the owner a statement of all sums due subcontractors, and the owner is directed to pay such sums directly to the subcontractors rather than to the general contractor. *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 1285, 4 L. Ed. 2d 1371 (1960).

Statement of Contractor Inures to Benefit of Materialmen, etc.—When the contractor furnishes the owner with statements of the amounts due the materialmen, according to this section, a direct obligation of the owner to the materialmen may be created, upon which the latter may sue

in their own names. *Perry v. Swanner*, 150 N.C. 141, 63 S.E. 611 (1909). See note to § 44-9.

Sufficiency of Notice.—The notice or itemized statement required by this section and § 44-9 must be filed in detail specifying the material furnished or labor performed and the time thereof. It must further show the amount due and unpaid so as to put the owner on notice that such amount is demanded. Neither invoices furnished under the contract nor statements made by the contractor to enable him to procure what is due, nor mere knowledge of the owner of the existence of the debt is sufficient to charge him with liability. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Burden Is on Materialman to Prove Notice Given.—While it is true that when a contractor furnishes a list of laborers and materialmen to whom he is indebted, the owner must retain a sufficient part of the contract price to satisfy such claims, the burden is on a person furnishing materials to the contractor to show that such notice was so given by the contractor or that the owner was notified directly by him. There is no lien until and unless the statutory notice, either under this section or under § 44-9, has been given. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Owner Liable to Materialmen for Paying Contractor after Receipt of Statement.—Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon, his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N.C. 417, 100 S.E. 597 (1919).

In order for a material furnisher to hold the owner liable he must show that the owner was notified by him or by the contractor of his claim before the owner completed payment to the contractor. *Economy Pumps v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

Personal Action by Mechanic, Materialmen, etc., against Owner.—A personal action against the debtor for not retaining a sum to pay the subcontractor, when the contractor has furnished him a statement of indebtedness, can be maintained against the owner, where the lien acquired has

been lost by delay to enforce it. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916). See *Hildebrand v. Vanderbilt*, 147 N.C. 639, 61 S.E. 620 (1908).

Duty of Owner to Reserve Funds to Pay Materialmen, etc.—The requirement of this section that the contractor furnish the owner of the building a statement of the persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the amounts due by the latter to the materialmen, and pay it to them, and under § 44-9, no payment to the contractor after such notice shall be a credit on or discharge of the lien provided for the materialmen. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N.C. 417, 100 S.E. 597 (1919).

Remedy of Subcontractors and Materialmen.—The subcontractor and material furnisher, having given the owner an itemized statement of material furnished by them, acquire a lien for the payment of their claims and may maintain a civil action thereon against the owner under the provisions of this section and §§ 44-9 and 44-10 without being required to file their liens within six months, etc., under the provisions of § 44-39 or bring suit within six months thereafter, under those of § 44-43. *Campbell v. Hall*, 187 N.C. 464, 121 S.E. 761 (1924).

Section Not Repealed by Later nor in Conflict with § 44-13.—This and the following two sections are not repealed by c. 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict that will fall within the repealing clause of that act; nor is there conflict between this section, and § 44-13, as amended. It is the legislative intent to extend their provisions to those who furnish materials to the subcontractors of railroads, and, construing the above sections in connection with § 44-39 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months thereafter. *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918).

Effect of Mortgages Subsequent to Notice.—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor has filed his lien in accordance with the statute before the justice of the peace or

clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take cum onere, and subject to the contractor's or

subcontractor's lien so acquired. *Porter v. Case*, 187 N.C. 629, 122 S.E. 483 (1924).

Cited in *Piedmont Elec. Co. v. Vance Plumbing & Elec. Co.*, 197 N.C. 495, 149 S.E. 858 (1929); *Schnepp v. Richardson*, 222 N.C. 228, 22 S.E.2d 555 (1942); *Caudle v. Southern Ry.*, 242 N.C. 466, 88 S.E.2d 138 (1955); *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E.2d 257 (1958).

§ 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.—Any subcontractor, laborer, mechanic, artisan, or person furnishing materials, who claims the lien provided for in this article for labor on, or materials furnished for, any building, vessel, railroad, or real estate, may give notice to the owner, agent or lessee who makes the contract for the labor or materials, of the amount due by the contractor to such claimant. The notice shall be in the form of an itemized statement of the amount due, except where the contract is entire for a gross sum and cannot be itemized. Upon the delivery of the notice to the owner, agent, or lessee, the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor. If the said owner, agent or lessee refuses or neglects to retain, out of the amount due the contractor under the contract, a sum not exceeding the price contracted for which will be sufficient to pay such claimant, then the claimant may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on or a discharge of the lien herein provided for. (1891, c. 203; 1899, c. 335; 1903, c. 478; Rev., s. 2021; 1913, c. 150, s. 4; C. S., s. 2440; 1943, c. 543.)

Cross Reference.—See note to § 44-12.

Editor's Note.—The 1943 amendment rewrote this section, incorporating therein the provisions formerly contained in § 44-7 (C. S. 2438).

Construction with Other Sections.—Manifestly §§ 44-8 through 44-11 must be construed together. *Huske Hardware House v. Percival*, 203 N.C. 6, 164 S.E. 334 (1932).

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. *Guilford Lumber Mfg. Co. v. Holladay*, 178 N.C. 417, 100 S.E. 597 (1919).

Elements Essential to Recovery.—See same catchline in note to § 44-6.

Rights of Subcontractor and Obligation of Owner Generally.—It is clear that under the North Carolina statutes the subcontractor who notifies the owner of his claim has (1) A lien upon the improved real estate superior to any lien which the general contractor may obtain, and (2) an independent cause of action, against the owner, maintainable in his own name and in his own right, without regard to the time limitations upon the commencement of suit to enforce a lien, and the owner, after notice, may not avoid or reduce his direct liability to the

subcontractor by any payment to, or settlement with, the general contractor. In any settlement with the general contractor, the owner may take credit for payments made by him to subcontractors, and he is required by statute to withhold sufficient funds to pay all of the claims of subcontractors of which he has notice. The obligation of the owner to the subcontractor is, thus, primary; his obligation to the general contractor, secondary. *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 1285, 4 L. Ed. 2d 1371 (1960).

There is no lien until the statutory notice has been given either under this or under the preceding section. *Economy Pumps v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

If the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. If he fails to do so, then the laborer may give the owner of the property notice, and thus create the lien in his favor. *Pinkston v. Young*, 104 N.C. 102, 10 S.E. 133 (1889); *Norfolk Bldg. Supplies Co. v. Elizabeth City Hosp. Co.*, 176 N.C. 87, 97 S.E. 146 (1918).

A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized

statement upon request, is not a sufficient notice upon which to base a materialman's lien. Such notice or itemized statement must show substantial compliance with the statute. However, if it is an entire contract for a gross sum the particularity otherwise required is not essential. *Huske Hardware House v. Percival*, 203 N.C. 6, 164 S.E. 334 (1932).

Sufficiency of Notice.—See same catchline in note to § 44-8.

Burden Is on Materialman to Prove Notice Given.—See same catchline in note to § 44-8.

Right to Prove Notice or Waiver by Testimony of Owners' Attorney.—Where property owners constituted an attorney their agent to distribute among subcontractors the amount remaining due for the construction of a dwelling, plaintiff subcontractor had the right to show by the attorney that plaintiff's claim was filed or that the filing was waived, there being nothing to indicate that any confidential communication was involved. *Goldston v. Randolph Mach. Tool Co.*, 245 N.C. 226, 95 S.E.2d 455 (1956).

Notice to Be Given before Settlement with Contractor.—It is necessary, to enforce a lien on a building for materials furnished the contractor, that the materialman file with the owner an itemized statement of the amounts due for materials, or that he give notice to the owner of the amount due him before the owner settles with the contractor, but the lien exists only to the extent of the amount then due. *Orinoco Supply Co. v. Masonic & E. Star Home*, 163 N.C. 513, 79 S.E. 964 (1913); *Schnepp v. Richardson*, 222 N.C. 228, 22 S.E.2d 555 (1942), construing former § 44-7, since repealed.

Same—Rule Not Affected by § 44-8.—This rule is not affected by § 44-8. That section is directed against the contractor, and is intended to compel him to furnish to the owner of the premises the statement necessary to give notice of claims of subcontractors and others. But if the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. *Pinkston v. Young*, 104 N.C. 102, 10 S.E. 133 (1889), construing former § 44-7.

Same—Otherwise No Lien Attaches.—When the required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. *Orinoco Supply Co. v. Masonic & E. Star Home*, 163 N.C. 513, 79 S.E. 964 (1913).

And the owner is justified in making payment to the contractor. *Clark v. Edwards*, 119 N.C. 115, 25 S.E. 794 (1896), construing former § 44-7.

Same—Even though Payment in Full Is Made in Advance.—In *Rose v. Davis*, 188 N.C. 355, 124 S.E. 576 (1924), it was held that a furnisher of material, used in the building by a contractor, acquired no lien on the building, under former § 44-7, by notice to the owner filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor. *North Carolina Lumber Co. v. Spear Motor Co.*, 192 N.C. 377, 135 S.E. 115 (1926).

Same—Right Statutory and Dependent upon Notice.—To share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916), construing former § 44-7.

The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given, nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. *Rose v. Davis*, 188 N.C. 355, 124 S.E. 576 (1924), construing former § 44-7.

Purpose of Notice—Liability of Owner for Disregarding It.—The notice required by former § 44-7 was intended to charge the owner or lessee of the land to withhold so much of the money due to the contractor as would pay the subcontractor's claim. If he failed to do so, he could not avoid his liability by paying the contractor. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891), construing former § 44-7.

Where the owner of a building being erected pays, according to the contract, his contractor a sum of money in excess of the amount due a materialman after he has received notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to the building as an obligation of the owner. *Blue Pearl Granite Co. v. Merchants' Bank*, 172 N.C. 354, 90 S.E. 312 (1916), applied; *Piedmont Elec. Co. v. Vance Plumbing & Elec. Co.*, 197 N.C. 495, 149 S.E. 858 (1929), distinguished. *Beeson Hardware*

Co. v. Burtner, 199 N.C. 743, 155 S.E. 733 (1930), construing former § 44-7.

That Laborers Are Working on Building Is Not of Itself Notice.—The mere fact that laborers and subcontractors are working on a building is not notice to the owner not to pay out to the contractor until it is ascertained how much is due by the latter to each and every subcontractor, laborer, materialman, etc. Clark v. Edwards, 119 N.C. 115, 25 S.E. 794 (1896), construing former § 44-7.

Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under this section, of any claim of lien thereon. Norfolk Bldg. Supplies Co. v. Elizabeth City Hosp. Co., 176 N.C. 87, 97 S.E. 146 (1918), construing former § 44-7.

Notice to Owner's Architect Not Notice to Owner.—The object of the notice required by the statute [former § 44-7] to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprise the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the architect upon which the former is to be allowed a payment of a certain percent under the terms of the contract as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien. Norfolk Bldg. Supplies Co. v. Elizabeth City Hosp. Co., 176 N.C. 87, 97 S.E. 146 (1918).

Unpaid Balance at Time of Notice Subject to Lien.—Where the owner of the building has paid his contractor to the

time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. Blue Pearl Granite Co. v. Merchants' Bank, 172 N.C. 354, 90 S.E. 312 (1916).

A subcontractor can enforce his right of lien against the owner of property only to the extent of any unpaid sums due the contractor at the date of giving notice to the owner of the subcontractor's claim. Clark v. Edwards, 119 N.C. 115, 25 S.E. 794 (1896).

Notice of Lien to Justice or Clerk Not Necessary.—The lien of the subcontractor is acquired by notice to the owner, and a filing of the notice of the lien with a justice or a clerk is not necessary, this being expressly provided by § 44-10. Morganton Mfg. & Trading Co. v. Andrews, 165 N.C. 285, 81 S.E. 418 (1914); Charlotte Pipe & Foundry Co. v. Southern Aluminum Co., 172 N.C. 704, 90 S.E. 923 (1916); Porter v. Case, 187 N.C. 629, 122 S.E. 483 (1924).

As to personal action against owner when lien lost by delay to enforce, see Hildebrand v. Vanderbilt, 157 N.C. 639, 61 S.E. 620 (1908); Charlotte Pipe & Foundry Co., v. Southern Aluminum Co., 172 N.C. 704, 90 S.E. 923 (1916), cited in note to § 44-43.

Assignment of Lien.—The statutory lien of a laborer or materialman, under the provisions of this section, is assignable as in case of ordinary business contracts. Horne-Wilson v. Wiggins Bros., 203 N.C. 85, 164 S.E. 365 (1932).

Cited in Dixon v. Ipock, 212 N.C. 363, 193 S.E. 392 (1937); Ranlo Supply Co. v. Clark, 247 N.C. 762, 102 S.E.2d 257 (1958).

§ 44-10. Sums due by statement to constitute lien.—The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court. (1887, c. 67, s. 2; Rev., s. 2022; C. S., s. 2441.)

Elements Essential to Recovery.—See same catchline in note to § 44-6.

Acquisition of Lien without Filing Notice.—By virtue of § 44-39, the lien of a contractor must be filed in six months, but by this section, the lien of the laborer, mechanic or artisan can be acquired without filing if a statement of the amount due is rendered the owner. [See note to § 44-9.] However acquired, the lien is lost under § 44-43 if action thereon is not begun in six months. Hildebrand v. Vanderbilt, 147 N.C. 639, 61 S.E. 620 (1908).

Same — Personal Action When Lien

Lost.—But when the lien acquired is lost by not bringing suit within six months, an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. Hildebrand v. Vanderbilt, 147 N.C. 639, 61 S.E. 620 (1908).

Cited in Schnepf v. Richardson, 222 N.C. 228, 22 S.E.2d 555 (1942); United States v. Durham Lumber Co., 257 F.2d 570 (4th Cir. 1958), aff'd, 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960).

§ 44-11. Where sums due contractor from owner insufficient; payment pro rata.—If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant. (1887, c. 67, s. 3; Rev., s. 2023; 1913, c. 150, s. 5; C. S., s. 2442.)

Provisions of § 44-40 Do Not Affect Distribution under This Section.—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of this section; and construing this section with other relevant sections, it is held that it does not conflict with § 44-40 requiring that liens shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk, for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914).

A right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor, are incidents of the rights given

the subcontractor by the provisions of this section. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

Priority of Claims.—One who has furnished material to a contractor, and who, with others, has given the statutory notice to the owner by enforcing his lien by action within the six months, acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

Cited in *Piedmont Elec. Co. v. Vance Plumbing & Elec. Co.*, 197 N.C. 495, 149 S.E. 858 (1929); *Dixon v. Ipock*, 212 N.C. 363, 193 S.E. 392 (1937); *Schnepf v. Richardson*, 222 N.C. 228, 22 S.E.2d 555 (1942); *United States v. Durham Lumber Co.*, 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960); *Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co.*, 259 N.C. 649, 131 S.E.2d 487 (1963).

§ 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.—If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1887, c. 67, s. 4; Rev., s. 3663; 1913, c. 150, s. 8; C. S., s. 2443.)

Section Is Directed against Contractor.—This section and § 44-8 are directed against, not the owner of the property but the contractor. The purpose is to compel the latter to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Owner Cannot Compel Contractor to Furnish Statement.—There is no liability created on the part of the owner of the property if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that the contractor has

not paid the laborer or mechanic or that he owes him any particular sum. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Subcontractor May Furnish Statement if Contractor Does Not.—A contractor who fails to furnish under this section a statement of all sums due subcontractors is guilty of a misdemeanor, but, whether he does or not, a subcontractor may furnish the owner with a statement of his account. If he does so, a lien immediately arises in his favor under § 44-9, and thereafter no "payment to the contractor shall be a credit on or a discharge of the lien . . ." *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363

U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960).

Applied in *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957).

§ 44-13. Laborer for railroad contractor may sue company; conditions of action.—As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or materialman may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or materialman the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given by the materialman to said company within thirty days after the materials have been furnished. Such notice to be given by the laborer shall be in writing and shall state the amount and the number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney; and such notice of the materialman shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such materialman or his attorney. The notice shall be served on an engineer, agent or superintendent employed by said company having charge of the section of road on which such labor was performed or material furnished, personally or by leaving the same at the office or usual place of business of said engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within ninety days after notice is given to the company by such laborer or materialman as above provided. (1871-2, c. 138, s. 12; Code, s. 1942; Rev., s. 2018; 1913, c. 150, s. 1; C. S., s. 2444.)

There is no conflict between § 44-8 and this section as amended. It is the legislative intent to extend the provisions of law relative to materialmen and subcontractors of railroads. *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918).

Application to Laborers Constructing Railroads.—This section applies only to laborers "constructing railroads." *Glazener v. Gloucester Lumber Co.*, 167 N.C. 676, 83 S.E. 696 (1914).

Logging Railroad Is within Section.—A logging road operated by the use of steam is a railroad within the meaning of this section, and by following the requirements of the section a lien may be obtained for work done in its construction, though done under an independent contractor. *Carter v. Coharie Lumber Co.*, 160 N.C. 8, 75 S.E. 1074 (1912).

Substantial Compliance with Statute Necessary.—The right to look beyond the contract of employment to an artificial responsibility that may be thrust upon the company under the provisions of this section is a creature of the statute, and one who claims the benefit of it must, like a mechanic seeking to enforce a lien, and

upon the same principle, show a substantial compliance with the requirements of this section. *Wray v. Harris*, 77 N.C. 77 (1877); *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700 (1888); *Moore v. Cape Fear & Y.V. Ry.*, 112 N.C. 236, 17 S.E. 152 (1893).

Where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account, it was held that a demurrer to the complaint was properly sustained. *Moore v. Cape Fear & Y.V. Ry.*, 112 N.C. 236, 17 S.E. 152 (1893).

Assignment of Claim after Compliance with Statute.—After complying with the requirements of this section a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor. *Moore v. Cape Fear & Y.V. Ry.*, 112 N.C. 236, 17 S.E. 152 (1893).

Time of Filing Lien and Its Precedence.

—A contractor or subcontractor who does work or furnishes material for the construction of a railroad is entitled to file a lien on the property of the company within six months from the time of doing such work or furnishing materials, and when filed the lien has precedence over a mortgage registered after the work has been commenced. *Dunavant v. Caldwell & N.R.R.*, 122 N.C. 999, 29 S.E. 837 (1898).

Misjoinder of Parties Not Fatal.

Where there were intermediate contrac-

tors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor, it was held that conceding that the plaintiff could in no event recover from any but the railroad company itself, under this section, yet the addition of the first contractor as a party would not be a fatal misjoinder. *Moore v. Cape Fear & Y.V. Ry.*, 112 N.C. 236, 17 S.E. 152 (1893).

§ 44-14. Contractor on municipal building to give bond; action on bond.—Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work under a contract or agreement made directly with the principal contractor or subcontractor. The amount of the said bond to be given by said contractor shall be equal to the contract price up to two thousand dollars, and when the contract price is between two and ten thousand dollars the amount of said bond shall be two thousand dollars plus thirty-five percent of the excess of the contract price over two thousand dollars and under ten thousand; when the contract is over ten thousand dollars, the amount of the said bond shall be two thousand dollars plus twenty-five percent of the excess of the contract price over the sum of two thousand dollars. If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor. Any laborer doing work on said building and materialman furnishing material therefor and used therein, under a contract or agreement between said laborer or materialman and the principal contractor or subcontractor has the right to sue on said bond, the principal and sureties thereof, in the courts of this State having jurisdiction of the amount of said bond, and any number of laborers or materialmen whose claims are unpaid for work done and material furnished in said building have the right to join in one suit upon said bond for the recovery of the amounts due them respectively. Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given. Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the building, road, or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that

such intervention shall be made within six months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant pro rata of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amounts of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability. (1913, c. 150, s. 2; 1915, c. 191, s. 1; C. S., s. 2445; 1923, c. 100; 1927, c. 151; 1935, c. 55.)

- I. General Consideration.
- II. Protection Afforded by Bond.
- III. Rights and Liabilities of Sureties.
 - A. In General.
 - B. Instances of Liability.
 - C. Instances of Nonliability.
- IV. Liability of Officials.

I. GENERAL CONSIDERATION.

Editor's Note.—As to relation of section to law of contracts, see 13 N.C.L. Rev. 99. As to 1935 amendment, see 13 N.C.L. Rev. 368.

Section Applies Only to Municipal Corporations.—This section applies only to bonds given to a county, city, town or other municipal corporation as required therein. *Independence Trust Co. v. Porter*, 190 N.C. 680, 130 S.E. 547 (1925).

Section Not Applicable to Highway Commission.—This section does not apply to the State Highway Commission. *John L. Roper Lumber Co. v. Lawson*, 195 N.C. 840, 143 S.E. 847 (1928).

This section does not apply to a bond given by a contractor to the State Highway Commission. *Independence Trust Co. v. Porter*, 190 N.C. 680, 130 S.E. 547 (1925).

Section Not Applicable to East Carolina Teachers' College.—While the board of trustees of the East Carolina Teachers' College is made a body corporate, it is not a municipal corporation within the meaning of this section. *Hunt Mfg. Co. v. Hudson*, 200 N.C. 541, 157 S.E. 799 (1931).

A local statute providing that this section should be read into private construction bonds is invalid. *Plott Co. v. H. K. Ferguson Co.*, 202 N.C. 446, 163 S.E. 688 (1932).

Section Prescribes Procedure to Be Followed by Claimant-Beneficiary.—When a claimant-beneficiary under this statutory provision brings his action, the procedure to be followed to enforce payment of a sum not to exceed the penal sum of the bond and distribution of this sum among claimants, is that prescribed by this section. *American Bridge Div. United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

And Contemplates Notice Which In-

forms.—This section contemplates notice which informs, not a notice which misinforms. *American Bridge Div. United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

Notice Erroneously Stating Time Limit for Intervention.—Where, in a creditor's action against the contractor and the surety on his bond to recover for labor and materials furnished and used in public construction, the notice of the pendency of the suit erroneously states the time limit for intervention by the other claimants, such notice does not meet the requirements of the statute, and a claimant who has given notice of his claim to the contractor and the surety within six months of the completion of the contract may not be precluded from intervening and joining in the recovery against the bond. *American Bridge Div. United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

Material Furnisher Can Acquire No Lien on Public Building.—A material furnisher to a subcontractor, who has used the material in the construction of a public school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the school board in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used. *Griffin Mfg. Co. v. Bray*, 193 N.C. 350, 137 S.E. 151 (1927).

Bond Is in Lieu of Lien on Public Building.—Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of this section, is given for their benefit in lieu of the right to acquire a lien thereon. *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926).

Section Gives Municipality No Right to Withhold Funds of Contractor.—Under this section the municipality cannot withhold funds belonging to the contractor upon notice from a laborer or materialman that the work done or material fur-

nished by him to the contractor has not been paid for. The contract of the laborer or materialman is with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even pro tanto, of its obligation to the contractor by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in *Scheff v. Pierce*, 176 N.C. 91, 97 S.E. 167 (1918), was disapproved in *Noland Co. v. Board of Trustees*, 190 N.C. 250, 129 S.E. 577 (1925); *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926).

Limitation of Action upon Bond.—Under this section the legislative intent was not to bar the rights of materialmen after three years from the time the materials were furnished, but from the time of the completion of the entire contract. *Chappell v. National Sur. Co.*, 191 N.C. 703, 133 S.E. 21 (1926).

Provision That Action Be Brought within Reasonable Time.—Under this section the provision in a bond for public construction that action thereon should be brought within a reasonable time is valid. *Horne-Wilson v. National Sur. Co.*, 202 N.C. 73, 161 S.E. 726 (1932).

Cited in Asheville Supply & Foundry Co. v. Catawba Constr. Co., 198 N.C. 177, 151 S.E. 93 (1930); *Becker Coal & Builders Supply Co. v. Board of Educ.*, 199 N.C. 575, 155 S.E. 252 (1930).

II. PROTECTION AFFORDED BY BOND.

This section was intended to provide protection for laborers and materialmen furnishing labor or material for the construction of public works commensurate with that afforded them while engaged in private construction. *Owsley v. Henderson*, 228 N.C. 224, 45 S.E.2d 263 (1947). See *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926).

The General Assembly has, by the enactment of this section and § 136-28, given to laborers and materialmen engaged in public construction a substantial equivalent to the lien given laborers and materialmen engaged in private construction. The surety on the bond is, for practical purposes, the substitute for the lien. *American Bridge Div. United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

Provisions of Section Are Incorporated in Bond.—The bond required by this section must provide the protection required by law. To that end the provisions of the section, if not actually included in the written agreement, are incorporated

therein by operation of law. *Owsley v. Henderson*, 228 N.C. 224, 45 S.E.2d 263 (1947).

Liability of Bond to Materialmen, etc., Conclusive Regardless of Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. *Standard Elec. Time Co. v. Fidelity & Deposit Co.*, 191 N.C. 653, 132 S.E. 808 (1926). See *Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928), holding that the amendment was passed to meet the decisions in *Warner v. Halyburton*, 187 N.C. 414, 121 S.E. 756 (1924), and *Ideal Brick Co. v. Gentry*, 191 N.C. 636, 132 S.E. 800 (1926).

Prior to 1923 Amendment a Contrary Rule Prevailed.—Where the contractor's bond for the erection of a public building does not create a liability on the surety to pay for the materials furnished for the erection of the building, but only imposes the duty to prevent loss to the municipality, there is no presumption that the bond which was executed prior to the 1923 amendment incorporated this provision, and no liability to the surety will be thereunder created. *Page Trust Co. v. Carolina Constr. Co.*, 191 N.C. 664, 132 S.E. 804 (1926).

This section before the 1923 amendment imposed no liability upon the surety in favor of those furnishing material, etc., unless that could be construed from the terms expressed in the bond, and in the building contract to which the bond referred. *Ideal Brick Co. v. Gentry*, 191 N.C. 636, 132 S.E. 800 (1926).

Provision Taking Away Right of Indemnification Is Void.—The policy of law with respect to mechanics' and laborers' liens, as evidenced by this section and decisions thereon, is to give protection to creditors of this class by expressly providing for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building; and hence any provision in incorporated in bonds of this character that takes away this right is contrary to our public policy and the express provisions of this section and void. *Ingold v. Hickory*, 178 N.C. 614, 101 S.E. 525 (1919). See *Guilford Lumber Mfg. Co. v. Johnson*, 177 N.C. 44, 97 S.E. 732 (1919).

Provision Limiting Right of Action to Obligor Is Void.—In *Maryland Cas. Co. v. Fowler*, 31 F.2d 881 (4th Cir. 1929), affirming 27 F.2d 421 (M.D.N.C. 1928), it

was held that under this section a school building contractor's bond, which provided that no right of action thereon should accrue to any person other than the obligee, was void insofar as it affected the claims of laborers and materialmen protected by the bond.

Parties May Contract for Protection in Addition to Statutory Minimum.—This section prescribes the minimum protection that must be furnished, but does not undertake to stipulate the maximum. The indemnity company will not be permitted to afford protection less than that required by law. On the other hand it may assume any additional liability and provide any additional protection it and the assured may agree upon. *Owsley v. Henderson*, 228 N.C. 224, 45 S.E.2d 263 (1947).

Effect of Taking Note of Contractor.—The bond required by this section inures to the benefit of a materialman, even though he took the note of the contractor for the materials he furnished. *Standard Elec. Time Co. v. Fidelity & Deposit Co.*, 191 N.C. 653, 132 S.E. 808 (1926); *Moore v. Builders Material Co.*, 192 N.C. 418, 135 S.E. 113 (1926).

III. RIGHTS AND LIABILITIES OF SURETIES.

A. In General.

Liability of Surety.—Under this section the surety on a contractor's bond for the erection of a municipal building is liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, except the surety is not liable for an amount in excess of the penalty of the bond. *Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928).

Same—Determined in Light of Contract and Bond.—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose. *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926).

Same—Limited to Penalty of Bond.—The surety on the contractor's bond for the erection of a public building is only liable for the amount of the penalty of the bond. *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926); *Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928).

A judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution. *Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928).

When Surety Takes Over Contract.—A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit, changes its liability as a surety on the bond and this section is not applicable. *Hunt Mfg. Co. v. Hudson*, 200 N.C. 541, 157 S.E. 799 (1931).

Surety's Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has reserved under the terms of the building contract a certain portion of the cost of construction, and the surety bond, given in accordance with this section, construed with the contract, provides that the surety will be subrogated to the rights of the principal in the event of the contractor's default, the surety is entitled to the money thus reserved as against the laborers and materialmen, whose claims remain unpaid after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into court under the statutory provision. *Robinson Mfg. Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926).

B. Instances of Liability.

Materials Not Actually Used.—The materialmen have a claim against the surety on the bond required by this section, whether the materials were actually used in the building or not. *Standard Sand & Gravel Co. v. Fidelity & Cas. Co.*, 191 N.C. 313, 131 S.E. 754 (1926). See *Moore v. Builders Material Co.*, 192 N.C. 418, 135 S.E. 113 (1926).

Material Furnished Subcontractor.—When according to the terms of its undertaking the surety on a contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, this liability not only extends to such as may have furnished the material directly to the original contractor, but to those who have done so to his subcontractors. *Standard Elec. Time Co. v. Fidelity & Deposit Co.*, 191 N.C. 653, 132 S.E. 808 (1926).

Feed for teams working on a public highway comes within the contemplation of this section as material furnished, mak-

ing a surety upon the contractor's bond for the building of a county highway liable. *Chappell v. National Sur. Co.*, 191 N.C. 703, 133 S.E. 21 (1926).

Compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety of the contractor's bond where the bond is given in conformity with the statute. *Snelson v. Hill*, 196 N.C. 494, 146 S.E. 135 (1929).

Rental Charges for Equipment.—A bond for public construction, conditioned upon the satisfaction of all claims and demands incurred in the performance of the contract and payment for labor and material, is held to include rental cost of pneumatic machinery or equipment hired to do mechanical work in furtherance of the contract. And the liability for rental charges is not limited to the time such equipment was in actual operation. *Owsley v. Henderson*, 228 N.C. 224, 45 S.E.2d 263 (1947).

C. Instances of Nonliability.

Money Loaned to Contractors.—A bank loaning money to a contractor to build a public highway may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose. *Snelson v. Hill*, 196 N.C. 494, 146 S.E. 135 (1929).

And money advanced by a foreman to the "petty cash account" of the contractor to build a public highway, and used in making repairs to the machinery from time to time, purchasing materials, and paying freight thereon, where the foreman took no assignments for the purchase

made from said account, was held not covered by the contractor's bond. *Snelson v. Hill*, 196 N.C. 494, 146 S.E. 135 (1929).

Payments for Machinery Parts Used to Replace Borrowed Parts.—Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. *Snelson v. Hill*, 196 N.C. 494, 146 S.E. 135 (1929).

IV. LIABILITY OF OFFICIALS.

No civil liability will attach to municipal and county officers in their official capacity for failure to take the bond required by this section. *Warner v. Halyburton*, 187 N.C. 414, 121 S.E. 756 (1924).

County Officers Subject to Indictment.—A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under this section, the remedy prescribed being by indictment of the latter in their individual capacity. *Fore v. Feimster*, 171 N.C. 551, 88 S.E. 977, 1916 F L.R.A. 481 (1916); *Noland Co. v. Board of Trustees*, 190 N.C. 250, 129 S.E. 577 (1925); *Hunter v. Allman*, 192 N.C. 483, 135 S.E. 291 (1926).

Misdemeanor Provision Still Applicable.—The provision making it a misdemeanor to fail to require the bond as fixed by this section is still applicable notwithstanding the amendment of 1923. *Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928).

ARTICLE 3.

Liens on Vessels.

§ 44-15. **For towage and for supplies at home port.**—Every vessel, boat, scow, lighter, flat, raft or other watercraft is subject to a lien for the payment of towage done by any steamboat or tugboat; and every vessel and boat is subject to a lien for debts due for materials and supplies furnished to such vessel or boat in her home port. These liens shall be filed and enforced as is provided for other liens. (1893, c. 357; Rev., s. 2040; 1909, c. 147; C. S., s. 2446.)

Cross Reference.—For lien on vessel for work on same or material furnished, see § 44-1 and note.

§ 44-16. **For labor in loading and unloading.**—Every vessel, her tackle, apparel and furniture, is subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by

any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (1881, c. 356, s. 1; Code, s. 1804; Rev., s. 2041; C. S., s. 2447.)

§ 44-17. **Filing lien; laborer's notice to master.**—The liens provided for in the preceding sections shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided. (1881, c. 356, s. 2; Code, s. 1805; Rev., s. 2042; C. S., s. 2448.)

§ 44-18. **Enforcement of lien.**—The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace. (1881, c. 356, s. 3; Code, s. 1806; Rev., s. 2043; C. S., s. 2449.)

In Court of Admiralty.—A lien given is enforceable in a court of admiralty. by a state statute for supplies furnished The Pearl, 189 Fed. 540 (E.D.N.C. 1911). to a vessel in her home port in the state

§ 44-19. **Judgment against contractor binds master and vessel.**—The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment. (1881, c. 356, s. 4; Code, s. 1807; Rev., s. 2044; C. S., s. 2450.)

§ 44-20. **Liens not to exceed amount due contractor.**—The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given. (1881, c. 356, s. 5; Code, s. 1808; Rev., s. 2045; C. S., s. 2451.)

§ 44-21. **Owner to see laborers paid.**—In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedore or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or boss stevedore are fully paid the wages that may be due such laborer before he makes final settlement with the contractor, stevedore or boss stevedore. (1887, c. 145, s. 1; Rev., s. 2046; C. S., s. 2452.)

§ 44-22. **Owner may refuse to settle with contractor until laborers paid.**—Any owner or agent referred to in the preceding section [§ 44-21] may refuse final settlement with the boss stevedore or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done. (1887, c. 145, s. 2; Rev., s. 2047; C. S., s. 2453.)

§ 44-23. **Owner may pay orders for wages.**—It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may

be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price. (1887, c. 145, s. 3; Rev., s. 2048; C. S., s. 2454.)

§ 44-24. Laborer's right of action against owner.—Any owner or agent of such vessel who neglects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or boss stevedore. (1887, c. 145, s. 4; Rev., s. 2049; C. S., s. 2455.)

§ 44-25. Stevedore's false oath punishable as perjury.—If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, [§§ 44-21 to 44-24], he shall be guilty of a felony and on conviction thereof shall be punished as is now prescribed by law for perjury. (1887, c. 145, s. 5; Rev., s. 3613; C. S., s. 2456; 1943, c. 543.)

Cross Reference.—As to punishment for perjury, see § 14-209.

§ 44-26. Stevedores to be licensed; omission misdemeanor.—No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1891, c. 450; 1899, c. 595; Rev., ss. 2050, 3791; C. S., s. 2457.)

§ 44-27. Tax and bond on procuring license.—Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the State of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained. (1891, c. 450; Rev., s. 2051; C. S., s. 2458.)

ARTICLE 4.

Warehouse Storage Liens.

§ 44-28. Liens on goods stored for charges.—Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid. Provided, however, where the holder of a security interest with respect to the property stored, or any part thereof, has instituted appropriate legal proceedings for the recovery of possession of the property, such holder shall be entitled to possession under the writ or other process upon payment of a fair fractional portion of the total storage charges reasonably allocable to the storage of the property described in the writ or other process. (1913, c. 192, s. 1; 1915, c. 190, s. 1; C. S., s. 2459; 1965, c. 1057.)

Cross Reference.—As to effective period for lien on leaf tobacco, see § 44-69.

Editor's Note.—The 1965 amendment added the second sentence.

Application of Section.—This section applies to such persons, firms or corporations as operate warehouses as a business for compensation, and not to an isolated

instance in which goods or chattels are left in a store or building of the claimant. *Champion Shoe Mach. Co. v. Sellers*, 197 N.C. 30, 147 S.E. 674 (1929).

§ 44-29. Enforcement by public sale.—If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the county courthouse door, after first advertising such sale for ten days at said courthouse door, and three other public places in said county, or in some newspaper published in said county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, pay to the owner of such furniture, tobacco, goods, wares or merchandise. (1913, c. 192, s. 2; 1915, c. 190, s. 2; C. S., s. 2460.)

Cross Reference.—As to requirement that Commissioner of Revenue be given thirty days' notice of sale of motor vehicle under mechanic's or storage lien, see § 20-77, subsec. (c).

Cited in *Champion Shoe Mach. v. Sellers*, 197 N.C. 30, 147 S.E. 674 (1929).

ARTICLE 5.

Liens of Hotel, Boarding and Lodging House Keeper.

§ 44-30. Lien on baggage.—Every hotel, boardinghouse keeper and lodging house keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boardinghouse or lodging house, until all reasonable charges for such room, bed and board are paid. (1899, c. 645, s. 1; Rev., s. 2037; 1917, c. 26, s. 1; C. S., s. 2461.)

Cross Reference.—As to hotels, inns, etc., generally, see § 72-1 et seq.

Property of Third Party.—An innkeeper has a lien even upon the goods of a third person held by the guest and brought to the inn, with the qualification however, that if he knew that they belonged to such third person he has no lien upon them. *Covington v. Newberger*, 99 N.C. 523, 6 S.E. 205 (1888).

A hotel keeper's lien for charges, under this section, was held not to attach to an automobile belonging to a third person which is brought to the hotel by the guest under given circumstances. *Pate Hotel Co. v. Blair*, 207 N.C. 464, 177 S.E. 330 (1934).

Occasional Entertainment of Strangers Not Innkeeping.—One who entertains strangers only occasionally, although he receives compensation for it, is not an inn-

keeper. *State v. Mathews*, 19 N.C. 425 (1837).

The principles of the law of bailment, as they apply to an action for negligent breach of duty arising under the implied contract of bailment, are not affected by the statutory lien given by this section. *Wells v. West*, 212 N.C. 656, 194 S.E. 313 (1937).

A proprietor of a lodging house is not a bailee of personal property left in the room rented by the owner of the personality, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personality necessary to establish the relationship, and this result is not affected by the statutory lien given by this section. *Wells v. West*, 212 N.C. 656, 194 S.E. 313 (1937).

§ 44-31. Baggage may be sold.—If such charges are not paid within ten days after they become due, then the hotel, boardinghouse or lodging house keeper is authorized to sell said baggage or other property at the courthouse door, or in front of any public building in the town in which the lien attaches, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property. (1899, c. 645, s. 2; Rev., s. 2038; 1917, c. 26, s. 2; C. S., s. 2462; 1935, c. 364.)

§ 44-32. Notice of sale.—Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a

resident of the State; but if he is a nonresident of the State, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same. (1887, c. 645, s. 3; Rev., s. 2039; C. S., s. 2463.)

ARTICLE 6.

Liens of Livery Stable Keepers.

§ 44-33. **Lien for ninety days' keep on animals in possession.**—Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable. (1911, c. 141, s. 1; C. S., s. 2464.)

§ 44-34. **Enforcement by public sale.**—If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, pay to the owner of said animal. (1911, c. 141, s. 2; C. S., s. 2465.)

§ 44-35. **Notice of sale to owner.**—Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the State; but if he be a nonresident of the State, or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same. (1911, c. 141, s. 3; C. S., s. 2466.)

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§ 44-36. **Season of sire a lien.**—In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet, cow or sow, turns the same to a studhorse, jack, bull, or boar, for the purpose of raising colts, calves, or pigs, the price charged for the season of the studhorse, jack, bull, or boar constitutes a lien on the colt, calf, or pigs until the price so charged for the season is paid. (1872-3, c. 94, s. 1; Code, s. 1797; 1885, c. 72; 1887, c. 14; Rev., s. 2024; 1915, c. 18, s. 1; C. S., s. 2467.)

§ 44-37. **Colts, etc., not exempt from execution for season price.**—The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the pigs. (1872-3, c. 94, s. 2; 1879, c. 47; Code, s. 1798; 1885, c. 72; Rev., s. 2025; 1915, c. 18; 1917, c. 229; C. S., s. 2468.)

§ 44-37.1. **Further as to lien on colt, calf or pig for service of sire.**—The owner of any stallion, jack, bull, boar, or semen therefrom, shall have a lien upon any colt, calf or pig begotten by such animal or by means of artificial

insemination with such semen, for the price stipulated to be paid for such service. Such lien shall continue in force until the service price is paid.

The colt, calf or pig shall not be exempt from execution for the payment of the service price by reason of the operation of the personal property exemption, provided the person claiming such lien institutes action to enforce the lien within twelve (12) months from the birth of such offspring. (1957, c. 787.)

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.—All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; Code, s. 1784; Rev., s. 2026; C. S., s. 2469.)

Cross References. — As to when statement constitutes a lien without filing, see § 44-10. As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Compliance with Section Necessary to Perfect Lien.—See *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Compliance with Section Not Required to Perfect Lien under § 44-2.—See note to § 44-2.

"Filing" Imports More than Mere Delivery to Clerk's Office.—The filing of a lien for labor or materials imports more than mere delivery of the written claim to the clerk's office, and requires the transcribing of the notice of lien in the lien docket in the clerk's office and the indexing of same in the name of the claimant (G.S. 2-42) but, as distinguished from liens required by statute to be registered in the office of the register of deeds (G.S. 161-22) does not require cross-indexing. *Saunders v. Woodhouse*, 243 N.C. 608, 91 S.E.2d 701 (1956).

The purpose of filing claims for liens, under this section, is to give public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700 (1888); *Fulp v. Kernersville Light & Power Co.*, 157 N.C. 157, 72 S.E. 867 (1911).

As to place of filing under former law, see *Chadbourn v. Williams*, 71 N.C. 444 (1874).

Particularity Required of Claim Filed.—A claim of lien, filed under the provisions of the section, must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and labor performed, or the time when the material was furnished and the labor performed, it was irregular and void. *Wray v. Harris*, 77 N.C. 77 (1877).

The claimant must comply strictly, certainly substantially, in all material respects, with the requirements of the statute, and it is but reasonable and just that he should do so. *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700 (1888), wherein claim of lien was held insufficient in failing to comply with the requirements.

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. *Jefferson & Bros. v. Bryant*, 161 N.C. 404, 77 S.E. 341 (1913).

This section does not require a listing of material item by item, or the labor hour by hour. Yet it demands more than a mere summary statement. It requires a statement in sufficient detail to put parties who are or may become interested in the

premises on notice as to the labor performed and material furnished, the time when the labor was performed and the material was furnished, the amount due therefor, and the property upon which it was employed. *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E.2d 204 (1953).

The provisions of this section and § 44-39 are not binding on an admiralty court in a proceeding to establish a lien for labor and materials furnished in the repair of a vessel, but the limitations which they prescribe can be considered by the admiralty court in applying the doctrine of laches. *Phelps v. The Cecelia Ann*, 199 F.2d 627 (4th Cir. 1952).

While state statutory provisions of limitation do not bind a federal court in admiralty proceedings, it is proper to consider them in applying the principle of laches. Thus a proceeding to enforce a maritime lien for supplies and materials furnished to a vessel and its owner was barred by laches, in view of this section and § 44-39 where the libel was not instituted until twenty-one months after the claim became due. *Davis v. The Nola Dare*, 157 F. Supp. 420 (E.D.N.C. 1957).

Instances of Sufficiency.—When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with this section. *Fulp v. Kernersville Light & Power Co.*, 157 N.C. 157, 72 S.E. 867 (1911).

The claim for a laborer's lien was as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, \$127.24. (Signed) D. A. C., claimant," which was sworn to. It was held that the claim as filed was a reasonable and substantial compliance with the statute. *Cameron v. Consolidated Lumber Co.*, 118 N.C. 266, 24 S.E. 7 (1896). See also *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E.2d 204 (1953).

The lien of a plaintiff who furnished materials for a building is not avoided

because in the notice thereof filed with the clerk it is made to attach on two distinct lots separated by a street. *Chadbourn v. Williams*, 71 N.C. 444 (1874).

When Defect Not Cured by Amendment.—Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and when the claim as filed is defective, as filed with the clerk, in not stating the time the house was completed, as required by this section, it cannot be cured by amendment allowed in the superior court at the trial. *Jefferson & Bros. v. Bryant*, 161 N.C. 404, 77 S.E. 341 (1913).

Defects Not Cured by Pleadings.—Where a laborer's claim of lien as filed was defective in failing to specify the time of his labor and that it was done on a particular crop, these defects were not cured by alleging the necessary facts in the pleadings in action to enforce the lien. *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700 (1888).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket" where the book without question was the book intended as the lien docket contemplated by § 2-42, though the book was also used for the filing of liens for old age assistance, since § 108-30.1 provides that such liens shall be filed in the regular lien docket. *Saunders v. Woodhouse*, 243 N.C. 608, 91 S.E.2d 701 (1956).

Stipulation that notice was filed with defendant landlord does not comply with this section requiring notice to be filed in the office of the superior court clerk. *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956).

Contract Negotiated by Husband for Drilling of Well on Wife's Property.—See *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E.2d 204 (1953).

Applied in *Gainey v. Gainey*, 203 N.C. 190, 165 S.E. 547 (1932); *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

Cited in *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929); *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), aff'd 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960); *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963); *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N.C. 1964).

§ 44-38.1. Liens on personal property created in another state.—(a) For the purposes of this section, personal property acquires a situs in this State when it is brought into this State with the intent that it be permanently

located in the State. The keeping of personal property in this State for two consecutive months is prima facie evidence that such property has acquired a situs in this State.

(b) When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State from another and acquires a situs in this State, such encumbrance is valid prior to registration in this State as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only upon fulfilling all of the following conditions:

- (1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and
- (2) That such encumbrance is properly registered in this State within ten days after the mortgagee, grantee in a deed of trust, or conditional sale vendor has knowledge that the encumbered property has been brought into this State; and
- (3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State.

(c) When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State and no situs is acquired in this State, the encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought.

(d) When encumbered personal property is brought into this State from a state where the encumbrance is not required to be registered, such encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the time of registration of such encumbrance in this State pursuant to G.S. 47-20.

(e) Nothing herein modifies any of the provisions of article 1 of chapter 44 of the General Statutes. (1949, c. 1129; 1951, c. 251; 1953, c. 675, s. 30.)

Editor's Note.—This section is apparently designed to get away from the rule laid down by the Supreme Court in *General Fin. & Thrift Corp. v. Guthrie*, 227 N.C. 431, 42 S.E.2d 601 (1947). See 27 N.C.L. Rev. 440.

The cases cited in the note to this section dealing with motor vehicles were decided prior to the enactment of the present provisions as to the perfection of security interests in vehicles requiring certificates of title. See §§ 20-58 to 20-58.10.

For brief comment on 1951 amendment, see 29 N.C.L. Rev. 410.

Section Modifies Common Law. — This section, in respect to conditional sales contracts, modifies the rule of the common law. *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

And General Rule of Comity.—The provisions of this section modify and supersede the general rule of comity. *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

Purpose of Section.—This section was enacted to protect persons in this State who purchase for a valuable consideration personal property, covered by a chattel mortgage or a conditional sale agreement

created in another state, when the property has been brought into this State from another state. *Home Finance Co. v. O'Daniel*, 237 N.C. 286, 74 S.E.2d 717 (1953).

The legislature enacted this section to afford purchasers of personal property in this State protection against liens created in some other state. *Central Nat'l Bank v. Rich*, 256 N.C. 324, 123 S.E.2d 811 (1962).

Application of Subsections (a), (b) and (c).—Subsection (b) applies to property if a situs has been acquired; subsection (c) applies if the property has acquired no situs. *Home Finance Co. v. O'Daniel*, 237 N.C. 286, 74 S.E.2d 717 (1953).

If the automobile does not acquire a situs in this State within the meaning of subsections (a) and (b) of this section, subsection (c) applies. *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

If the automobile acquires a situs in this State within the meaning of subsections (a) and (b) of this section, a conditional sale contract will be valid as against a purchaser for a valuable consideration from the conditional sale vendee, only upon fulfilling all of the conditions of subsection

(b). *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

Prima Facie Evidence of Acquisition of Situs.—The intent contemplated by subsection (a) is often difficult, if not impossible, to establish so as to make out a case for the jury. In order to facilitate the making out of a case for the jury, the second sentence of subsection (a) was enacted. *Home Fin. Co. v. O'Daniel*, 237 N.C. 286, 74 S.E.2d 717 (1953).

The prima facie evidence referred to in subsection (a) means, and means no more than, evidence sufficient to justify, but not to compel, an inference that the property has acquired a situs in North Carolina if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted, by the jury. It simply carries the

case to the jury for determination, and no more. *Home Fin. Co. v. O'Daniel*, 237 N.C. 286, 74 S.E.2d 717 (1953).

Registration in Other State after Vehicle Brought into This State.—Where a conditional sale contract is not registered in the state in which the conditional sale was made until after the vehicle had been brought into this State, a bona fide purchaser without notice from the conditional sale vendee acquires title free from the lien of the conditional sale contract, irrespective of whether the vehicle acquired a situs here. *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

Cited in Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950); *Handley Motor Co. v. Wood*, 237 N.C. 318, 75 S.E.2d 312 (1953).

§ 44-39. Time of filing notice.—Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops. (1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; Code, s. 1789; Rev., s. 2028; 1909, c. 32; 1913, c. 150, s. 7; C. S., s. 2470.)

Cross References.—As to effect of this section in proceedings in admiralty court, see note to § 44-38. As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Validity of Section.—This section was held valid in *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*, 111 N.C. 615, 16 S.E. 857 (1892).

Compliance with Section Necessary to Perfect Lien.—See *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

The lien is lost if the steps required to perfect it are not taken in the manner and within the time prescribed by law. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

Time Runs from Furnishing of Last Item of Work or Materials.—The time for filing a claim in a mechanic's lien proceeding is computed from the date when the last item of work, labor or materials is done, performed or furnished. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

But the work performed and materials furnished must be required by the contract, and whatever is done must be done in good faith for the purpose of fully performing the obligations of such contract, and not for the mere purpose of extending the time for filing lien proceedings. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

And Must Be Performed or Furnished

under One Continuous Contract.—In order that the date of the last item be taken as that from which limitation for filing notice of lien shall run, it is essential that the work or materials at different times be furnished under one continuous contract. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

Lien Relates Back.—When the notice is filed the lien is at once established, and relates back to and is effective from the time at which the work was commenced or the materials were furnished. *Chadbourn v. Williams*, 71 N.C. 444 (1874); *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891); *Clark v. Edwards*, 119 N.C. 115, 25 S.E. 794 (1896); *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91 (1930); *Bankers' Trust Co. v. T. A. Gillespie Co.*, 181 Fed. 448 (4th Cir. 1910).

The purpose is to protect the subcontractor or laborer as to his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, not simply subsequently to the filing of the notice of claim in the office of the superior court clerk, but as well subsequently to the time when the work was commenced or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

And this is so, although the subsequent encumbrancer had no notice of the lien thus relating back. *McNeal Pipe & Foundry Co. v. Howland & Durham Water Co.*

dry Co. v. Howland & Durham Water Co., 111 N.C. 615, 16 S.E. 857 (1892).

Claimant Cannot Extend Time by Furnishing Additional Items for that Purpose.—Where the time allowed for filing a lien has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

Good Faith in Furnishing Additional Materials a Question of Fact.—Whether the materials furnished after the contract had been substantially completed were in good faith and for the purpose of completing the contract or colorably to revive the lien is a question of fact. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

Attempts to Extend Lien Held to Constitute Constructive Fraud.—Where the evidence established that the purpose of a disputed sale was to extend the defendant's time for filing its lien, and the defendant acted under a mistake of law, its attempts to extend the lien constituted legal or constructive fraud which may exist without any fraudulent intent. *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

Claim against Railroad Company.—When a contractor or subcontractor, who does work on, or furnishes material for, the construction of a railroad, files a lien on the property of the company within the time required, the lien has precedence over a mortgage registered after the work has been commenced. *Dunavant v. Caldwell & N. Ry.*, 122 N.C. 999, 29 S.E. 837 (1898).

Filing in Six Months after Moneys Are Due.—In *Porter v. Case*, 187 N.C. 629, 122 S.E. 483 (1924), it was held that the notice must be filed within six months from the time the moneys are due the

contractor, under the terms of the contract.

The "shorter time" referred to in this section evidently refers to the notice required to be given by § 44-13. *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91 (1930). And this section was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the "final furnishing" of the materials. *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918).

Notice Filed Too Late.—Notice of lien held not to have been filed within the time required by this section. *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91 (1930).

A materialman does not waive his right of lien by accepting a note for the amount due him for the material furnished, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require. *Raeord Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 79 S.E. 627 (1913).

Question for Jury.—Whether the notice of claim of a lien was filed within the time prescribed by this section is a question for the jury where it appears from the evidence that later work was done under the original contract. *Beaman v. Elizabeth City Hotel Corp.*, 202 N.C. 418, 163 S.E. 117 (1932).

Applied in Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Cited in *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929); *White v. Riddle*, 198 N.C. 511, 152 S.E. 501 (1930); *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941); *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956); *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd*, 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960).

§ 44-40. Date of filing fixes priority.—The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk. (1868-9, c. 117, s. 11; Code, s. 1792; Rev., s. 2035; C. S., s. 2471.)

Section Relates to Liens Filed with Officers.—This section applies only to liens required to be filed with the proper officers. *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914); *White v. Riddle*, 198 N.C. 511, 152 S.E. 501 (1930).

Liens of materialmen and laborers are statutory, and by the clear provisions of

this section and § 44-42 the liens of parties furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk. *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680 (1932).

This section does not affect the provisions as to subcontractors who acquire a

lien only by notice to the owner. *Morgan-ton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914).

The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, § 44-11, no notice of lien being required to be filed with the justice of the peace or clerk in the

case of subcontractors, notice to owner being sufficient under the statute. *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680 (1932).

Cited in *United States v. Durham Lum-ber Co.*, 257 F.2d 570 (4th Cir. 1958), aff'd 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960).

§ 44-41. Laborer's crop lien dates from work begun.—The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrance which attached to the crops subsequent to the time at which the work was commenced. (1869-70, c. 206, s. 2; Code, s. 1782; Rev., s. 2034; C. S., s. 2472.)

Cross Reference.—As to landlord's lien on crops for rents, advances, etc., see § 42-15 et seq.

Lien Prior to Other Subsequent Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. *Lookout Lumber Co. v. Mansion Hotel & B. Ry.* 109 N.C. 658, 14 S.E. 35 (1891).

Breach of Contract—Lien for Claim.—The liens provided for by this section arise out of the simple relation of debtor and creditor for labor done or materials furnished, and where there is no other se-

curity than the personal obligation of the debtor. Therefore, where the plaintiff, having abandoned a contract made with the defendant to cultivate a crop upon shares, upon the ground that the defendant had failed to furnish the necessary stock, etc., as agreed, and attempted to assert a lien for the labor he had bestowed upon the crop, it was held that the statute did not embrace his case. *Grissom v. Pickett*, 98 N.C. 54, 3 S.E. 921 (1887).

Quoted in *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Cited in *Warren v. Woodard*, 70 N.C. 382 (1874); *White v. Riddle*, 198 N.C. 511, 152 S.E. 501 (1930).

§ 44-42. Duly filed claims of prior creditors not affected.—Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer. (1869-70, c. 206, s. 6; Code, s. 1786; Rev., s. 2036; C. S., s. 2473.)

Priority in Accordance with Time of Filing.—By the clear provisions of this section and § 44-40 the liens of parties furnishing labor and material under direct contract with the owner have priority in

accordance with the time of filing notice of lien with the justice of the peace or clerk. *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680 (1932).

§ 44-43. Action to enforce lien; perfection of lien by filing claim with receiver.—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. Provided, when the assets of the debtor against whom the lien was created are in the hands of a duly appointed receiver, the lien may be perfected by the filing of a claim with the receiver within the times described above, without the necessity of bringing action. (1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, cc. 250, 251; Code, ss. 1785, 1790; Rev., s. 2027; C. S., s. 2474; 1961, c. 972.)

Compliance with Section Necessary to Perfect Lien.—See *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

When Section Not Applicable.—This section cannot have been intended for a case in which a resort to any court is unnecessary, and a complete and efficient

measure of relief is committed to and may be obtained by the parties' own act. *McDougall v. Crapon*, 95 N.C. 292 (1886).

Jurisdiction of Justice. — A proceeding under this section must be brought before a justice of the peace, if the amount claimed is under \$200. *Smaw v. Cohen*, 95 N.C. 85 (1886); *Finger v. Hunter*, 130 N.C. 529, 41 S.E. 890 (1902).

Jurisdiction of Federal Court. — While this section gives a right of action at law for the enforcement of a mechanic's lien, it has been held that a federal court sitting in equity has jurisdiction to enter a bill for that purpose, especially where there are conflicting liens to be adjusted. *Healey Ice Mach. Co. v. Green*, 181 Fed. 890 (E.D.N.C. 1910).

Possession by Justice of Notice of Lien. — It is not necessary that the justice of the peace before whom application is made to enforce the lien should be in possession of the original notice of the lien; a copy from the magistrate with whom it was filed must be sufficient. There can be no reason why a copy of a notice properly filed with the clerk will not also suffice. The only reason why the justice who is to enforce the lien must have a copy of the notice is because he is required to state in his judgment the date of the lien and also what property it binds. *Boyle v. Robbins*, 71 N.C. 130 (1874).

Waiver of Lien by Failure to Enforce. — Failure to enforce the lien under this section within the time prescribed constitutes a waiver of the lien. *Norfleet v. Tarboro Cotton Factory*, 172 N.C. 833, 89 S.E. 785 (1916).

What Interest Subject to Sale. — An action to enforce a contractor's lien is designed to enforce the lien by the sale of whatever interest the person who caused the building to be erected or repaired had in the land improved by the labor or materials of the contractor at the time the lien attached. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

This section does not undertake to specify who shall be made parties to the action to enforce the contractor's lien, which it requires to be brought within the period of six months designated by it. The solution of this problem is, therefore, to be found in the nature and object of the action to enforce the lien. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Landowner Who Contracted for Debt Is Necessary Party. — Since the judgment in the action will directly affect his inter-

est in the real property involved in the suit, the landowner who contracted the debt for which the lien is claimed is certainly a necessary party to the action to enforce the lien. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Subsequent Encumbrancers and Adverse Claimants Are Proper, but Not Necessary, Parties. — The contractor can obtain the complete relief sought, i.e., the sale of the interest owned by the person who caused the improvement to be made at the time the lien attached in his action against the landowner, without having the rights of adverse claimants ascertained and settled. In consequence, subsequent encumbrancers and other adverse claimants are not necessary parties to an action to enforce a contractor's lien. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

But subsequent encumbrancers and other adverse claimants are proper parties to such action, for they have ascertainable interests in the subject matter of the controversy. It is highly desirable that they be made parties to the action so that the decree or judgment may conclude the rights of all persons having any interest in the subject matter of the litigation. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

If a subsequent encumbrancer is not joined in an action to enforce a contractor's lien, he is not bound by the judgment in the action between the contractor and the owner, and one who purchases the property under that judgment takes it subject to the rights of the encumbrancer, whatever they may be. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

But neither the contractor nor any other interested party is precluded from relying on the contractor's prior lien as against subsequent encumbrancers because of the contractor's failure to make the subsequent encumbrancers parties to his action to enforce the lien brought against the owners within the statutory period. *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

Personal Action against Owner after Loss of Lien by Delay to Enforce. — If the plaintiff does not begin his action after giving the statement of his claim to the owner, he loses his lien; but having acquired and lost the lien he can maintain an action against the owner, personally, under the statute which makes it the duty of the owner to retain from the money

due the contractor a sum not exceeding the price contracted for, to be paid to the laborer, mechanic, or materialman whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor. *Hildebrand v. Vanderbilt*, 147 N.C. 639, 61 S.E. 620 (1908); *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916). See §§ 44-8, 44-9.

Same—Owner's Liability Pro Rata to Extent of Sum Due.—The laborer or materialman can only recover of the owner his pro rata part of that sum which the owner is required to retain from the contractor. This pro rata share is to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc.; and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. *Hildebrand v. Vanderbilt*, 147 N.C. 639, 61 S.E. 620 (1908).

Limitation of Actions Pleaded by Owner for Contractor.—When the owner is sued

by a laborer or materialman in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor. *Hildebrand v. Vanderbilt*, 147 N.C. 639, 61 S.E. 620 (1908).

Defects in Claim Filed Not Cured by Pleading.—It is not sufficient to allege in the pleadings the time of the labor, and that it was done on a particular crop which the plaintiff seeks to charge with a lien. This must appear substantially in some way in the claim filed. *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700 (188).

Applied in Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Stated in Lowery v. Haithcock, 239 N.C. 67, 79 S.E.2d 204 (1953).

Cited in Atlas Supply Co. v. McCurry, 199 N.C. 799, 156 S.E. 91 (1930); *United States v. Durham Lumber Co.*, 257 F.2d 570 (4th Cir. 1958), *aff'd* 363 U.S. 522, 80 Sup. Ct. 1282, 4 L. Ed. 2d 1371 (1960).

§ 44-44. When attachment available to plaintiff.—In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lienor of his lien, the claimant may have a remedy by attachment. (1868-9, c. 117, s. 14; Code, s. 1795; Rev., s. 2031; C. S., s. 2475.)

Sufficiency of Affidavit for Attachment.—An affidavit that defendant has removed and is removing and disposing of a cotton crop without regard to the lien, was held insufficient to justify the issuing of

the warrant of attachment under this section, in the absence or allegation that the removal is with the intent to defraud the laborer. *Brogden v. Privett*, 67 N.C. 45 (1872).

§ 44-45. Defendant entitled to counterclaim.—The defendant in any suit to enforce the lien is entitled to any setoff arising between the contractors during the performance of the contract, or counterclaim allowed by law. (1869-70, c. 206, s. 8; Code, s. 1788; Rev., s. 2032; C. S., s. 2476.)

§ 44-46. Execution.—Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant. (1868-9, c. 117, s. 9; Code, s. 1791; Rev., s. 2029; C. S., s. 2477.)

Strict Construction.—The North Carolina Supreme Court has stated that the statutory procedure for the enforcement of laborers' and materialmen's liens must be strictly followed. In order to justify a departure from a strict construction of the statute, in the absence of any pronouncement of the North Carolina Supreme Court

on the point, there must exist equities in favor of the party seeking to void the procedure outlined by the statute. In *re Haithcock*, 165 F. Supp. 182 (M.D.N.C. 1958), holding that no such special equities existed in the instant case.

Property Subject to Lien Must Be Sold First.—Under this section, the property

subject to a contractor's special lien, i.e., the building and the lot on which it is situated, must be sold for the satisfaction of the judgment before resort can be had to the other property of the owner. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952); *In re Haithcock*, 165 F. Supp. 182 (M.D.N.C. 1958).

Descriptions in the Judgment.—In *Boyle v. Robbins*, 71 N.C. 130 (1874), this section was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be bound by the lien, the justice must insert in his execution a requirement that the specific property, subject to the lien, shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the superior court, and the clerk must incorporate in the execution similar direction as to the order of selling. So the

judgment cannot be enforced in strict compliance with the law unless the officer, whose duty it is to issue execution, has gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien and consequently to a primary liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it, is to embody it in the judgment, which will constitute a part of the record in either court, no matter which officer may find it necessary to insert the date and description in the execution. *McMillan v. Williams*, 109 N.C. 252, 13 S.E. 764 (1891).

A judgment to enforce a mechanic's lien upon specific property for its satisfaction, must contain a general description of such property, and execution thereon must direct that such property shall first be sold to satisfy the judgment. *McMillan v. Williams*, 109 N.C. 252, 13 S.E. 764 (1891).

Stated in *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

§ 44-47. No justice's execution against land.—No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of the superior court for the purpose of selling such estate or any interest therein. (1868-9, c. 117, s. 13; Code, s. 1794; Rev., s. 2030; C. S., s. 2478.)

§ 44-48. Discharge of liens.—All liens created by this chapter may be discharged as follows:

- (1) By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.
- (2) By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.
- (3) By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.
- (4) By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (1868-9, c. 117, s. 12; Code, s. 1793; Rev., s. 2033; C. S., s. 2479.)

Failure to Enforce as Discharge.—Failure of claimant to enforce his lien within six months as prescribed by § 44-43 operates as a discharge of the lien. *Norfleet v. Tarboro Cotton Factory*, 172 N.C. 833, 89 S.E. 785 (1916).

Applied in *Rural Plumbing & Heating,*

Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Stated in *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E.2d 204 (1953).

Cited in *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided for shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action.

No liens of the character provided for in the first paragraph of this section shall hereafter be valid with respect to money that may be recovered in any pending civil actions in this State unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after April 5, 1947.

No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created by the first paragraph of this section when recovery has heretofore been had by the person injured, and no claims against such recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in such action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027; 1959, c. 800, s. 1.)

Editor's Note.—The 1947 amendatory act provided that nothing in the act should be construed as affecting §§ 44-50 and 44-51 of the General Statutes, except to fix the time within which claims must be filed. For discussion of amendment, see 25 N.C.L. Rev. 450.

Strictly Construed.—This section and § 44-50 provide rather extraordinary remedies in derogation of the common law and must be strictly construed. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955).

Lien Created Where Beneficiary Indebted for Expenses.—The lien provided for by this section is created only in cases where the beneficiary may be indebted for the expenses incurred. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955).

Minor Cannot Recover for Medical Ex-

penses.—This section does not change the common-law rule so as to permit the recovery of expenses for medical treatment as a part of the minor's cause of action for injuries. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955).

In a suit by parent as next friend to recover damages for personal injuries to minor child, a motion by the defendant to strike allegations as to medical expenses should be allowed, since evidence as to such medical expenses would not have been competent in a trial of the action, as a minor child cannot recover medical expenses. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955).

Applied in *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Cited in *Smith v. Hewett*, 235 N.C. 615, 70 S.E.2d 825 (1952); *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or

otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2.)

Strictly Construed.—See note to § 44-49.

§ 44-51. Disputed claims to be settled before payments.—Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3; 1943, c. 543.)

Cross Reference.—See note to § 44-44.

ARTICLE 10.

Agricultural Liens for Advances.

§ 44-52. Lien on crops for advances.—If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, or advances of wood, coal, kerosene, gasoline, fuel oil, or other combustible substance which is to be used in preparing a product of the soil for sale, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except laborer's and landlord's liens, to the extent of such advances. When such lien has been created by a tenant or a sharecropper, the lienholder shall acquire no rights against the landlord unless said lienholder notifies said landlord in writing of the existence of such lien before settlement is made between said landlord and said landlord and said tenant or sharecropper. The notice required herein shall give the office, book and page number where the lien is recorded. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown. Provided, that where a county line divides a farm the crop lien may be recorded in the county where the owner of said farm resides: Provided, he resides on said farm: Provided, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, and referred to in the said lien. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1955, c. 816; 1957 c. 999.)

Local Modification.—Bertie: Pub. Loc. III. The Written Agreement.
1927 c. 173. A. Form and Execution.

I. In General.

II. Priority of Liens.

B. Registration.

IV. Description of Land.

V. Evidence.

Cross References.

For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507. As to landlord's lien on crops for rents, advances, etc., see § 42-15. As to laborer's lien, see § 44-1 et seq. and § 44-41. As to effective period for lien on leaf tobacco sold in auction warehouse, see § 44-69.

I. IN GENERAL.

Editor's Note.—Section 2, c. 700, Session Laws 1965, repeals §§ 44-52 to 44-64, effective at midnight June 30, 1967.

For discussion of this section, see 2 N.C.L. Rev. 191 and 4 N.C.L. Rev. 4.

Conditions Rendering Lien Effectual.—

The prescribed conditions upon which the lien of this section becomes effectual are the previous reduction of the contract for it to writing, setting out its terms, and registration; these provisions are manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrances upon the crop. *Reese & Co. v. Cole*, 93 N.C. 87 (1885).

Compliance with Requirements Prerequisite.—The lien can only be by force of the statute and by a compliance with its requirements. Where the section has not been followed, to sustain the agreement as an agricultural lien would utterly defeat the letter and the public policy embraced by the statute. *Clark v. Farrar*, 74 N.C. 686 (1876), wherein requirements are enumerated.

Strict Construction—Lienor Not Bound to See That Property Used on Farm. —

This section was not intended simply to permit a person to give a lien upon his crop for advances, but also to give such a lien a preference to all other liens existing or otherwise to the extent of such advance. Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the lienee must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the lienor was not bound to see that the property was used on the farm, his duty being discharged by furnishing it. *Nichols & Bros. v. Speller*, 120 N.C. 75, 26 S.E. 632 (1897); *Collins v. Bass*, 198 N.C. 99, 150 S.E. 706 (1929).

Lien Covering Articles Not Actually Used in Making Crop. — An instrument

which gives a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien, and, as between the parties, in the absence of fraud and compulsion, the lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without a showing that such articles were actually used in making the crop. *Nichols & Bros. v. Speller*, 120 N.C. 75, 26 S.E. 632 (1897).

Estopped to Deny Articles Received as "Supplies".—One who gives a lien on a crop to obtain supplies, under the provisions of this section, is estopped from asserting that articles which he receives as a compliance with the contract are not "supplies" within the meaning of the statute; and a second mortgagee, who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission. *Womble v. Leach*, 83 N.C. 84 (1880).

Crops Covered by Lien. — The operations of a mortgage or agricultural lien in respect to crops are confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. *Wooten v. Hill*, 98 N.C. 48, 3 S.E. 846 (1887).

Power of Sale in Instrument Does Not Invalidate It.—A power of sale upon default in paying advances, inserted in an instrument, giving a lien upon crops, does not invalidate the instrument, though prescribing a different remedy from that allowed by the statute. *Crinkley v. Eger-ton*, 113 N.C. 142, 18 S.E. 341 (1893).

Mortgage on Crops as Agricultural Lien.—A mortgagee, under a mortgage on a crop not expressed to be for advances to be made and not recorded after its execution, has no rights as an agricultural lienor by virtue of this section. *Cooper v. Kimball*, 123 N.C. 120, 31 S.E. 346 (1898).

Cited in *Warren v. Woodward*, 70 N.C. 382 (1874); *Brooks v. Garrett*, 195 N.C. 452, 142 S.E. 486 (1928); *White v. Riddle*, 198 N.C. 511, 152 S.E. 501 (1930).

II. PRIORITY OF LIENS.

Lien Preferred to All Others Save the Exceptions Specified. — An agricultural lien, given by this section, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by this section to all others, the only exception being that in favor of the landlord or laborer con-

tained in § 44-60, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed of trust on the same crop to the extent of the amount advanced thereunder. *Williams v. Davis*, 183 N.C. 90, 110 S.E. 577 (1922). See *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941).

Not Subordinate to Marketing Agreement.—In view of the policy of the State as manifested in the statutes to favor agricultural liens, such a lien for advances will not be held subordinate to a marketing agreement. *Tobacco Growers' Co-Op. Ass'n v. Harvey & Son Co.*, 189 N.C. 494, 127 S.E. 545 (1925).

Precedence over Prior Mortgage Lien.—An agricultural lien duly executed and registered takes precedence over a mortgage of prior date and registrations upon the "crops" therein subjected to the extent of the advances made. *Wooten v. Hill*, 98 N.C. 48, 3 S.E. 846 (1887); *Killebrew v. Hines*, 104 N.C. 182, 10 S.E. 159, 251 (1889). But see *Brewer v. Chappell*, 101 N.C. 251, 7 S.E. 670 (1888).

A statutory agricultural lien for supplies and advancements during the current crop year, conforming to the requirements of this section both as to context and registration, is superior to a prior registered chattel mortgage given to secure an antecedent debt, the chattel mortgage not being in the required form to constitute a crop lien for supplies as contemplated by the section. *Eastern Cotton Oil Co. v. Powell*, 201 N.C. 351, 160 S.E. 292 (1931).

Priority of Lien of Landlord.—The lien of the landlord for rents and advancements is the lien first preferred above all others. *Brewer v. Chappell*, 101 N.C. 251, 7 S.E. 670 (1888).

Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, under this section, and the lienor knew of the surrender at the time he made the advancements, his lien is secondary to that of the landlord's for rent, and a paper-writing of the agreement of surrender between the landlord and tenant was not necessary. Section 44-53 is not applicable to such case. *Montague v. Thorpe*, 196 N.C. 163, 144 S.E. 691 (1928). See note to § 42-15.

Same—Extent of Priority.—Although under this section the lien of a landlord for rent and advances is superior to that

of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard & Co. v. Johnson*, 114 N.C. 141, 19 S.E. 98 (1894).

III. THE WRITTEN AGREEMENT.

A. Form and Execution.

No Particular Form Required.—To create an agricultural lien under this section no particular form of agreement is required. If the requisites prescribed by the statute are embodied in the agreement, and the intent of the parties to create the lien is apparent, the agreement will be upheld as a valid agricultural lien though it be in the form of a chattel mortgage. *Meekins v. Walker*, 119 N.C. 46, 25 S.E. 706 (1896).

Furnishing Supplies and Providing Security Contemporaneously.—When furnishing the supplies and making the securing instruments are contemporaneous, constituting one transaction of which these acts are parts, it is not material which precedes in actual time, for in contemplation of law both are done at one and the same time. This view is suggested in *Womble v. Leach*, 83 N.C. 84 (1880), as a reasonable construction which accomplishes the substantial purposes intended. *Reese & Co. v. Cole*, 93 N.C. 87 (1885).

B. Registration.

Registration Not Necessary Inter Partes.—A crop lien to secure agricultural advances executed under this section was held valid inter partes, although not registered within thirty days as was required by the section prior to the 1925 amendment. *Gay v. Nash*, 78 N.C. 100 (1878). See *Reese & Co. v. Cole*, 93 N.C. 87 (1885).

Registration Necessary as to Third Parties.—It was said that the lien mentioned in the preceding paragraph was void as to third persons. *Gay v. Nash*, 78 N.C. 100 (1878).

It has been held that a mortgage on a crop, not expressed to be for advances, and not registered within the thirty days formerly required, had no rights as an agricultural lien under the former wording of this section. *Cooper v. Kimball*, 123 N.C. 120, 31 S.E. 346 (1898).

Priority of First Lien Registered.—The statute fails to require registration within any specified time before the harvesting of the crop. What would be the ef-

fect of two persons making advances on the same crop, when the latter advance, in point of time, was the first registered? It would seem that the first lien registered should prevail. It would be a race for the register's office. See 4 N.C.L. Rev. 5.

IV. DESCRIPTION OF LAND.

Identification of Land. — The land on which the crops are to be grown must be sufficiently identified at the time the lien is executed. Within this ruling, land is sufficiently identified when described as "a field or farm in possession of the mortgagor or seller." *Weil v. Flowers*, 109 N.C. 212, 13 S.E. 761 (1891). See *Gwathney v. Etheridge*, 99 N.C. 571, 6 S.E. 411 (1888).

An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate dur-

ing the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but void as to those raised on "any other lands." *Crinkley v. Egerton*, 113 N.C. 142, 18 S.E. 341 (1893).

V. EVIDENCE.

Extraneous Evidence to Show Time of Furnishing Supplies.—Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, dehors such instrument, that the supplies were furnished after the making of the agreement. Such evidence would not contradict the written instrument. *Meekins v. Walker*, 119 N.C. 46, 25 S.E. 706 (1896).

§ 44-53. **Contract for advances to mortgagor in possession.** — The preceding section [§ 44-52] shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors, their tenants, lessees or croppers, who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not. (1889, c. 476; Rev., s. 2053; C. S., s. 2481; 1931, c. 173, ss. 2, 3.)

Cross Reference.—See note to § 44-52.

Repeal of Section.—See Editor's Note to § 44-52.

Cited in *Slade Rhodes & Co. v. James*, 194 N.C. 240, 139 S.E. 240 (1927).

§ 44-54. **Price to be charged for articles advanced limited.**—In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price or prices of not more than ten percent over the retail cash price or prices of the article or articles advanced, and the said ten percent shall be in lieu of interest on the debt for such advances: Provided, however, that coupon books and trade checks commonly used by time merchants shall be considered as supplies advanced, when sold by merchants to customers, and charged for in the same manner. If more than ten percent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void as to the article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced. (1917, c. 134, s. 1; C. S., s. 2482; 1921, c. 89.)

Local Modification. — Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20.

Editor's Note. — Session Laws 1945, c. 694, by repealing Public Laws 1929, c. 262, made §§ 44-54 to 44-59 fully applicable to Lenoir County.

Repeal of Section.—See Editor's Note to § 44-52.

Evidence Insufficient to Sustain Finding as to Price Charged.—In an action to recover the balance due from a cropper for advancements made for the cultivation of the crop and to establish the lien provided by § 44-52, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 percent

above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of this section. It was held that the action of the trial judge in confirming the report of the referee was erroneous, in the absence of evidence that such advance price had been charged for the fertilizer, and

that even if it were proved that an advance price was charged for the fertilizer, the lien would not be void as to the other merchandise sold. *Slade Rhodes & Co. v. James*, 194 N.C. 240, 139 S.E. 240 (1927).

Stated in *Carolina Industrial Bank v. Merrimon*, 260 N.C. 335, 132 S.E.2d 692 (1963).

§ 44-55. "Cash prices" defined and determined.—In the case of retail merchants, the retail cash price or prices shall be the regular cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made. (1917, c. 134, s. 2; C. S., s. 2483.)

Local Modification. — Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20. **Repeal of Section.**—See Editor's Note to § 44-52.

§ 44-56. Person advanced not estopped by agreement. — No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten percent over the average retail cash price or prices in that locality at the time the advance or advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten percent, then the lien shall be null and void as to the article or articles upon which such overcharge is made. (1917, c. 134, s. 2; C. S., s. 2484.)

Local Modification. — Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Robeson: 1929, c. 20. **Repeal of Section.**—See Editor's Note to § 44-52.

§ 44-57. Commission in lieu of interest where advance in money.—Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten percent of the amount of money actually advanced: Provided, that money advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten percent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced. (1917, c. 134, s. 3; C. S., s. 2485.)

Local Modification. — Robeson: 1929, c. 20. **Applied in** *Ransom v. Eastern Cotton Oil Co.*, 203 N.C. 193, 165 S.E. 350 (1932).

Repeal of Section.—See Editor's Note to § 44-52.

§ 44-58. Disposition of commission, where advanced by credit union.—In case the money is advanced by a credit union, the funds derived from the ten percent commission allowed in the preceding section [§ 44-57] shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union

in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year. (1917, c. 134, s. 4; C. S., s. 2486.)

Local Modification.—Robeson: 1929, c. 20. **Repeal of Section.**—See Editor's Note to § 44-52.

§ 44-59. Purchasers for value protected.—All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such cases the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article. (1917, c. 134, ss. 5, 6; C. S., s. 2487.)

Local Modification.—Robeson: 1929, c. 20. **Repeal of Section.**—See Editor's Note to § 44-52.

§ 44-60. Crop seized and sold to preserve lien.—If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of this State, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2488.)

Repeal of Section.—See Editor's Note to § 44-52.

Summary Remedy and Procedure.—The purpose of the statute is to give a summary remedy. *Thomas v. Campbell*, 74 N.C. 787 (1876), discussing the procedure under the statute. See also *Gay v. Nash*, 84 N.C. 334 (1881); *Cottingham & Brother v. McKay*, 86 N.C. 241 (1882).

No Summons to Defendant Is Necessary.—It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien under the statute that a summons should be issued to the defendant. *Thomas v. Campbell*, 74 N.C. 787 (1876).

Effect of Verdict Failing to Assess Damages.—Where in a proceeding to enforce an agricultural lien the crop was sold by the sheriff, and on trial before a jury the defendant admitted the execution of the lien, but denied that anything was due for advances thereunder, there was a general verdict for the plaintiff, and the court refused judgment because the jury failed to assess the damages. It was held error; the verdict established the "lien debt" in excess of the proceeds of sale, entitling the plaintiff to judgment. *Gay v. Nash*, 84 N.C. 334 (1881).

Return of Moneys in Court's Custody to Defendant.—Where, in a proceeding under this and the following section, the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and filed an affidavit that the defendant is insolvent. *Cottingham & Brother v. McKay*, 86 N.C. 241 (1882).

Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. *Cottingham & Brother v. McKay*, 86 N.C. 241 (1882).

Priorities.—An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens, to the extent of advances made thereunder. *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941). See § 44-52.

Cited in *White v. Riddle*, 198 N.C. 511, 152 S.E. 501 (1930).

§ 44-61. Lienor's claim disputed; proceeds of sale held; issue made for trial.—If the person to whom the advances have been made, or who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made up and set for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C. S., s. 2489.)

Cross Reference.—See note to § 44-60.

Repeal of Section.—See Editor's Note to § 44-52.

§ 44-62. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a preexisting debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Iredell, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pender, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Washington, Watauga, Wayne and Wilson:

North Carolina, County.
Whereas, ha agreed to make advances to for the purpose of enabling said to cultivate the lands hereinafter described during the year 19...., the amount of said advances not to exceed dollars: and,

Whereas, said is indebted to said in the further sum of dollars now due; now, therefore, in order to secure the payment of the same the said do hereby convey to said all the crops of every description which may be raised during the year 19.... on the following lands in County, North Carolina, Township, adjoining the lands of and also the following other property, viz.: And if by the day of, 19...., said fail to pay said indebtedness, then said may foreclose this lien as provided in § 44-60 of the North Carolina Code or otherwise, and may sell said crops and other property after ten days' notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said, and the said hereby represents that said crops and other property are the absolute property of and free from encumbrance

Witness hand and seal, this the day of, 19....

Witness:
....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said

This the day of, 19....

Witness:

..... (Seal)

North Carolina, County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of, the subscribing witness thereto.

This the day of, 19....

. (Seal)

North Carolina, County.

The foregoing certificate of, a of County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the day of, 19....

., Clerk Superior Court.
(1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; Rev., s. 2055; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; C. S., s. 2490; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; 1951, c. 926, s. 1.)

Local Modification.—Beaufort: 1933, c. 101; Johnston: 1943, c. 653.

Repeal of Section.—See Editor's Note to § 44-52.

No Particular Form Required. — This section requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that prescribed. And the courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the inten-

tion of the parties; and an instrument expressing itself to be an agricultural lien, and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. *Jones-Phillips Co. v. McCormick*, 174 N.C. 82, 93 S.E. 449 (1917).

Cited in *McNeill v. McDougald*, 242 N.C. 255, 87 S.E.2d 502 (1955).

§ 44-63. Local: Rights on lienee's failure to cultivate.—If any person in the counties mentioned in the preceding section [§ 44-62], after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days' notice published at the courthouse door and three other public places in said county. (1899, c. 17, s. 3; 1901, c. 329, s. 3; Rev., s. 2056; C. S., s. 2491.)

Repeal of Section.—See Editor's Note to § 44-52.

Provision Only Applicable to Valid Lien.—The provision that the lien shall become due and collectible at once, if the person executing the lien does any act calculated to impair the security therein given, has no application, unless there is a valid lien. *McNeill v. McDougald*, 242

N.C. 255, 87 S.E.2d 502 (1955), holding that failure to charge provision was prejudicial error.

If plaintiff is estopped to deny that defendant had valid liens, that fact alone would not make the liens due and collectible prior to their maturity date. *McNeill v. McDougald*, 242 N.C. 255, 87 S.E.2d 502 (1955).

§ 44-64. Local: Commissioners to furnish blank records.—The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds. (1899, c. 17, s. 4; 1901, c. 329, s. 4; Rev., s. 2057; C. S., s. 2492.)

Repeal of Section.—See Editor's Note to § 44-52.

ARTICLE 11.

Liens for Internal Revenue.

§ 44-65. **Filing notice of lien.**—Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (Ex. Sess. 1924, c. 44, s. 1.)

Lien Is Effective Only against Property of Taxpayer as Determined by State Law.

—The lien of the federal government for taxes upon the recording of notice of federal tax lien in the office of the register of deeds of a county is effective only against the property of the taxpayer, and the property or property rights of the taxpayer to

which the lien attaches must be determined by State law. *Planters Nat'l Bank & Trust Co. v. South Carolina Ins. Co.*, 263 N.C. 32, 138 S.E.2d 812 (1964).

Quoted in *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cited in *United States v. Haddock*, 144 F. Supp. 720 (E.D.N.C. 1956).

§ 44-66. **Duty of register of deeds.**—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order in a file or files to be provided by the board of county commissioners and designated federal tax lien notices. The board of commissioners of each county is authorized to fix a fee for recording federal tax liens in the office of the register of deeds not to exceed two dollars (\$2.00) per lien and a fee for filing certificates of discharge not to exceed two dollars (\$2.00) per certificate. The fees provided herein are to be charged to the United States. (Ex. Sess. 1924, c. 44, s. 2; 1953, c. 1106, s. 1; 1963, c. 544.)

Editor's Note. — The 1963 amendment substituted the last two sentences for the former last sentence, which provided for

a fee of seventy-five cents for all services required under this article.

§ 44-67. **Certificate of discharge.**—When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said register of deeds shall enter the same with date of filing in said federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. (Ex. Sess. 1924, c. 44, s. 3; 1953, c. 1106, s. 2.)

§ 44-68. **Purpose of article.**—This article is passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of section three thousand one hundred eighty-six of the Revised Statutes of the United States, as amended by the act of March fourth, one thousand nine hundred thirteen, thirty-seven Statutes at Large, page one thousand sixteen. (Ex. Sess. 1924, c. 44, s. 4.)

ARTICLE 12.

Liens on Leaf Tobacco and Peanuts.

§ 44-69. **Effective period for lien on leaf tobacco sold in auction warehouse.**—No chattel mortgage, agricultural lien, or other lien of any nature upon leaf tobacco shall be effective for any purpose for a longer period than six months after the sale of such tobacco at a regular sale in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This section shall not absolve any person from prosecution and punishment for crime. (1943, c. 642, s. 1.)

§ 44-69.1. **Effective period for lien on peanuts.**—No chattel mortgage, agricultural lien or other lien of any nature upon peanuts shall be effective for any purpose for a longer period than six months from the date of sale by the lienor. This section shall not absolve any person from prosecution and punishment for crime. (1955, c. 266.)

ARTICLE 13.

Factors' Liens.

§ 44-70. **Definitions.**—The terms "factor" and "factors" wherever used in this article means persons, firms, banks, and corporations, and their successors in interest, who advance money to manufacturers or processors on the security of materials, goods in process, or merchandise, whether or not they are employed to sell such materials, goods in process, or merchandise. (1945, c. 182, s. 1.)

Cross Reference.—For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

sion Laws 1965, repeals §§ 44-70 to 44-76, effective at midnight June 30, 1967.

Stated in Presley E. Brown Lumber Co. v. Textile Banking Co., 248 N.C. 308, 103 S.E.2d 334 (1958).

Editor's Note. — Section 2, c. 700, Ses-

§ 44-71. **Factors' liens; filing notice of lien.**—If so provided by any written agreement, all factors shall have a continuing general lien upon all materials, goods in process, and merchandise from time to time consigned to or pledged with them, whether in their constructive, actual or exclusive occupancy or possession or not, for all their loans and advances to or for the account of the person creating the lien (hereinafter called the borrower), together with interest thereon and also for the commissions, obligations, indebtedness, charges, and expenses properly chargeable against or due from said borrower and for the amounts due or owing upon any notes or other obligations given to or received by them for or upon account of any such loans or advances, interest, commissions, obligations, indebtedness, charges, and expenses and such lien shall be valid from the time of filing the notice hereinafter referred to, whether such materials, goods in process, or merchandise shall be in existence at the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower; provided that a notice of the lien is filed stating:

- (1) The name of the factor, the name under which the factor does business, if an assumed name; the principal place of business of the factor within the State, or if he has no place of business within the State, his principal place of business outside of the State; and if the factor is a partnership or association, the name of the partners, and if a corporation, the state under whose laws it was organized.
- (2) The name of the borrower, and the interest of such person in the materials, goods in process, and merchandise, as far as known to the factor.
- (3) The general character of materials, goods in process, and merchandise subject to the lien, or which may become subject thereto, the date of the agreement and the period of time during which such loans or advances may be made under the terms of the agreement providing for such loans or advances and for such lien.

Amendments of the notice may be filed from time to time to record any changes in the information contained in the original, subsequent or amended notices. (1945, c. 182, s. 2; 1955, c. 386, s. 1.)

Repeal of Section.—See Editor's Note to § 44-70.

§ **44-72. Registration.**—Such notice shall be acknowledged or proven by the factor or his duly authorized representative in the form of acknowledgments to deeds. The notice so acknowledged shall be filed for registration in the office of the register of deeds in the county wherein the property referred to in the notice is located and shall be recorded and cross indexed in the same manner as chattel mortgages. The fees for acknowledging and recording shall be the same as those provided for by law for acknowledging and recording chattel mortgages. (1945, c. 182, s. 3.)

Repeal of Section.—See Editor's Note to § 44-70.

§ **44-73. Effect of registration.**—Such notice may be filed for registration at any time after the making of the agreement and shall be effectual from the time of the filing thereof as against all claims of unsecured creditors of the borrower and as against subsequent liens of creditors, except that if, pursuant to the laws of this State, a lien should subsequently attach to the materials, goods in process, or merchandise in favor of a processor, dyer, mechanic, or other artisan, or in favor of a landlord, then the lien of the factor on such materials, goods in process, or merchandise shall be subject to such subsequent lien. When materials, goods in process, or merchandise subject to the lien provided for by this article are sold in the ordinary course of the business of the borrower, such lien, whether or not the purchaser has knowledge of the existence thereof, shall terminate as to the materials, goods in process, or merchandise and shall attach without further act, writing or formality to any obligation to pay for the same and to any other proceeds of such sale of goods of the borrower including such accounts receivable or obligation as may be created in the hands of the borrower, without filing an additional notice. (1945, c. 182, s. 4; 1955, c. 386, s. 2.)

Repeal of Section.—See Editor's Note to § 44-70.

§ **44-74. Satisfaction and discharge.**—Upon payment or satisfaction of the indebtedness secured by any lien specified in this article the factor, his assignee or duly authorized representative, attorney or attorney in fact, may in the presence of the register of deeds or his deputy acknowledge the satisfaction of the provisions of such lien, whereupon the register of deeds or his deputy shall forthwith make upon the margin of the record of such lien an entry of such acknowledgment of satisfaction, which shall be signed by the factor, his assignee or duly authorized representative, attorney or attorney in fact and witnessed by the register of deeds or his deputy, who shall affix his name thereto.

Upon the exhibition of the original notice to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the factor, his duly authorized representative, attorney or attorney in fact, the register of deeds or his deputy shall cancel the lien by entry of "satisfaction" on the margin of the record.

Such satisfaction as hereinabove set forth shall operate as a release of all claims of the factor set forth in the said notice. All notices of liens filed pursuant to this article and not satisfied as hereinabove set forth shall be and remain in full force and effect under this article without further or other filing. (1945, c. 182, s. 5.)

Repeal of Section.—See Editor's Note to § 44-70.

§ **44-75. Common-law lien.** — When any factor, or any third party for the account of any such factor, shall have possession of materials, goods in process, or merchandise, such factor shall have a continuing general lien, as set forth

in § 44-71, without filing the notice provided for in this article. (1945, c. 182, s. 6; 1955, c. 386, s. 3.)

Repeal of Section.—See Editor's Note to § 44-70.

§ 44-76. **Construction.**—This article is to be construed liberally to secure the beneficial interest and purpose thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. Nothing in this article shall be construed as affecting or limiting any existing or future lien at common law or any rights at common law, or any right given by any other statute, and as to any transaction falling within the provisions both of this article and of any other statute of this State requiring or permitting filing, registering, consent, publication, notices, or formalities of execution, the factor shall not be required to comply with the provisions of any such other statute. (1945, c. 182, s. 7.)

Repeal of Section.—See Editor's Note to § 44-70.

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§ 44-77. **Definitions.**—In this article, unless otherwise clearly indicated by the context:

- (1) "Account" or "account receivable" means a right to the present or future payment of money—
 - a. Under an existing contract, or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for,
 - b. Not including a building or construction contract,
 - c. The assignment of which right is not subject to special statutory provisions not contained in this article,
 - d. Which right to payment is not secured under a chattel mortgage, deed of trust, conditional sale, or other instrument, which is required to be recorded in order that no assignee from the assignor and no creditor of the assignor can after such recordation acquire any rights in the account assigned, or in the proceeds thereof in any form, superior to the rights of the beneficiary of such recorded instrument and,
 - e. Which right to payment is not represented by a judgment, negotiable instrument, or other instrument, the surrender, presentation, possession or indorsement of which customarily gives to the owner, holder or indorsee the right to payment thereon.
- (2) "Assignee," "assignment," "assignor," and "debtor" are limited respectively to assignee, assignment, and assignor of, and a debtor on, an account receivable.
- (3) "Assignee" and "assignor" shall include persons, firms, partnerships, associations and corporations. "Assignee" and "assignor" in § 44-78 shall include prospective assignees and assignors.
- (4) "Assignment" includes an assignment for value as security and the creation by agreement of a lien on an account.
- (5) "Filing assignee" or "filing assignor" means a person, firm, partnership, association or corporation designated as assignee or assignor in a recorded notice of assignment.
- (6) "Value" means any consideration, other than a seal, sufficient to support a simple contract. An antecedent claim of any kind against any person, firm, partnership, association or corporation constitutes value

when an account or other property is taken in satisfaction thereof or as security therefor. (1945, c. 196, s. 1; 1957, c. 504.)

Cross Reference.—For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

Editor's Note.—Section 2, c. 700, Session Laws 1965, repeals §§ 44-77 to 44-85, effective at midnight June 30, 1967.

Effect and Application of 1957 Amendment.—This section as originally enacted was by express language limited to "a presently subsisting right to the present or future payment of money—(a) Under an existing contract." Not until 1957 was it possible in this State to give constructive notice of the assignment of an account to accrue under a contract to be subsequently made. And where an agreement providing for such an assignment was registered, and action was brought thereon, before May 1, 1957, the effective date of the 1957 amendment to this sec-

tion, the provisions of the amendment were not applicable and the registration of the agreement did not constitute notice of the equitable assignment. *Presley E. Brown Lumber Co. v. Textile Banking Co.*, 248 N.C. 303, 103 S.E.2d 334 (1958).

This article does not provide an exclusive method of giving security by mortgage, pledge or assignment of choses in action. In *re Steele*, 122 F. Supp. 948 (E.D.N.C. 1954).

A transfer or assignment of accounts receivable in connection with sales by a going concern is outside the scope of this article. In *re Steele*, 122 F. Supp. 948 (E.D.N.C. 1954).

Quoted in *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Cited in *In re Battery King Mfg. Co.*, 240 N.C. 586, 83 S.E.2d 490 (1954); *North Carolina Nat'l Bank v. Lumbermens Mut. Cas. Co.*, 335 F.2d 486 (4th Cir. 1964).

§ 44-78. Filing of notice of assignment; cancellation.—(a) The assignment of accounts receivable may be protected by the filing of a statement to be known as a "notice of assignment" which shall be signed by the assignor and the assignee and acknowledged by the assignor before an officer authorized to take acknowledgments, and probated as other instruments are now probated, which shall contain:

- (1) The name and mailing address within this State of both assignor and assignee, or if either the assignor or the assignee has no mailing address within the State, the mailing address outside the State,
- (2) A statement that the assignor has assigned or intends to assign, or has assigned and intends to assign one or more accounts to the named assignee.

(b) It shall not be necessary to describe the account or accounts in any manner in the notice of assignment.

(c) The place for filing the notice of assignment shall be the office of the register of deeds of the county wherein the assignor, if an individual, resides; or if the assignor is a domestic or domesticated corporation which has a registered office in this State, the notice of assignment must be filed in the county wherein such registered office is located; or if the corporation has no such registered office in this State but does have a principal office in this State as shown by its certificate of incorporation or amendment thereto or legislative charter or, in case of a domesticated corporation, as shown by its statement filed with the Secretary of State, the notice of assignment must be filed in the county wherein the principal office is said to be located by such certificate of incorporation or amendment thereto or legislative charter or such statement filed with the Secretary of State. If the assignor is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the notice of assignment shall be filed in the office of the register of deeds of any county wherein the assignor has a place of business.

(d) The notice of assignment shall be for a definite period of time stated therein, but may be extended for a definite period of time by a statement containing the book and page where the original notice of assignment is recorded, and signed, probated and recorded in the same manner as the notice of assignment. Any such

extension statement must be filed within the period of time prescribed in the original notice of assignment or last extension thereof and when filed shall be effective as of the time of the filing of the original notice of assignment.

(e) An account shall be deemed located in this State:

- (1) If the transaction out of which the account arose occurred in this State, or if payment is to be made in this State, or
- (2) If the account has been transferred to this State so that the place of payment of the account is in this State, or
- (3) In all other cases where an account is deemed located in this State under general rules of law.

(f) The register of deeds shall index and record each notice of assignment, or extension statement, in the same manner as chattel mortgages; and for indexing and recording the same the register of deeds shall receive the same fee as is provided by law for the recording and indexing of short form chattel mortgages.

(g) The notice of assignment may be cancelled of record at any time by the assignee or by his duly authorized attorney in fact, or upon presentation by the assignor or the assignee of the original notice of assignment marked satisfied in full by the assignee, but such cancellation shall not affect the protection afforded to accounts already assigned under a protected assignment. The cancellation of the original notice of assignment shall operate as a cancellation of all extension statements. (1945, c. 196, s. 2; 1957, c. 564.)

Repeal of Section.—See Editor's Note to § 44-77.

This article prescribes two methods of protecting an assignment of accounts receivable: (1) By the registration of a notice of assignment in the public registry of the county of residence of the assignor as provided by this section; or (2) by "the giving of written notice to the debtor

that the account has been assigned to the named assignee" as provided by G.S. 44-80 (a), (3). *In re Battery King Mfg. Co.*, 240 N.C. 586, 83 S.E.2d 490 (1954).

Cited in *In re Steele*, 122 F. Supp. 948 (E.D.N.C. 1954); *Haworth v. General Motors Accept. Corp.*, 238 F.2d 203 (1956); *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

§ 44-79. Filing of notices of discontinuance of assignment.—(a) A filing assignor may at any time file a "notice of discontinuance of assignment," signed by him and designating the book and page where the original notice of assignment to be discontinued is recorded, stating that he will not make any further assignments to the designated assignee after a specified date. Such notice, to be effective, shall be receipted for by the assignee or accompanied by an affidavit that a copy has been forwarded to the assignee by registered mail and such affidavit shall state the registration number. The filing of such notice of discontinuance shall not affect the protection afforded to accounts already assigned under a protected assignment.

(b) The register of deeds shall record such notices of discontinuance and index same as required for chattel mortgages, and shall make an entry of the filing thereof upon the recorded notice of assignment to which it relates. For recording a notice of discontinuance of assignment and making the entry, the register of deeds shall receive the fee allowed by law for the recording and indexing of short form chattel mortgages. (1945, c. 196, s. 3.)

Repeal of Section.—See Editor's Note to § 44-77.

§ 44-80. Protected assignments.—(a) An assignment becomes protected:

- (1) At the time of the filing of a notice of assignment contemporaneously with, or subsequently to, such assignment, or
- (2) At the time of the filing of the notice of assignment, as to an assignment made after the filing of the notice of assignment, if the assignment is taken within the period specified in the notice of assignment or

in any extension statement or on or before the date specified in the notice of discontinuance of assignment, or

- (3) If no notice of assignment is on file in accordance with the provisions of § 44-78, then upon the giving of written notice to the debtor that the account has been assigned to the named assignee.

(b) When an assignment becomes protected, it shall be deemed to have been fully perfected at that time, and no bona fide purchaser from the assignor, no creditor of any kind of the assignor, and no other assignee or transferee of the assignor, in any event shall have, or be deemed to have, acquired any right in the account so transferred or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights of the protected assignee therein.

(c) As between protected assignees the one who first protects his assignment has the superior right. (1945, c. 196, s. 4.)

Repeal of Section.—See Editor's Note to § 44-77.

Methods of Protecting Assignment of Accounts.—See note to § 44-78.

Notice of assignment of account by seller on copy of invoice received by wholly owned subsidiary of purchaser two days prior to receivership of seller was notice to purchaser within the meaning of sub-

section (a) (3) of this section; and such assignment defeats the purchaser's right to setoff. In re Battery King Mfg. Co., 240 N.C. 586, 83 S.E.2d 490 (1954).

Quoted in *Scarborough v. Berkshire Fine Spinning Associates*, 128 F. Supp. 948 (S.D.N.Y. 1955); *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

§ 44-81. Statement of accounts assigned or of balance due.—The assignee shall, upon written demand of the assignor, furnish the assignor with a statement in writing of the balance due by the assignor to the assignee and a list of all accounts assigned as security thereof. Any third person who in good faith acts upon said information and furnishes valuable consideration in reliance thereon shall be protected. (1945, c. 196, s. 5.)

Repeal of Section.—See Editor's Note to § 44-77.

§ 44-82. Rights between debtor and assignee. — In any case where, acting without actual knowledge of an assignment of an account to a protected assignee, the debtor in good faith pays all or part of the account to the assignor, or to a creditor, subsequent purchaser, or other assignee or transferee, or other person holding a lien upon, or interest or right in or to such account, such payment shall be an acquittance and release to the debtor to the extent of such payment, and such person so receiving payment shall be a trustee of any sums so paid and shall be accountable and liable therefor to the assignee who, under the provisions of this article, has superior rights and is entitled to such sums so paid by the debtor. (1945, c. 196, s. 6.)

Repeal of Section.—See Editor's Note to § 44-77.

Cited in *In re Steele*, 122 F. Supp. 948 (E.D.N.C. 1954).

§ 44-83. Validity as to third person; acts of assignor; dominion and control.—The validity, effect, and relative priority or lien of a protected assignment of an account as to third persons shall not be affected by failure to notify the debtor thereof or by any act or omission of the assignor with respect to the assigned account or the proceeds thereof.

Any permission by the assignee to the assignor to exercise dominion and control over a protected assigned account or the proceeds thereof shall not invalidate the assignment as to third persons. (1945, c. 196, s. 7.)

Repeal of Section.—See Editor's Note to § 44-77.

§ 44-84. Returned goods.—(a) Where the assignor has possession of goods which gave rise to an assigned account, the interest of a protected assignee

therein shall be superior to those of the general or judgment creditors of the assignor but subject to the rights of purchasers and lienees, who, in good faith, acquired their interest in the specific goods for value and without actual notice of the assignee's interest.

(b) The assignor shall hold in trust for the assignee:

- (1) The proceeds of an assigned account in any form,
- (2) Goods which gave rise to the account in the assignor's possession, and
- (3) The proceeds of the sale or lien referred to in (a) above.

(c) The assignment of an account includes the assignment of an account arising from a resale of the goods which gave rise to the assigned account. (1945, c. 196, s. 8.)

Repeal of Section.—See Editor's Note to § 44-77.

Proceeds of Sale Held in Trust. — Where seller assigned account for merchandise prior to return of merchandise from buyer to seller, and receiver of seller

resold merchandise to buyer, the receiver held the proceeds of resale in trust for assignee. *In re Battery King Mfg. Co.*, 240 N.C. 586, 83 S.E.2d 490 (1954).

Quoted in *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

§ 44-85. **Short title.**—This article may be cited as the Assignment of Accounts Receivable Act. (1945, c. 196, s. 10.)

Repeal of Section.—See Editor's Note to § 44-77.

(E.D.N.C. 1954); *In re Battery King Mfg. Co.*, 240 N.C. 586, 83 S.E.2d 490 (1954).

Cited in *In re Steele*, 122 F. Supp. 948

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ARTICLE 1.

Chattel Securities.

§ 45-1. **Form of chattel mortgage.**—Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I,, of the county of in the State of North Carolina, am indebted to, of county, in said State, in the sum of dollars, for which he holds my note to be due the of, A. D. 19....., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: but on this special trust, that if I fail to pay said debt and interest on or before the day of, A. D. 19....., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this day of, A. D. 19.....
 (Seal.)
 (1870-1, c. 277; Code, s. 1273; Rev., s. 1039; 1911, c. 69, s. 1; C. S., s. 2575.)

Local Modification. — New Hanover: 1945, c. 859.

No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. *Comron v. Standland*, 103 N.C. 207, 9 S.E. 317 (1889).

What Mortgage Must Show.—While no particular form is necessary to constitute

a mortgage, yet the words must clearly indicate the creation of a lien, specify the debts to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect. The statement that the creditor is to have a lien, and that on default he may take possession and sell, sufficiently discloses the intent. *Harris v. Jones*, 83 N.C. 318 (1880); *Britt v. Harrell*, 105 N.C. 10, 10 S.E. 902 (1890).

If a security for money is intended, that security is a mortgage, though not having on its face the form of a mortgage. *McCoy v. Lassiter*, 95 N.C. 88 (1886).

§ 45-2. **Registration.**—Chattel mortgages substantially in the form provided in § 45-1 are good to all intents and purposes when the same are duly

registered according to law. (1870-1, c. 277, ss. 1, 2; Code, ss. 1273, 1274; Rev., s. 1040; C. S., s. 2576.)

Cross References.—As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10. As to place of registration, see § 47-20. As to fee to register of deeds for registering chattel mortgage, etc., see § 161-10. As to offense of disposing of mortgaged or otherwise encumbered property and punishment therefor, see § 14-114.

Purpose of Section. — The purpose of the legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarrass trade and tend to encourage fraud. *Hodges v. Wilkinson*, 111 N.C. 56, 15 S.E. 941 (1892).

The lien of the chattel mortgage is created by registering the original instrument, and such registration is notice to the world of the existence of the lien. It is not material to the public whether the debt and property were transferred by the mortgagee. *Hodges v. Wilkinson*, 111 N.C. 56, 15 S.E. 941 (1892).

Registration is not essential between the parties to the mortgage. *Williams v. Jones*, 95 N.C. 504 (1886); *Thomas v. Cooksey*, 130 N.C. 148, 41 S.E. 2 (1902).

Assignment of Mortgage Not Required to Be Registered.—There is no provision which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often it is assigned, it is still good to protect the interest of the holder of the debt. *Hodges v. Atkinson*, 111 N.C. 56, 15 S.E. 941 (1892).

§ 45-3. **Mortgage of household and kitchen furniture.**—(a) Except as provided in subsection (b) of this section, all conveyances of household and kitchen furniture by a married person, made to secure the payment of money or other things of value, are void unless his or her spouse joins therein and their acknowledgments are taken in the manner prescribed by law in conveyances of real estate.

(b) A conveyance referred to in subsection (a) of this section is valid without the joinder of the spouse if:

- (1) The conveyance is made to secure the payment of all or part of the purchase price of the property conveyed; or
- (2) The spouse not joining in the conveyance has been adjudged a lunatic or insane; or
- (3) The spouse who executes the conveyance is authorized to do so by a valid and lawful deed of separation previously executed by the husband and wife; or
- (4) The spouse who executes the conveyance is the spouse not at fault in one

No Special Statutory Mode of Registration.—There is no special statutory mode presented for the registration of a chattel mortgage. If it is actually registered and indexed, that is sufficient. This section does not determine the mode. *Williamson v. Bitting*, 159 N.C. 321, 74 S.E. 808 (1912).

Delivery to Register in His Office Necessary.—It is required for a valid filing of a mortgage that it be delivered at the office of the register of deeds, and until then it can acquire no priority over one theretofore executed. *McHan v. Dorsey*, 173 N.C. 694, 92 S.E. 598 (1917).

When Two Mortgages Registered Simultaneously. — Where two mortgages given to different persons on the same subject matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien. *McHan v. Dorsey*, 173 N.C. 694, 92 S.E. 598 (1917).

Registration Prior to Attachment Gives Priority.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. *Williamson v. Bitting*, 159 N.C. 321, 74 S.E. 808 (1912).

Registry after Death of Mortgagor.—A mortgage both of land and personal property may be registered after the death of the mortgagor. *Williams v. Jones*, 95 N.C. 504 (1886).

Cited in *State v. Smith*, 230 N.C. 198, 52 S.E.2d 348 (1949).

of the instances described in G.S. 31A-1 (d). (1891, c. 91; Rev., s. 1041; C. S., s. 2577; 1931, c. 211; 1945, c. 73, s. 8; 1965, c. 794.)

Cross References. — As to forms of acknowledgment, see §§ 47-38, 47-39, 47-40. As to provision that spouse need not join in purchase-money mortgage, see § 39-13.

Editor's Note. — The 1965 amendment rewrote this section.

Provisions within Police Power of State. — The provisions of this section are in exercise of the police power of the State and promotive of its economic welfare and public convenience and comfort, and designed for the protection of the home, and the section is a constitutional and valid enactment. *Thomas v. Sanderlin*, 173 N.C. 329, 91 S.E. 1028 (1917).

Section as Declaration of Public Policy. — The requirements that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty are all of a piece as a declaration of public policy. *Thomas v. Sanderlin*, 173 N.C. 329, 91 S.E. 1028 (1917).

The evident mischief sought to be overcome by this section is the facility with which these necessary articles for the comfort and convenience of every household, however humble—the household and kitchen furniture—may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least, during the life of the husband, by the chattel mortgage, or other lien, now almost the only basis of credit for the poor man. *Kelly v. Fleming*, 113 N.C. 133, 18 S.E. 81 (1893).

Section 30-8 Distinguished. — A distinction between this section and § 30-8 should be noted. In this section the conveyance without the joinder of the wife is declared to be void, while in the latter statute such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. *Boyd v. Brooks*, 197 N.C. 644, 150 S.E. 178 (1929).

Section Applies to Liens Conferred by Writing, Whether Property Belongs to Wife or Husband. — This section could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privy examination [required by this sec-

tion before the 1945 amendment] of the wife would have been impracticable. Nor could the section apply to the sale by the husband of the personal property of which he was the sole owner, because in this instance it was not necessary that the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privy examination of the wife, as in sale of real estate; and this may be applicable to such property whether it belongs to the husband or to the wife. *Kelly v. Fleming*, 113 N.C. 133, 18 S.E. 81 (1893).

The word "convey," in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. A conveyance is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson*, 100 N.C. 52, 6 S.E. 71 (1888); *Kelly v. Fleming*, 113 N.C. 133, 18 S.E. 81 (1893).

Application to Joint Note of Husband and Wife to Bind Separate Estate. — This section does not apply to a note signed by husband and wife binding her separate personal estate. *Harvey v. Johnson*, 133 N.C. 352, 45 S.E. 644 (1903).

Applies Only to Conveyances of Furniture—Privy Examination. — This section applies only to conveyances by the husband of the household and kitchen furniture, and the former requirement of the privy examination of the wife in giving her assent thereto was within the power of the General Assembly and was in line with the same requirement in the Constitution, as to the joinder of the wife in the conveyance of the allotted homestead—the only instance in which the Constitution recognizes such a requirement. *Thomas v. Sanderlin*, 173 N.C. 329, 91 S.E. 1028 (1917).

Goods for Sale in Shop Not Covered. — The words "household and kitchen furniture" may comprise not only that species of property which is in actual use, but also that which is on sale in shops, yet no one

will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. *Kelly v. Fleming*, 113 N.C. 133, 18 S.E. 81 (1893).

Phrase "Household Furniture" Covers Piano. — A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms "Household and kitchen furniture" as used

in this section, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute. *Thomas v. Sanderlin*, 173 N.C. 329, 91 S.E. 1028 (1917).

Former Law.—See *Kelly v. Fleming*, 113 N.C. 133, 18 S.E. 81 (1893); *Thomas v. Sanderlin*, 173 N.C. 329, 91 S.E. 1028 (1917). See also 9 N.C.L. Rev. 392.

§ 45-3.1. Right of installment buyers to possession.—If any chattel is sold or agreed to be sold, and it is agreed between the parties to the sale that part or all of the price is to be paid in one or more installments, which are secured either by conditional sale, purchase money chattel mortgage, purchase money chattel deed of trust, or similar security, on the chattel sold, and possession of the chattel is by consent of the parties placed in the buyer, it shall be deemed to be the intention of the parties, in the absence of an express agreement to the contrary, that he shall have the right to retain such possession until he defaults by failing to make a payment as agreed or otherwise failing to comply with the terms of the sale or security, or by failing to provide care and maintenance of the chattel in such a manner as to cause damage or injury to it, or by using the chattel for any purpose prohibited by law. (1961, c. 211.)

Editor's Note. — For comment on this section, see 40 N.C.L. Rev. 81 (1961).

Mortgagee Was Formerly Entitled to Possession Prior to Default.—Until modified by this section, a mortgagee of chattels or his assignee was, in the absence of an agreement to the contrary, entitled to possession of the mortgaged property even prior to a default. *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962).

After Default Mortgagee May Exercise Right to Possession without Process of Law.—After default a mortgagee is entitled

to possession of the mortgaged property and he may exercise that right without process of law provided he does so peacefully. *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962).

Right to Enter Premises of Mortgagor.—Where the mortgage contains an express provision authorizing mortgagee to peacefully enter the premises of mortgagor and take possession, such entry and taking is not wrongful. *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962).

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.—When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this State as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (1887, c. 147; 1895, c. 431; 1901, c. 186; 1905, c. 425; Rev., s. 1031; C. S., s. 2578; 1933, c. 199.)

Power of Sale Vests in Executor of Mortgagee.—When a power of sale in a mortgage is given to the mortgagee, "his executors," etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of this

section and the contract in the mortgage. *Scott v. Blades Lumber Co.*, 144 N.C. 44, 56 S.E. 548 (1907).

Same—Even in the Absence of Stipulation to That Effect. — The executor of a mortgagee may exercise the power of sale contained in the mortgage, when the deed

in terms confers such power upon the mortgagee and his executors. This section was intended to confer the power of sale upon executors and administrators when such power is not given in the deed. *Yount v. Morrison*, 109 N.C. 520, 13 S.E. 892 (1891).

Joint Exercise of Power of Sale.—While the executors of a deceased mortgagee may exercise the power of sale in the

mortgage where there are two executors of the deceased mortgagee the power must be exercised by them jointly. *Combs v. Porter*, 231 N.C. 585, 58 S.E.2d 100 (1950).

Stated in *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957).

Cited in *Allred v. Trexler Lumber Co.*, 194 N.C. 547, 140 S.E. 157 (1927); *Nall v. McConnell*, 211 N.C. 258, 190 S.E. 210 (1937).

§ 45-5. **Foreclosures by representatives validated.**—In all actions which were brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (1905, c. 425, s. 2; Rev., s. 1032; C. S., s. 2579.)

§ 45-6. **Renunciation by representative; clerk appoints trustee.**—The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county. (1905, c. 128; Rev., s. 1038; C. S., s. 2580.)

Cross Reference.—As to appointment of successor to trustee, etc., see § 36-17. See also § 45-9 and note.

Cited in *Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938).

§ 45-7. **Agent to sell under power may be appointed by parol.**—All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C. S., s. 2581.)

Recitals in Deed Prima Facie Correct.—Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are

taken as prima facie correct. *Hayes v. Ferguson*, 206 N.C. 414, 174 S.E. 121 (1934).

§ 45-8. **Survivorship among donees of power of sale.**—In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or

more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C. S., s. 2582.)

Editor's Note.—See 13 N.C.L. Rev. 93.
Execution of Power by Survivor Trustee in Mortgage.—Where one of two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being

a trust coupled with an interest. *Cawfield v. Owens*, 129 N.C. 286, 40 S.E. 62 (1901).

Cited in *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957).

§ 45-9. Clerk appoints successor to incompetent trustee.—When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the State, or in any way becomes incompetent to execute the said trust, or is a nonresident of this State, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the State, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (1869-70, c. 188; 1873-4, c. 126; Code, s. 1276; 1901, c. 576; Rev., s. 1037; C. S., s. 2583; 1933, c. 493.)

Appointment of New Trustee upon the Death of the Old.—Upon the death of a trustee, the clerk of the superior court may appoint another under this section, who may proceed to execute the trust according to the terms of the deed. *Wright v. Fort*, 126 N.C. 615, 36 S.E. 113 (1900).

Appointment of Trustees upon the Death of Last Survivor of Board.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors would be appointed under this section, by the clerk of the court. *Thornton v. Harris*, 140 N.C. 498, 53 S.E. 341 (1906).

Appointment upon Appeal.—Where the clerk of the superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such

appointment. *Roseman v. Roseman*, 127 N.C. 494, 37 S.E. 518 (1900).

Section Inapplicable to Active Express Trust.—The provisions of this section may not be held applicable to an active express trust. *Cheshire v. First Presbyterian Church*, 221 N.C. 205, 19 S.E.2d 855 (1942).

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under this section; and a deed made by the substitute trustee passes the title to the purchaser at a foreclosure sale. *Thompson v. State*, 223 N.C. 340, 26 S.E.2d 902 (1943).

Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method expressed for this purpose is contractual and does not arise under this section requiring certain proceedings to be taken in the

courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale. *Raleigh Real Estate & Trust Co. v. Padgett*, 194 N.C. 727, 140 S.E. 714 (1927).

Administrator C.T.A. Taking Place of Executor Trustee.—Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds to the trusteeship, and hence an appointment by the clerk of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no power. *State ex rel. Clark v. Peebles*, 120 N.C. 31, 26 S.E. 924 (1897).

Petition for Appointment of New Trustee—Title of New Trustee.—Under this section, when a trustee dies, all of the parties in interest may join in a petition to the superior court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee, so far as it is competent for the court to confer them. *McAfee v. Green*, 143 N.C. 411, 55 S.E. 828 (1906).

All Persons Interested Must Be Made Parties.—The appointment of a trustee in cases where the former trustee has died, removed from the county, or become incompetent, cannot be done on an ex parte motion or petition. The application for such appointment is in the nature of a civil

action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims. *Guion v. Melvin*, 69 N.C. 242 (1873).

"All persons interested" include, in a proceeding for the removal of a trustee and the appointment of a substitute trustee under this section, only the trustor, the trustee or trustees, and all of the cestuis que trustent whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted. *Thompson v. State*, 223 N.C. 340, 26 S.E.2d 902 (1943).

Personal Powers of Old Trustee Cannot Be Transferred to New.—Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. *Young v. Young*, 97 N.C. 132, 2 S.E. 78 (1887).

Bond for Substituted Trustee Unnecessary.—It is not necessary in substituting one trustee for another in pursuance of this section, to require a bond of the substituted trustee. *Strayhorn v. Green*, 92 N.C. 119 (1885).

Cited in New York Life Ins. Co. v. Lassiter, 209 N.C. 156, 183 S.E. 616 (1936); *Nall v. McConnell*, 211 N.C. 258, 190 S.E. 210 (1937); *Cheshire v. First Presbyterian Church*, 222 N.C. 280, 22 S.E.2d 566 (1942); *Mast v. Blackburn*, 248 N.C. 231, 102 S.E.2d 812 (1958).

§ 45-10. Substitution of trustees in mortgages and deeds of trust.—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real or personal property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper-writing whenever it appears:

- (1) In the case of individual trustees: That the trustee then named in such mortgage, deed of trust, or other instrument securing the payment of money, has died, or has removed from the State, or is not a resident of this State or cannot be found in this State, or has disappeared from the community of his residence so that his whereabouts remains unknown in such community for a period of three months or more; or that he has become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy or conviction of a criminal offense; or that he has refused to accept such appointment as trustee or refuses to act or has been declared a bankrupt; or that a petition in involuntary bankruptcy has been filed against him, or that a suit has been instituted in any court of this State asking relief against him on account of insolvency; or that a cause of action has been asserted against him on account of fraud against his creditors.

- (2) In the case of corporate trustees: That the trustee is a foreign corporation or has ceased to do business, or has ceased to exercise trust powers, or has excluded from its regular business the performance of such trusts; or that the corporation has been declared bankrupt, or has been placed in the hands of a receiver; or that insolvency proceedings have been instituted in any court of this State or in any court of the United States against it, or that any action has been instituted in either of said courts against it in which relief is asked on the ground of insolvency or fraud against its creditors; or that any officer or commission of this State, or any employee of such commission or officer, has taken charge of its affairs for the purpose of liquidation pursuant to any statute.

The powers recited in this section shall be cumulative and optional. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543.)

Editor's Note.—See 9 N.C.L. Rev. 402, as to the effect of the 1943 amendment.

Section Becomes Part of Contract.—Where a deed of trust is executed after the effective date of this section the provisions of the section enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the cestui que trust, are not injuriously affected, does not violate the constitutional provisions. *Bateman v. Sterrett*, 201 N.C. 59, 159 S.E. 14 (1931).

A substituted trustee succeeds to all the rights, titles and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. *Pearce v. Watkins*, 219 N.C. 636, 14 S.E.2d 653 (1941).

A sale of the property by the substituted

trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land. *North Carolina Mortgage Corp. v. Morgan*, 208 N.C. 743, 182 S.E. 450 (1935).

Substitute Trustee May Execute Deed to Purchaser.—A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute a deed to the purchaser at a sale duly conducted by the original trustee. *Pendergrast v. Home Mortgage Co.*, 211 N.C. 126, 189 S.E. 118 (1937); *Pearce v. Watkins*, 219 N.C. 636, 14 S.E.2d 653 (1941).

Cited in *New York Life Ins. Co. v. Lassiter*, 209 N.C. 156, 183 S.E. 616 (1936); *Thompson v. State*, 223 N.C. 340, 26 S.E.2d 902 (1943); *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 132 S.E.2d 345 (1963).

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real or personal property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1.)

Editor's Note.—For comment on this section, see 19 N.C.L. Rev. 507.

§ 45-12. **Certificate by clerk of superior court.**—Whenever the powers set out in § 45-10 shall be exercised the clerk of the superior court shall certify that the instrument has been executed by the owner or owners of a majority in amount of the indebtedness, notes, bonds or other instruments secured therein, have executed the same, and that it has been made to appear to him that the cause of substitution as set forth therein is true and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust, and unless such certificate is attached to said instrument before registration and registered therewith the same shall be invalid and of no effect. (1931, c. 78, s. 3.)

§ 45-13. **Right of appeal by any person interested; judge to review findings of clerk de novo.**—Whenever the power contained in § 45-10 or in § 45-11 is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to March 4, 1931, then, at any time within twelve months from the registration of the instrument designating the new trustee but within thirty days from actual knowledge of the same, any person interested therein may appeal from the findings of the clerk of the superior court pursuant to § 45-12, and such appeal shall be duly constituted when a written notice signed by, or on behalf of such person, shall have been served in any of the methods of service of summons provided by law on all other parties interested therein, including the said substituted trustee. The notice shall state that a motion will be made before the judge of the superior court of the county of the clerk who made such certificate at the next regular term of such superior court beginning more than ten days after the service of said notice on all interested parties, and the docketing of such notices on the civil issue docket of said county. On the hearing of said motion it shall be open to all parties to contest and defend the findings of said clerk, and the judge shall review said findings de novo and make such findings in respect thereof as shall appear to him from the evidence to be true, and if the said substituted trustee shall be removed at said hearing another trustee shall be substituted in his stead by the court upon a finding that he or it is a proper person or corporation to perform the functions of said trusteeship, but only one such appeal shall be allowed as to each appointment. (1931, c. 78, s. 4; 1941, c. 115, s. 2.)

§ 45-14. **Acts of trustee prior to removal not invalidated.**—If any such trustee who has been substituted as provided in § 45-10 or in § 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in §§ 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts insofar as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

§ 45-15. **Registration of substitution constructive notice.**—The registration of such paper-writing designating a new trustee under § 45-10 or under § 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

§ 45-16. **Register of deeds to make marginal entry of substituted trustee.**—Whenever any substituted trustee shall be appointed as provided in §§ 45-10 to 45-17 and such designation of such substituted trustee shall have been registered, together with the certificates required in §§ 45-10 to 45-17, then it shall be the duty of the register of deeds to make an appropriate notation on the margin of the registration of the said mortgage, deed of trust, or other instrument securing

the payment of money, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in § 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17, and in which cases the register of deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7.)

§ 45-17. Substitution made as often as justifiable.—The powers set out in § 45-10 and in § 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in §§ 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before February 1, 1963, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substituted trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon has been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241.)

Editor's Note.—The act from which this section was codified, Laws 1939, c. 13, provided that it should not be construed to affect any litigation pending on February 3, 1939, nor to divest vested rights.

The 1963 amendment substituted "February 1, 1963," for "February 3, 1939," near the beginning of the section.

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian.—When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian. (1905, c. 433; Rev., s. 1034; C. S., s. 2584.)

§ 45-20. Sales by mortgagees and trustees confirmed.—All sales of real property made prior to February tenth, nineteen hundred and five, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed. (Ex. Sess. 1920, c. 27; C. S., s. 2584(a).)

§ 45-20.1. Validation of trustees' deeds where seals omitted.—All deeds executed prior to the first day of January, one thousand nine hundred and

forty, by any trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee has omitted to affix his seal after his signature, shall be good and valid: Provided, however, that this section shall not apply to actions instituted and pending prior to the fifteenth day of May, one thousand nine hundred and forty-three. (1943, c. 171.)

§ 45-20.2. Further validation of trustees' deeds where seals omitted.—All deeds executed prior to the first day of March, 1965, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature, if otherwise valid, shall not be rendered invalid by reason of omission of said seal, provided, however, that this section shall not apply to any pending litigation. (1965, c. 147.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.—In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

Editor's Note.—This section, which became effective March 15, 1941, did not apply to or affect pending litigation. For comment on section, see 19 N.C.L. Rev. 507.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.—As used in this article, "sale" means only a sale of real or personal property pursuant to—

- (1) An express power of sale contained in a mortgage, deed of trust, or conditional sale contract, or
- (2) A power of sale provided by statute with respect to a mortgage or deed of trust of personal property, or conditional sale contract, which does not contain an express power of sale. (1949, c. 720, s. 1.)

Editor's Note.—For discussion of this article, see 27 N.C.L. Rev. 479.

§ 45-21.2. Article not applicable to foreclosure by court action.—This article does not affect any right to foreclosure by action in court, and is not applicable to any such action. (1949, c. 720, s. 1.)

Quoted in *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 45-21.3. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 720, s. 1.)

§ 45-21.4. Place of sale of real property.—(a) Every sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different

times or from different persons, or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) When a mortgage or deed of trust with power of sale of real property designates the place of sale within the county, the sale shall be held at the place so designated.

(d) When a mortgage or deed of trust with power of sale of real property confers upon the mortgagee or trustee the right to designate the place of sale, the sale shall be held at the place within the county designated by the mortgagee or trustee in the notice of sale.

(e) When a mortgage or deed of trust with power of sale of real property does not designate, or confer upon the mortgagee or trustee the right to designate, the place of sale, or when it designates as the place of sale some county in which no part of the property is situated, such real property shall be sold as follows:

- (1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated.
- (2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated. (1949, c. 720, s. 1.)

§ 45-21.5. Place of sale of personal property.—(a) When a mortgage, deed of trust or conditional sale contract designates the county in which a sale of personal property shall be held or the place of sale within the county, the terms of the instrument shall be complied with.

(b) When the instrument does not designate the county in which a sale of personal property shall be held, the sale may be held in any county—

- (1) Where such instrument is recorded, if it has been recorded as provided by G.S. 47-20 or G.S. 47-23; or
- (2) Where the property, or any part thereof, is located when the mortgagee, trustee or vendor takes possession of, or repossesses it.

(c) When the instrument does not designate the particular place of sale within the county, the sale shall be held at such place therein as is designated in the notice of sale by the mortgagee, trustee or vendor. (1949, c. 720, s. 1; 1955, c. 1345, s. 2.)

§ 45-21.6. Presence of personal property at sale required.—The person holding a sale of personal property shall have the property present at the place of sale unless—

- (1) The instrument containing the power of sale specifically provides otherwise, or
- (2) Prior to the sale, the clerk of the superior court in his discretion, upon application of any interested party, and upon notice being given, as provided by article 48 of chapter 1, to all parties in interest, issues an order authorizing the sale to be held without the property being present because the nature, condition or use of the property is such that the clerk deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection be set out in the notice of sale. (1949, c. 720, s. 1.)

§ 45-21.7. Sale of separate tracts in different counties.—(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale, and each subsequent resale, of each such tract shall be subject to a separate upset bid. The clerk of the superior court of the

county where the property is situated has jurisdiction with respect to resale of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1.)

§ 45-21.8. Sale as a whole or in parts.—(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1.)

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.—(a) When a person exercising a power of sale sells property in parts pursuant to G.S. 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation, and the costs and expenses of the sale. The readvertisement of such sale shall be made as provided by G.S. 45-21.17 in the case of real property or G.S. 45-21.18 in the case of personal property.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1.)

§ 45-21.10. Requirement of cash deposit at sale.—(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee holding the sale of real property may require the highest bidder immediately to make a cash deposit not to exceed ten percent (10%) of the amount of the bid up to and including \$1,000, plus five percent (5%) of any excess over \$1,000.

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1.)

§ 45-21.11. Application of statute of limitations to serial notes.—When a series of notes maturing at different times is secured by a mortgage, deed of trust or conditional sale contract and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1.)

§ 45-21.12. Power of sale barred when foreclosure barred.—(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage, deed of trust or conditional sale contract, or provided by statute, when an action to foreclose the mortgage or deed of trust, or to enforce the conditional sale contract, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage, deed of trust or conditional sale contract, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, or to enforce such conditional sale contract, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of the sale is first posted or published as provided by this article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1.)

Cross Reference.—As to statute of limitations on foreclosure, see § 1-47, subdivision (3).

Editor's Note.—Many of the cases in the following note were decided under repealed § 45-26, which was somewhat similar to this section.

Former § 45-26 was not a mere statute of limitation, and was not required to be pleaded by a party whose rights might be affected. It simply destroyed, by direct prohibition, the authority of any power of sale made in the mortgage contract or conveyance. *Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938). See 17 N.C.L. Rev. 448.

Construed against Exercise of Power.—Where reasonable doubt existed as to the interpretation of former § 45-26, it was required to be strictly construed against the exercise of the power of foreclosure and the doubt resolved in favor of the holder of the equitable title. *Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938).

Applicable to Contracts in Existence at Effective Date.—See *Graves v. Howard*, 159 N.C. 594, 75 S.E. 998 (1912).

Doctrine of Cone v. Hyatt Changed.—The holding in *Cone v. Hyatt*, 132 N.C. 810, 44 S.E. 678 (1903), that the power of sale in a deed of trust or mortgage was not barred by the statute of limitation, though an action for foreclosure thereon was barred, was changed by former § 45-26. See also *Lester Piano Co. v. Loven*, 207 N.C. 96, 176 S.E. 290 (1934).

Exercise of Power in Mortgage Subject to Ten-Year Limitation.—While formerly there was no bar to the execu-

tion of a power of sale contained in a mortgage of lands, by former § 45-26 mortgages then executed were made subject to the ten-year statute. *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918).

Ten-Year Period Runs from Maturity of Note or Notes Secured.—The right to exercise any power of sale contained in a deed of trust is barred after ten years from the maturity of any note or notes secured thereby, where no payments have been made thereon extending the statute. *Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).

Or from Last Payment Thereon.—The power referred to in this section must be exercised within the ten-year period following the maturity of the note, or from the last payment thereon. *Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).

The provisions of § 1-47, subdivision (3), relating to the bar of actions to foreclose mortgages of real property, were required to be read into former § 45-26; and it appears that a power of sale contained in a mortgage becomes inoperative and unenforceable when not exercised within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same "where the mortgagor or grantor has been in possession of the property." Ownbey v. Parkway Properties, 222 N.C. 54, 21 S.E.2d 900 (1942).

Statute Does Not Commence Running until Debt Due.—The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the power of sale contained in the mort-

gage may be exercised within ten years after the maturity of the principal. *Scott v. Blades Lumber Co.*, 144 N.C. 44, 56 S.E. 548 (1907).

Running of Statute on Installment Debts.—See *Cone v. Hyatt*, 132 N.C. 810, 44 S.E. 678 (1903).

Limitation When Power of Sale for Default of Interest Optional.—See *Scott v. Blades Lumber Co.*, 144 N.C. 44, 56 S.E. 548 (1907).

Notes in Series, with Acceleration Clause.—See *E. H. & J. A. Meadows Co. v. Bryan*, 195 N.C. 398, 142 S.E. 487 (1928). See also § 45-21.11.

Restraining Foreclosure.—Where notes secured by a mortgage were barred by the statute of limitations, and the power of sale contained in the instrument was barred by the lapse of over ten years from the date of the last payment on the notes, the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure, on the

principle that he who seeks equity must do equity, was unavailing. *Serls v. Gibbs*, 205 N.C. 246, 171 S.E. 56 (1933).

Foreclosure Deed Voidable Merely.—A foreclosure deed executed pursuant to a sale held after the power of sale was barred by former § 45-26 was held voidable and not void. *Edwards v. Hair*, 215 N.C. 662, 2 S.E.2d 859 (1939).

Burden of Proof.—An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred by former § 45-26 at the time of foreclosure, was error, the burden being upon plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. *Edwards v. Hair*, 215 N.C. 662, 2 S.E.2d 859 (1939).

Applied in *In re Gibbs*, 205 N.C. 312, 171 S.E. 55 (1933).

Stated in *Demai v. Tart*, 221 N.C. 106, 19 S.E.2d 130 (1942).

Cited in *Moore v. Owens*, 255 N.C. 336, 121 S.E.2d 540 (1961).

§ 45-21.13. Conditional sale contract; mortgage or deed of trust of personal property; statutory power of sale.—When a conditional sale contract or mortgage or deed of trust of personal property, does not contain an express power of sale, a power of sale is hereby conferred upon the vendor, mortgagee or trustee, which power may be exercised in the same manner as an express power of sale, except as provided by G.S. 45-21.18. (1949, c. 720, s. 1.)

Cross Reference.—As to registration of conditional sales of personal property, see § 47-20 et seq.

For case applying repealed § 45-24, simi-

lar in subject matter to this section, see *House v. Parker*, 181 N.C. 40, 106 S.E. 137 (1921).

§ 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.—Whenever any person fails to file any report or account, as provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court having jurisdiction on his own motion or the motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 720, s. 1.)

Cross Reference.—See note to § 45-21.26.

§ 45-21.15. Trustee's fees.—(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

- (1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;
- (2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;
- (3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to such compensation as the parties agree upon;

- (4) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, and the parties are not able to agree as to the trustee's compensation, then five percent (5%) of the amount of the obligation secured by the instrument, not exceeding the amount stipulated in the instrument as compensation for the trustee's services in actually holding a sale, shall be deposited with the clerk of the superior court. Such sum shall be held by the clerk until the trustee's compensation is fixed by the clerk, upon petition by the trustee, after notice to the person who deposited such sum. (1949, c. 720, s. 1.)

Part 2. Procedure for Sale.

§ 45-21.16. **Contents of notice of sale.**—The notice of sale shall—

- (1) Refer to the instrument pursuant to which the sale is held;
- (2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this article;
- (3) Describe real property to be sold substantially as it is described in the instrument containing the power of sale, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold substantially as it is described in the instrument pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;
- (5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;
- (6) Include any other provisions required by the instrument to be included therein; and
- (7) State that the property will be sold subject to taxes and special assessments if it is to be so sold. (1949, c. 720, s. 1; 1951, c. 252, s. 1.)

Cross Reference. — As to requirements for notice of execution and judicial sales, see §§ 1-339.15, 1-339.51.

Editor's Note.—The cases in the following note were decided under repealed § 45-25, which was similar in subject matter to subdivision (3) of this section.

Description "Substantially" as in Instrument.—In *Douglas v. Rhodes*, 188 N.C. 580, 125 S.E. 261 (1924), construing repealed § 45-25, the court said: "If the legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have easily said so in

the statute, but on the contrary it used the word 'substantially.' The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy."

In notices for the sale of realty under mortgages or deeds of trust, the identical description of the land, as contained in the instrument, was not required by former § 45-25, and a description "substantially" as in the conveyance was sufficient. *Peedin v. Oliver*, 222 N.C. 665, 24 S.E.2d 519 (1943).

As to description held sufficient under former § 45-25, see *Douglas v. Rhodes*, 188 N.C. 580, 125 S.E. 261 (1924); *Blount v. Basnight*, 209 N.C. 268, 183 S.E. 405 (1936).

§ 45-21.17. **Posting and publishing notice of sale of real property.**—(a) When the instrument pursuant to which a sale of real property is to be held contains provisions with respect to posting or publishing notice of sale of the real property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of real property is to be

held contains no provision with respect to posting or publishing notice of the sale of real property, the notice shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

(c) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(d) When the real property to be sold is situated in more than one county, the provisions of subsections (a) or (b) whichever is applicable, and subsection (c) shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1; 1965, c. 41.)

Editor's Note.—Prior to the 1965 amendment, paragraph b of subdivision (2) of subsection (b) provided for posting the notice at three other public places in the county.

Advertisement Gives Mortgagor Required Notice.—The mortgagor is always entitled to notice of sale under foreclosure, but notice is given when the advertisement required by this section is made. *Woodell v. Davis*, 261 N.C. 160, 134 S.E.2d 160 (1964).

Effect of Notice to Discontinue Publication of Notice of Sale. — A notice, from

the trustee in a mortgage or deed of trust to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property and breaks the continuity of publication of notice required by former § 1-325, and no subsequent renewal of authority can bridge the gap or restore the publication to its original status. *Smith v. Bank of Pinehurst*, 223 N.C. 249, 25 S.E.2d 859 (1943).

§ 45-21.18. Posting notice of sale of personal property; mailing notice when statutory power of sale exercised.—(a) When an instrument containing an express power of sale of personal property contains provisions with respect to posting or publishing a notice of sale of the property, such provisions shall be complied with, and compliance therewith is sufficient notice.

(b) When the instrument pursuant to which a sale of personal property is to be held contains no provision with respect to posting or publishing notice of the sale, the notice of sale, except in the case of perishable property as described in G. S. 45-21.19, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the sale.

(c) When a mortgage or deed of trust of personal property, or a conditional sale contract, contains no express power of sale, any person exercising the statutory power of sale provided therefor, in addition to the posting of notice required by subsection (b), shall, at least ten days before the date of sale, mail by registered mail a copy of the notice of sale to the mortgagor or grantor in case of a mortgage or deed of trust of personal property, or the vendee in case of a conditional sale contract—

(1) At the actual address of the mortgagor, grantor or vendee, if such address is known to the mortgagee, trustee or vendor, or

(2) At the address, if any, furnished the mortgagee, trustee or vendor by the

mortgagor, grantor or vendee, when the actual address is not known to the mortgagee, trustee or vendor.

(d) If the actual address of the mortgagor, grantor or vendee is not known to the mortgagee, trustee or vendor, and if no address of the mortgagor, grantor or vendee has been furnished to the mortgagee, trustee or vendor, no mailing of a copy of the notice of sale pursuant to subsection (c) is required. (1949, c. 720, s. 1.)

Cross Reference.—As to advertisement for judicial sale and sale under execution of personal property, see §§ 1-339.18, 1-339.53.

Editor's Note.—The cases in the following note were decided under repealed § 45-23, which formerly governed notice of sale of personal property.

Strict Compliance with Statute. — In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument, not inconsistent with the statute in respect to notice and other terms on which the power may be exercised, shall be strictly complied with;

and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. *Ferebee v. Sawyer*, 167 N.C. 199, 83 S.E. 17 (1914).

Presumption of Regularity. — While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places, and the burden of proof is on the party claiming a failure of proper notice or advertisement to show it. *Cowfield v. Owens*, 129 N.C. 286, 40 S.E. 62 (1901); *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918).

§ 45-21.19. Exception; perishable property.—If, in the opinion of a person who is about to exercise a power of sale of personal property, the property is perishable because subject to rapid deterioration, such person may report such fact together with a description of the property to the clerk of the superior court of the county in which the property is to be sold, and apply for authority to sell the property at an earlier date than this article would otherwise permit. If the clerk determines that the property is such perishable property, he shall order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk makes no such order, the person authorized to hold the sale shall proceed as if the matter had not been presented to the clerk. (1949, c. 720, s. 1.)

§ 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.—A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered of—

- (1) The obligation secured by the mortgage, deed of trust or conditional sale contract, and
- (2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G.S. 45-21.15. (1949, c. 720, s. 1.)

§ 45-21.21. Postponement of sale.—(a) Any person exercising a power of sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale—

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney—

- (1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
- (2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17 in the case of real property or G.S. 45-21.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall—

- (1) State that the sale is postponed,
- (2) State the hour and date to which the sale is postponed,
- (3) State the reason for the postponement, and
- (4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to hold the sale may readvertise the property in the same manner as he was required to advertise the sale which was not held, and may hold a sale at such later date as is fixed in the new notice of sale. (1949, c. 720, s. 1.)

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 720, s. 1.)

§ 45-21.23. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sale of personal property may continue until 10:00 o'clock P.M. (1949, c. 720, s. 1.)

§ 45-21.24. Continuance of uncompleted sale.—A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1.)

§ 45-21.25. Delivery of personal property; bill of sale.—The person holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The person holding the sale may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. No report of such sale is necessary. (1949, c. 720, s. 1.)

§ 45-21.26. **Preliminary report of sale of real property.**—(a) The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale was had.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney, and shall show—

- (1) The authority under which the person making the sale acted;
- (2) The name of the mortgagor or grantor;
- (3) The name of the mortgagee or trustee;
- (4) The date, time and place of the sale;
- (5) A reference to the book and page in the office of the register of deeds, where the instrument is recorded or, if not recorded, a description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (6) The name or names of the person or persons to whom the property was sold;
- (7) The price at which the property, or each part thereof, was sold, and that such price was the highest bid therefor;
- (8) The name of the person making the report; and
- (9) The date of the report. (1949, c. 720, s. 1; 1951, c. 252, s. 2.)

Failure to Report within Five Days.—If a trustee fails to report within the five days directed by this section, the clerk may compel a report under § 45-21.14. When the clerk assumes jurisdiction and orders a resale based on a raised bid, his orders are not void. *Gallos v. Lucas*, 252 N.C. 480, 113 S.E.2d 923 (1960).

If a trustee fails to report a foreclosure sale within the five days as directed by this section, the clerk is authorized to compel such report. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 45-21.27. **Upset bid on real property; compliance bonds.**—(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first \$1000 thereof plus five percent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of sale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 720, s. 1; 1963, c. 377.)

Editor's Note. — The 1963 amendment inserted "or by certified check or cashier's check satisfactory to the said clerk" near the middle of subsection (a).

Most of the cases in the following note were decided under repealed § 45-28, of similar import to this and the three following sections. It should be noted that § 45-28 applied to foreclosure by order of court, to execution sales, and to sales by personal representatives and sales by any person pursuant to a power contained in a will, as well as to sales under power of sale contained in a mortgage or deed of trust. As to former § 45-28, see 13 N.C.L. Rev. 15, 300.

Purpose of Former § 45-28 as to Mortgages.—Former § 45-28 was intended for the protection of mortgagors where sales were made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10% had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale. *Pringle v. Winston-Salem Bldg. & Loan Ass'n*, 182 N.C. 316, 108 S.E. 914 (1921).

Liberal Construction.—Under former § 45-28 it was held that, while the clerk of the superior court is without authority to order a resale of lands foreclosed under a mortgage without an increase bid filed with him, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor. *Clayton Banking Co. v. Green*, 197 N.C. 534, 149 S.E. 689 (1929).

Statute Incorporated in Mortgages and Deeds of Trust.—The provisions of former § 45-28, concerning the sale of land under a power contained in a mortgage or deed of trust, entered into and controlled the sale under such instruments. In *re Sermon's Land*, 182 N.C. 122, 108 S.E. 497 (1921).

The provisions of former § 45-28 were by operation of law, incorporated in all mortgages and deeds of trust and enter into and control any sale under such instruments. *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 62 S.E.2d 521 (1950).

Status of Mortgage and Deed of Trust Sales.—Under former § 45-28 a sale of land under the power in a mortgage or deed of trust was given the same status as if made under a judgment or decree of court. *Pringle v. Winston-Salem Bldg. & Loan Ass'n*, 182 N.C. 316, 108 S.E. 914 (1921).

Power of Court over Judicial Sales Not Affected.—There was nothing in former § 45-28 which deprived the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees. *Koonce v. Fort*, 204 N.C. 426, 168 S.E. 672 (1933). See § 45-21.2.

Mortgagor or Trustor May Make Advanced Bid.—Under former § 45-28, of similar import to this and the two following sections, the mortgagor or trustor was entitled to procure resales through advanced bids made in conformity with the statute. In *re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).

Trustor May Repeatedly Procure Resales.—The fact that the trustor repeatedly procured resales through the making of advanced bids in compliance with former § 45-28 worked no legal wrong upon the cestui and was within the trustor's right, even though he procured such upset bids for the purpose of delaying foreclosure and the recovery by the cestui of the indebtedness. In *re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949). See § 45-21.29.

Authority of Clerk—Generally.—The only authority conferred by former § 45-28 on the clerk is to order a resale of the property where the bid has been raised as therein prescribed. In *re Bauguess*, 196 N.C. 278, 145 S.E. 395 (1928). See In *re Mortgage Sale of Ware Property*, 187 N.C. 693, 122 S.E. 660 (1924).

The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., by former § 45-28 were not those of general control as exercised by the courts in case of an ordinary judicial sale, but were confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. *Lawrence v. Beck*, 185 N.C. 196, 116 S.E. 424 (1923).

As to the supervisory powers given the clerks of the superior courts by former § 45-28, the statute must be strictly complied with. *Redfern v. McGrady*, 199 N.C. 128, 154 S.E. 3 (1930).

Same—Where Property Injured within Ten-Day Period.—Former § 45-28 controlled as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and conferred no power on the clerk to make such order, unless within the ten days allowed there had been an increased bid, etc., and did not extend to instances wherein a material loss had been sustained by destruction of a house on the lands, within the stated

period. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921).

Same—When Supervisory Power Begins.—Supervisory authority conferred by this section relates to resales and does not arise until an upset bid has been filed with the clerk as provided therein. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Under former § 45-28 the jurisdiction of the clerk vested at the moment an upset bid was filed with him. Thereafter he had supervisory power over the sale which continued until after the final sale and confirmation thereof. *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 62 S.E.2d 521 (1950).

Under former § 45-28 it was held that the clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, which continues until after the final sale under foreclosure. *Lawrence v. Beck*, 185 N.C. 196, 116 S.E. 424 (1923).

Report of Sale.—Former § 45-28 did not require that the sale of land under mortgage or deed of trust be reported to the clerk of the court until an advanced bid had been properly made. *Pringle v. Winston-Salem Bldg. & Loan Ass'n*, 182 N.C. 316, 108 S.E. 914 (1921). See also *In re Sermon's Land*, 182 N.C. 122, 108 S.E. 497 (1921); *Dillingham v. Gardner* 219 N.C. 227, 13 S.E.2d 478 (1941); *Peedin v. Oliver*, 222 N.C. 665, 24 S.E.2d 519 (1943). See § 45-21.26.

Irregularity Requiring Vacation of Confirmation and Deed.—After upset bid under former § 45-28 the property in suit, having a market value of from \$5,500 to \$6,000, was actually sold for \$825. The trustee erroneously reported the bid as \$6,400, which report was on record in the clerk's office from the date of the sale until confirmation. It was held that the irregularity was of such substantial nature as to require a sale of equity to vacate the confirmation and the deed pursuant thereto without requiring trustors to prove that anyone was misled or failed to file an upset bid by reason of the erroneous report. *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 62 S.E.2d 521 (1950).

Jurisdiction of Judge on Appeal.—The discretion vested in the superior court judge on appeal from the clerk, under § 1-276, to hear and determine the matter in controversy, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, for the clerk has no authority to further pass thereon in the

absence of an increased bid. In re Mortgage Sale of Ware Property, 187 N.C. 693, 122 S.E. 660 (1924).

Sale Not Consummated until Expiration of Ten Days.—A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of ten days after the public auction. *Shelby Bldg. & Loan Ass'n v. Black*, 215 N.C. 400, 2 S.E.2d 6 (1939).

Interest of Highest Bidder.—The bidder at the sale during the period of ten days allowed for the filing of upset bids acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921). See *Richmond County v. Simmons*, 209 N.C. 250, 183 S.E. 282 (1936).

No Specific Performance When Sale Reopened.—The principle upon which specific performance of a binding contract to convey lands is enforceable has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands during the ten days allowed for the filing of upset bids, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921).

Assignment of Bid.—While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the ten-day period, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had. *Creech v. Wilder*, 212 N.C. 162, 193 S.E. 281 (1937).

Revocation of Order for Deed.—It is the duty of the clerk of the superior court to readvertise and resell the mortgaged property as often as the statute is complied with, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. *Hanna v. Carolina Mortgage Co.*, 197 N.C. 184, 148 S.E. 31 (1929).

Where Land Conveyed before Expiration of Statutory Time.—See *Wise v. Short*, 181 N.C. 320, 107 S.E. 134 (1921).

Payment of Mortgage within Ten-Day Period.—The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. *Cherry v. Gilliam*, 195 N.C. 233, 141 S.E. 594 (1928). See § 45-21.20.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. *Davis v. Central Life Ins. Co.*, 197 N.C. 617, 150 S.E. 120 (1929).

Deposit of Advanced Bid with Clerk.—Under the facts of this case presenting the question of a valid resale of mortgaged land under the provisions of former § 45-28, objection that only 2% of the proposed advanced bid was deposited with the clerk was untenable. *Briggs v. Asheville Developers*, 191 N.C. 784, 133 S.E. 3 (1926).

Clerk Cannot Require Larger Deposit than That Required by Statute.—Under former § 45-28, it was held that the clerk had no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute, or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. *In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).

Time of Making Deposit.—Under repealed § 45-28 it was held that when within the statutory time limit the offerer had

communicated with the clerk of the court by telephone and offered to come from an adjacent town and make a sufficient deposit, and was informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check was accordingly mailed, a substantial compliance with the statute was made, though the check was received by the clerk after the expiration of the time limit of the statute. *Clayton Banking Co. v. Green*, 197 N.C. 534, 149 S.E. 689 (1929).

Rights of Owner of Equity of Redemption.—Where lands had been many times resold under former § 45-28 and the owner of the equity of redemption had not protected himself at the sales, he could not have the deed at the final sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. *Brown v. Sheets*, 197 N.C. 268, 148 S.E. 233 (1929). See *Phipps v. Wyatt*, 199 N.C. 727, 155 S.E. 721 (1930).

When Sale Not Subject to Collateral Attack.—See *First Carolina's Joint-Stock Land Bank v. Stewart*, 208 N.C. 139, 179 S.E. 463 (1935).

Recitals in Deed as to Compliance Prima Facie.—Where the question in controversy in a suit for specific performance against the purchaser is whether there has been a compliance with former § 45-28 as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and alone are insufficient to sustain the judgment. *Briggs v. Asheville Developers*, 191 N.C. 784, 133 S.E. 3 (1926).

As to commissions allowed under former § 45-28, see *Pringle v. Winston-Salem Bldg. & Loan Ass'n*, 182 N.C. 316, 108 S.E. 914 (1921); *In re Hollowell Land*, 194 N.C. 222, 139 S.E. 769 (1927); *Tidewater Brokerage Co. v. Southern Trust Co.*, 203 N.C. 182, 165 S.E. 353 (1932). See § 45-21.15.

Applied (former § 45-28) in *Vance v. Vance*, 203 N.C. 667, 166 S.E. 901 (1932); *Howard v. Ray*, 222 N.C. 710, 24 S.E.2d 529 (1943); *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

Cited in *In re Hardin*, 248 N.C. 66, 102 S.E.2d 420 (1958).

§ 45-21.28. Separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold in parts, as provided by G.S. 45-21.8, the sale and each subsequent resale, of any such part is subject to a separate upset bid; and, to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 720, s. 1.)

§ 45-21.29. **Resale of real property; jurisdiction; procedure; writs of assistance and possession.**—(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(c) When the notice of resale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The person holding the resale shall report the resale in the same manner as required by G.S. 45-21.26.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such resale remains subject to other upset bids and resales pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) When a resale of real property is had pursuant to an upset bid, such sale may not be consummated until it is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting any further upset bid, pursuant to G.S. 45-21.27, has expired.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales.

(j) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this article fails to make definite provision as to such procedure.

(k) Upon the completion or confirmation of any sale or resale of real property held in the exercise of the power of sale contained in any mortgage or deed of trust and pursuant to the provisions of this article, the clerk of the superior court of the county within which said sale is held is empowered to issue writs of assistance and possession to place the purchaser in possession of the property sold upon the following conditions: When application has been made to the clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of said property, provided he has paid the purchase price bid. Provided, further, that no writ of assistance and possession shall be issued by the clerk unless the applicant has given ten (10) days' notice to the party or parties in possession of the real property, or any part thereof, at the time of the sale. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299.)

Editor's Note. — The 1965 amendment inserted new subsection (k).

Most of the cases in the following note were decided, under repealed § 45-28, of similar import to §§ 45-21.27 to 45-21.30. See note to § 45-21.27.

Where a resale is ordered the bidder at the first sale is released from any and all obligation by reason of his bid. *Richmond County v. Simmons*, 209 N.C. 250, 183 S.E. 282 (1936).

Keeping Resale Open for Ten Days. — Under the provisions of former § 45-28 as to resale of mortgaged lands upon a raised bid, it was required that the matter be kept open by the clerk for ten days thereafter. *Briggs v. Asheville Developers*, 191 N.C. 784, 133 S.E. 3 (1926).

Clerk Must Order Resale Each Time Upset Bid Is Placed. — Under former § 45-28 it was held that the clerk of the superior court was required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid was made in accordance with the statute, regardless of how often an upset bid may be placed. In *re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949). See note to § 45-21.27.

Clerk May Not Make Orders Abrogating Rights Conferred by Statute. — The provision of former § 45-28 that the clerk

should make such orders as may be just and necessary to safeguard the interests of all parties did not authorize him to enter orders abrogating rights conferred by the statute. In *re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).

Striking Out Order for Resale. — Where, on account of an upset bid, an order for a resale has been entered, it is error eleven days thereafter to strike out such order and declare the sale final, in prejudice of further rights of mortgagors. *Virginia Trust Co. v. Powell*, 189 N.C. 372, 127 S.E. 242 (1925).

The order of the clerk to deliver title required by former § 45-28 was merely ministerial in its nature, and its omission, when in fact the trustee had, after complying with all the terms of the power of sale, made title to the purchaser, did not invalidate the foreclosure, or render the title acquired by the purchaser as grantee in the deed of the trustee void. *Cheek v. Squires*, 200 N.C. 661, 158 S.E. 198 (1931). See *Lawrence v. Beck*, 185 N.C. 196, 116 S.E. 424 (1923).

Quoted in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Cited in Gallos v. Lucas, 252 N.C. 480, 113 S.E.2d 923 (1960).

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale. — (a) If the terms of a sale of real or personal property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a sale of personal property for cash fails to pay the amount of his bid, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a sale or resale of real property fails to comply with his bid upon tender to him of a deed for the property or after a bona fide attempt to tender such deed, the person authorized to sell the property may hold a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the provisions of G.S. 45-21.29 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(d) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1.)

Editor's Note. — The cases in the note to this section were decided under repealed § 45-28, of similar import to §§ 45-21.27 to 45-21.30. See note to § 45-21.27.

Deposit When No Upset Bid Is Made. — Under the provisions of former § 45-28

the last and highest bidder at a foreclosure sale obtained no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee might, in fixing the terms of the sale, require a reasonable

cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid was made, the reasonableness of such deposit might be determined by analogy to the deposit required for an upset bid, and a demand for a cash deposit at the sale amounting to 25% of the bid was unreasonable. *Alexander v. Boyd*, 204 N.C. 103, 167 S.E. 462 (1933).

Recovery of Deposit When Resale Is Ordered. — Where the last and highest bidder at a sale of lands has been required to deposit a certain percentage of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the placing of an advanced bid and cash deposit by another and the entering of an order of resale by the clerk. *Koonce v. Fort*, 204 N.C. 426, 168 S.E. 672 (1933).

Recovery of Deposit on Advanced Bid. — The deposit required by former § 45-28

was to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the superior court required of a person placing an advance bid a deposit representing a five percent increase bid, and in addition a deposit to guarantee compliance with the bid, and the lands were resold and bought in by the one making the advance bid, and he refused to pay the amount because of threatened litigation, and the lands were again resold and brought a surplus over that of the prior resale, there was no loss occasioned by the first resale, and the person making the deposit therefor was entitled to receive it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property. *Harris v. American Bank & Trust Co.*, 198 N.C. 605, 152 S.E. 802 (1930).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.—(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—

- (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;
- (2) Taxes due and unpaid on the property sold, as provided by G.S. 105-408, if the property sold is real property, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;
- (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-408, if the property sold is real property, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;
- (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—

- (1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and
- (2) In all cases when he is unable to locate the persons entitled thereto, and
- (3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and
- (4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1949, c. 720, s. 1; 1951, c. 252, s. 1.)

Alternatives of Mortgagee.—Where the owner of lands mortgaged the same as tracts numbered 1 and 2, and later conveyed tract No. 2 to a purchaser in fee simple, and devised tract No. 1 for life with remainder over, it was held, under repealed § 45-29, similar in subject matter to this section, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who might determine whether the surplus should be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of § 8-47, or the mortgagee might relieve himself of liability by paying the fund into court pursuant to former § 45-29. *Brown v. Jennings*, 188 N.C. 155, 124 S.E. 150 (1924).

Auctioneer's Fee Formerly Payable Out of Trustee's Commissions.—See *Duffy v. Smith*, 132 N.C. 38, 43 S.E. 501 (1903).

Liability of Trustee for Failure to Pay Over Surplus to Clerk.—Under subsection (b) (4) of this section, the trustee or mortgagee must pay into the hands of the clerk

of the superior court the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted, and where the trustee pays such funds into the hands of the administrator of the deceased trustor, the trustee remains liable therefor until they are paid into the hands of the clerk as provided by law. *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954).

There is no limit to the amount of funds that may be paid to the clerk of a superior court under the provisions of this section, the limitation of the amount payable to the clerk under the provisions of § 28-68 not being applicable to the surplus realized upon the foreclosure of a mortgage or deed of trust. *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954).

Applied in *Staunton Military Academy, Inc. v. Dockery*, 224 N.C. 427, 94 S.E.2d 354 (1956).

Cited in *Childers v. Powell*, 243 N.C. 711, 92 S.E.2d 65 (1956); *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

§ 45-21.32. Special proceeding to determine ownership of surplus.

—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 45-21.31, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceeding shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of \$200.00 or otherwise comply with the provisions of G.S. 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 720, s. 1.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Statute of Limitations Need Not Be Plead.—Section 1-15, requiring the defense of the statute of limitations to be raised by answer, applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale under repealed §§ 45-29 and 45-30, similar in subject matter to § 45-21.31 and this section, the rights of the parties be-

ing determined in accordance with the admitted facts. In *re Gibbs*, 205 N.C. 312, 171 S.E. 55 (1933).

Clerk and Not Administrator Determines Priority of Payment of Surplus Claims.—Where there are adverse claims against the surplus realized upon the foreclosure of a deed of trust after the death of the trustor, and a proceeding is instituted pursuant to this section to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments, although the administrator claiming the

funds is a necessary party. *Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954).

Cited in Childers v. Powell, 242 N.C. 711, 92 S.E.2d 65 (1956); *United States v.*

Williams, 139 F. Supp. 94 (M.D.N.C. 1956); *Porter v Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

§ 45-21.33. **Final report of sale of real property.**—(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within thirty days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk—

- (1) A copy of the notices of sale and resale, if any, which were posted, and
- (2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1.)

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. **Enjoining mortgage sales or confirmations thereof on equitable grounds.**—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the Supreme Court from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3.)

Editor's Note.—See 11 N.C.L. Rev. 240, for review of this section, which formerly appeared as § 45-32.

Constitutionality.—This section does not violate any provision of the Constitution of the United States or of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties

to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

This section is constitutional and valid. *Hopkins v. Swan*, 206 N.C. 439, 174 S.E. 409 (1934).

This section is remedial only, and is

valid for that purpose. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

Retroactive Effect.—This section is applicable to a sale made since its enactment, although the sale was made under the power of sale contained in a mortgage or deed of trust executed prior to its enactment. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

"Confirmation" Means Confirmation Required for Consummation. — "Confirmation," as used in this section refers only to a foreclosure sale where confirmation is required for consummation in accordance with law. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Confirmation Is Not Required of Sale under Power If No Upset Bid Filed. —Where a foreclosure sale is conducted in accordance with the provisions of article 2A of this chapter, and no upset bid is filed as provided in § 45-21.27 there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

This and following sections have no application after confirmation of a foreclosure sale under power contained in the instrument. *Whitford v. North Carolina Joint-Stock Land Bank*, 207 N.C. 229, 176 S.E. 740 (1934).

Requiring Bond within Court's Discretion.—The condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay is within the court's discretionary equitable power, the provisions of this section being constitutional and valid. *Whitaker v. Chase*, 206 N.C. 335, 174 S.E. 225 (1934); *Little v. Wachovia Bank & Trust Co.*, 208 N.C. 726, 182 S.E. 491 (1935).

Where the mortgagee or cestui que trust is not satisfied with the bond given by the mortgagor or trustor, as provided by this section, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

When Court Determines Whether Bid Was Grossly Inadequate.—Where, in a suit to enjoin the consummation of a foreclosure sale the issue of whether the bid

at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if it finds that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if it finds that the bid is grossly inadequate. *Smith v. Bryant*, 209 N.C. 213, 183 S.E. 276 (1936).

Mere Inadequacy of Price Is Insufficient to Upset Sale.—Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in strict conformity with the power of sale. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

But Court Will Interpose Where Gross Inadequacy Is Coupled with Other Inequity.—Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Gross Inadequacy May be Considered in Weighing Materiality of Irregularity.—Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Where the parties expressly waive a jury trial, and the trial court finds that the amount bid at the sale represented the fair market value of the lands, and that there is no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale. *Barringer v. Wilmington Sav. & Trust Co.*, 207 N.C. 505, 177 S.E. 795 (1935).

Where It Is Error for Court to Grant Motion to Nonsuit. — Where plaintiffs, trustors in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. *Smith v. Bryant*, 209 N.C. 213, 183 S.E. 276 (1936).

Granting Resale after Action for Specific Performance. — Where the last and highest bidder at the sale instituted action for specific performance, and the personal representative of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court had authority to hear the motion. *Hopkins v. Swain*, 206 N.C. 439, 174 S.E. 409 (1934).

Executor Seeking Injunction upon Petition to Sell Lands to Make Assets.—An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of this and the following sections. *Miller v. Shore*, 206 N.C. 732, 175 S.E. 133 (1934).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the Supreme Court in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3.)

Editor's Note.—This section formerly appeared as § 45-33.

Stated in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937); *Certain-Teed Prods.*

Injunction Held to Be Properly Continued to Hearing upon Court's Finding. — Where a mortgagor or trustor institutes suit to enjoin the consummation of a foreclosure sale had under the terms of the instrument, and files bond to indemnify the mortgagee or cestui que trust against loss, the temporary injunction granted in the cause is properly continued to the hearing upon the court's finding that serious controversy exists between the parties and that plaintiff is entitled to a jury trial upon the issues of fact raised by the pleadings. *Little v. Wachovia Bank & Trust Co.*, 208 N.C. 726, 182 S.E. 491 (1935).

Stated in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937).

Cited in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936); *Roberson v. Boone*, 242 N.C. 598, 89 S.E.2d 158 (1955); *In re Hardin*, 248 N.C. 66, 102 S.E.2d 420 (1958).

Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Cited in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.—When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale

or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3.)

Editor's Note.—This section formerly appeared as § 45-34.

See 12 N.C.L. Rev. 366, for note on "Relief During the Depression."

This section is constitutional and valid. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

This section has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937).

Not "Emergency Legislation". — This section is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

Debtor's Obligation Recognized. — This section recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

This section recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well-settled principles of equity. It provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

This section alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the

mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement, but limits that right so as to prevent his obtaining more than his due. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937).

Amount Bid is Not Conclusive as to Value.—The amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

This section applies only to foreclosure under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936). See also *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937).

Not Applicable to Sales under Order of Court.—Where the maker of a note assigned a judgment in its favor to the payee as security and the judgment was sold under order of court and purchased by the payee who thereafter realized upon the judgment an amount in excess of the sale price, it was held that the note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and that since the bidding at the sale was open to all and the sale was under order of court, the endorser on the note could not assert this section as a defense to his liability, the statute, by the express language of its proviso, not being applicable. *Briggs v. Lassiter*, 220 N.C. 761, 18 S.E.2d 419 (1942).

Section Inapplicable.—Where an action is not one to recover from the estate of a deceased a balance due upon an indebtedness secured by a deed of trust, but is an action to establish the rights of the parties

with respect to the proceeds of a life insurance policy assigned by the deceased as security for the debt, the statutory principle of law regulating the recovery of deficiency judgments embodied in this section has no application. *Thompson v. Pilot*

Life Ins. Co., 234 N.C. 434, 67 S.E.2d 444 (1951).

Cited in *Thompson v. Angel*, 214 N.C. 3, 197 S.E. 618 (1938); *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938).

§ 45-21.37. Certain sections not applicable to tax suits.—Sections 45-21.34 through 45-21.36 do not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4; 1949, c. 720, s. 3.)

Editor's Note.—This section formerly appeared as § 45-35.

Cited in *Richmond Mortgage & Loan*

Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price; deficiency judgment under conditional sale contract.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604.)

Cross Reference. — For provision that spouse need not join in purchase-money mortgage, see § 39-13.

Editor's Note.—The first paragraph of this section formerly appeared as § 45-36. The second paragraph was derived from the second 1949 act cited to the section.

The effect of this section is to limit the creditor to the property conveyed, when the mortgage is for the purchase money, changing in that respect § 1-123. See 11 N.C.L. Rev. 219.

Foreign Executed Mortgage on Foreign Realty.—This section operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the section applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. *Bullington v. Angel*, 220 N.C. 18, 16 S.E.2d 411, 136 A.L.R. 1054 (1941).

This section does not limit the jurisdiction of the federal district court in an action by a nonresident for a deficiency judgment amounting to \$3,000 where the land mortgaged was in Virginia and the deed of trust signed by defendant was a Virginia contract securing notes signed by defendant and made payable at a bank in Roanoke, Virginia. *Bullington v. Angel*, 56 F. Supp. 372 (W.D.N.C. 1944), *aff'd*, *Angel v. Bullington*, 150 F.2d 679 (4th Cir. 1945), holding that this section did not bar action in federal district court in North Carolina for deficiency judgment under a contract executed in Virginia and valid there. But see *Angel v. Bullington*, 330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 557 (1947), reversing such case on the ground that the decision of the North Carolina Supreme Court denying a deficiency judgment in a previous suit on the same contract was *res judicata*. For article criticizing decision in *Angel v. Bullington*,

330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 557 (1947), see 26 N.C.L. Rev. 29. For further comment on this case, see 26 N.C.L. Rev. 60.

Where Land Sold under Prior Mortgage.—This section is not available as a defense to an action on a purchase-money note secured by a second mortgage when the land has been sold under the first mortgage for a sum sufficient to pay only the notes secured by the first mortgage, assumed by the purchaser as a part of the purchase price. *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E.2d 601 (1940).

Section Held Inapplicable.—Where the deed of trust covered land other than that purchased from the plaintiffs by the defendants, it could not qualify as a purchase-money deed of trust under this section. This was true because a deed of trust is a purchase-money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price. *Dobias v. White*, 239 N.C. 409, 80 S.E.2d 23 (1954).

To Unsecured Note with Endorsers.—This section has no application to an unsecured note with endorsers, given by the purchaser of land in addition to a cash payment and a purchase money note se-

cured by deed of trust on the property. *Brown v. Owens*, 251 N.C. 348, 111 S.E.2d 705 (1959).

Seller Liable for Buyer's Losses If Note and Security Do Not Disclose They Are for Purchase-Money.—This section makes the seller liable for losses which the purchaser sustains because of seller's failure to insert a statement that debt is for purchase-money in a note and deed of trust prepared by it or under its supervision. *Childers v. Parker's, Inc.*, 259 N.C. 237, 130 S.E.2d 323 (1963).

But No Loss Is Suffered Until Payment or Judgment against Buyer.—Where there has been a foreclosure and the proceeds are insufficient to pay the amount called for in the note, purchaser has not sustained a loss as contemplated by this section until he has been compelled to pay or judgment has been rendered fixing his liability. *Childers v. Parker's, Inc.*, 259 N.C. 237, 130 S.E.2d 323 (1963).

Applied in *Fleishel v. Jessup*, 242 N.C. 605, 89 S.E.2d 160 (1955).

Cited in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937); *Jones v. Castevens*, 222 N.C. 411, 23 S.E.2d 303 (1942); *Mitchell v. Battle*, 231 N.C. 68, 55 S.E.2d 803 (1949).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.39. **Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.**—(a) No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after March 14, 1941, in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

(b) This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection (a) hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said subsection, unless the grounds set out in subsection (a) are an essential part thereof.

(c) This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202; 1949, c. 720, s. 4.)

Editor's Note.—This section formerly appeared as § 45-22.

§ 45-21.40. **Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.**—In all

cases where sales of real property have been made under powers of sale contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deed of trust, and the execution and delivery of deeds in consummation of such sales have been delayed until after the expiration of the period which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2; 1949, c. 720, s. 4.)

Editor's Note.—This section formerly appeared as § 45-26.1.

§ 45-21.41. Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 53, s. 1; C. S., s. 2593(a); 1949, c. 720, s. 4.)

Editor's Note.—This section formerly appeared as § 45-31.

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.—In all cases prior to the first day of March, one thousand nine hundred and fifty-seven where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of the superior court, or with the court, together with all necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be con-

strued as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4; 1957, c. 505.)

Editor's Note.—This section formerly appeared as § 45-36.1.

§ 45-21.43. Validation of certain foreclosure sales. — In all cases where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement and sale in the county where such real estate is located, notwithstanding the wording of such mortgages or deeds of trust providing for advertisement or sale, or both, in some other county, or at some other particular place in the county in which the real estate is located, which place was in fact designated in the notice of sale, all such sales are hereby fully validated, ratified and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if such mortgages or deeds of trust had provided for advertisement and sale in the county where such real estate is actually situate. (1951, c. 220; 1961, c. 537.)

§ 45-21.44. Validation of foreclosure sales when provisions of G.S. 45-21.17 (c) (2) not complied with.—In all cases prior to June 1, 1963, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to twenty days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G.S. 45-21.17 (c) (2) had been fully complied with. (1959, c. 52; 1963, c. 1157.)

Editor's Note.—The 1963 amendment substituted "June 1, 1963" for "March 1, 1959" near the beginning of this section.

ARTICLE 3.

Mortgage Sales.

- § 45-22: Transferred to § 45-21.39 by Session Laws 1949, c. 720, s. 4.
- §§ 45-23 to 45-26: Repealed by Session Laws 1949, c. 720, s. 5.
- § 45-26.1: Transferred to § 45-21.40 by Session Laws 1949, c. 720, s. 4.
- §§ 45-27 to 45-30: Repealed by Session Laws 1949, c. 720, s. 5.
- § 45-31: Transferred to § 45-21.41 by Session Laws 1949, c. 720, s. 4.
- § 45-32: Transferred to § 45-21.34 by Session Laws 1949, c. 720, s. 3.
- § 45-33: Transferred to § 45-21.35 by Session Laws 1949, c. 720, s. 3.
- § 45-34: Transferred to § 45-21.36 by Session Laws 1949, c. 720, s. 3.
- § 45-35: Transferred to § 45-21.37 by Session Laws 1949, c. 720, s. 3.
- § 45-36: Transferred to § 45-21.38 by Session Laws 1949, c. 720, s. 3.
- § 45-36.1: Transferred to § 45-21.42 by Session Laws 1949, c. 720, s. 4.

ARTICLE 4.

Discharge and Release.

§ 45-36.2. Register of deeds includes assistants and deputies.—The words "register of deeds" appearing in this article shall be interpreted to mean "register of deeds, assistant register of deeds, or deputy register of deeds." (1953, c. 848.)

§ 45-37. Discharge of record of mortgages and deeds of trust. — Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

- (1) The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.
- (2) Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, with endorsement of payment and satisfaction, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was cancelled.
- (3) Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.
- (4) Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be cancelled as above provided until the ownership of said instruments shall have been lawfully determined: Provided that noth-

ing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

- (5) The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subdivision shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property. This subdivision shall be applicable from and after one year from March 20, 1945, to all instruments executed prior to the enactment of chapter one hundred and ninety-two of the Public Laws of one thousand nine hundred and twenty-three, and any person affected hereby shall have until said date to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for; provided, also, that this subdivision shall be applicable from and after July 1st, 1947, to all instruments executed subsequent to March 6th, 1923, and prior to January 2nd, 1924, and any person affected by this proviso shall have until July 1st, 1947, to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C. S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1.)

Local Modification.—Dare: 1957, c. 464.

Cross Reference.—As to requirement of registration for mortgages and deeds of trust, see § 47-20.

Editor's Note.—For brief comment on

the 1947 amendment, see 25 N.C.L. Rev. 407.

The 1951 amendment inserted "irrespective of whether the credit was extended or the purchase was made before or after the

expiration of said fifteen years," in the first sentence of subdivision (5).

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 408.

History of Section.—See *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957).

Section Construed as a Whole. — This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. *Richmond Guano Co. v. Walston*, 187 N.C. 667, 122 S.E. 663 (1924).

Not Retroactive.—This section has no application to a mortgage given prior to the passage of the section, nor does it wipe out a valid debt existing at the time the statute took effect. *Dixie Grocery Co. v. Hoyle*, 204 N.C. 109, 167 S.E. 469 (1933). And it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee. *Roberson v. Matthews*, 200 N.C. 241, 156 S.E. 496 (1931). But see the 1945 and 1947 amendments to subdivision (5).

1945 Amendment Constitutional as Applied to Preexisting Mortgages.—The 1945 amendment to subdivision (5) of this section, providing that the statute should apply to preexisting mortgages, but allowing one year from the ratification of the act during which the owners of the debts might proceed to foreclosure or make marginal entry on the instrument that the debt is still outstanding, is constitutional. *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957).

Applicable Only to Deeds of Trust and Mortgages.—This section giving to the marginal entry of satisfaction the effect of reconveyance applies only to discharge of trust deeds and mortgages. *Smith v. King*, 107 N.C. 273, 12 S.E. 57 (1890).

Subdivision (2) Applies to Deeds of Trust.—Subdivision (2) of this section does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. *Richmond Guano Co. v. Walston*, 187 N.C. 667, 122 S.E. 663 (1924).

Modes of Release. — A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. *Barber v. Wadsworth*, 115 N.C. 29, 20 S.E. 178 (1894).

Procedure of Cancellation and Effect.—Regularly, the mortgagee acknowledges the satisfaction and discharge of the mortgage in the presence of the register of

deeds, and he enters satisfaction on the margin of the record of the mortgage, and this entry is signed by the mortgagee; and this, done as required by this section, will operate as a deed of release, or reconveyance of the land embraced by the mortgage. Otherwise the mortgagee must reconvey the land by proper deed. *Walker v. Mebane*, 90 N.C. 259 (1884).

Marginal Satisfaction Not Necessary as between Parties.—When a mortgage debt has been discharged, the mortgage is no longer operative between the parties, though not marked "satisfied of record." *Blake v. Broughton*, 107 N.C. 220, 12 S.E. 127 (1890).

Who May Cancel. — Only the mortgagee, or his duly authorized agent or representative, is entitled to have his mortgage cancelled on the book in the office of the register of deeds by subdivision (1) of this section; and when the mortgagee cancels the instrument in person, under subdivision (1), it is a complete release and discharge of the mortgage, for in such case the statute does not require the exhibition of the mortgage and the note it secures. *First Nat'l Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865 (1922).

Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but only with the surrender of the instrument to the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. *First Nat'l Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865 (1922).

Under this section, subdivision (2), there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. *Faircloth v. Johnson*, 198 N.C. 429, 127 S.E. 346 (1930).

Payee or Mortgagee Must Be Sui Juris.

—In order to constitute a valid cancellation under subdivision (2), this section contemplated a payee or mortgagee who is sui juris. *Faircloth v. Johnson*, 189 N.C. 429, 127 S.E. 346 (1925).

Cancellation by Attorney—Ratification Thereof.—While an attorney at law has no power to cancel or discharge a deed of mortgage, without authority conferred by his client, yet where such attorney informed his client that he was unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods, upon which the creditor had a lien, unless a cancellation of an old mortgage was

made, and that he would cancel the old mortgage by a day named, unless directed not to do so, and the attorney, receiving no such direction, cancelled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered, it was held to be a ratification by the client of the act of cancellation of the old mortgage. *Christian v. Yarborough*, 124 N.C. 72, 32 S.E. 383 (1899).

Authority of Trustee as to Cancellation.

— Possession of the papers by the trustee raises a presumption of his authority to cancel the deed of trust of record. *Williams v. Williams*, 220 N.C. 806, 18 S.E.2d 364 (1942).

Same — To Release Part of Property without Satisfaction.— This section only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.," the entry operating as a reconveyance. "As was said in *Browne v. Davis*, 109 N.C. 23, 13 S.E. 703 (1891): 'It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land.' We do not mean to say, however, that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if it was done with the creditor's consent and authority properly shown." *Woodcock v. Merrimon*, 122 N.C. 731, 30 S.E. 321 (1898).

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remains unsatisfied. *Browne v. Davis*, 109 N.C. 23, 13 S.E. 703 (1891).

Cancellation by First Mortgagee.— The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section, and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price, of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his

own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. *First Nat'l Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865 (1922).

Form and Validity of Cancellation.— This section must be strictly complied with in order to secure the grantee in a subsequent conveyance of the locus in quo against the prior encumbrance, and where this is done upon exhibit of the cancelled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. *Mills v. Kemp*, 196 N.C. 309, 145 S.E. 557 (1928).

Irregular Cancellation as Notice to Subsequent Mortgagee.— Where an entry of cancellation is made of record by the register of deeds in cancelling a mortgage under this section reciting another name as mortgagee, trustee or cestui que trust than that appearing in the registration of the instrument, and that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds has made a mistake in cancelling the mortgage, and fix him with notice of all facts which a reasonable inquiry would have revealed. *Mills v. Kemp*, 196 N.C. 309, 145 S.E. 557 (1928).

Effect of Forged Cancellation.— When the attorney for the owner of the land agreed to have a mortgage cancelled of record, and thereafter surreptitiously obtained the cancellation stamp of the register of deeds and forged his signature so that apparently the mortgage was cancelled under the provisions of this section, subdivision (2), and relying thereon the proposed purchaser accepted the deed and paid the consideration, it was held that the supposed cancellation of the mortgage was void as against the mortgagee, who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. *Union Cent. Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927).

Same — Upon Rights of Subsequent Mortgagee.— As against the mortgagee of a third mortgage given on the same lands, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been cancelled of record. *Swindell v. Stephens*, 193 N.C. 474, 137 S.E. 420 (1927).

Unauthorized Cancellation of Deed of Trust.—See *Monteith v. Welch*, 244 N.C. 415, 94 S.E.2d 345 (1956).

Effect of Prior Fraud.—Where the register of deeds has entered “satisfaction” of a deed of trust, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the cancelled instrument will not affect the rights of the subsequent mortgagees, when such mortgagees were unaware of or had not participated in the fraud. *Richmond Guano Co. v. Walston*, 187 N.C. 667, 122 S.E. 663 (1924).

Entry of “Satisfied” as Evidence of Payment of Debt.—It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of “satisfied” on the margin of the record signed by the mortgagee and witnessed by the register of deeds. *Robinson v. Sampson*, 121 N.C. 99, 28 S.E. 189 (1897).

The primary purpose sought to be accomplished by subdivision (5) of this section was to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transactions, and this economic purpose is adequately accomplished by furnishing protection to parties who extend credit or purchase for a valuable consideration “from and after” the expiration of the fifteen-year period. *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

§ 45-37.1. Validation of certain entries of cancellation made by beneficiary or assignee instead of trustee.—In all cases where, prior to January first, one thousand nine hundred and thirty, it appears from the margin or face of the record in the office of the register of deeds of any county in this State that the original beneficiary named in any deed of trust, trust indenture, or other instrument intended to secure the payment of money and constituting a lien on real estate, or his assignee of record, shall have made an entry purporting to fully satisfy and discharge the lien of such instrument, and such entry has been signed by the original payee and beneficiary in said deed of trust, or other security instrument, or by his assignee of record, or by his or their properly constituted officer, agent, attorney, or legal representatives, and has been duly witnessed by the register of deeds or his deputy, all such entries of cancellation and satisfaction are hereby validated and made full, sufficient and complete to release, satisfy and discharge the lien of such instrument, and shall have the same effect as if such entry had been made and signed by the trustee named in said deed of trust, or other security instrument, or by his duly appointed successor or substitute. (1945. c. 986.)

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages in counties using microfilm.— In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the satisfaction and cancel the record

The first clause of the caption or title of the act from which subdivision (5) of this section is derived indicates the primary purpose of the act, that is, to facilitate the examination of titles. *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947). See Editor's Note to this section.

Retroactive Effect of Subdivision (5).— See *Thomas v. Myers*, 229 N.C. 234, 49 S.E.2d 478 (1948); *Hicks v. Kearney*, 189 N.C. 316, 127 S.E. 205 (1923); *Humphrey v. Stephens*, 191 N.C. 101, 131 S.E. 383 (1926).

Removal of Deed of Trust as Cloud on Title.—Where a deed of trust is executed subsequent to the effective date of subdivision (5) of this section, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed insofar as it constitutes a cloud on their title. *Thomas v. Myers*, 229 N.C. 234, 49 S.E.2d 478 (1948), decided prior to the 1951 amendment. See Editor's Note to this section.

Cited in *Owney v. Parkway Properties*, 222 N.C. 54, 21 S.E.2d 900 (1942); *Moore v. Owens*, 255 N.C. 336, 121 S.E.2d 540 (1961).

of each such instrument satisfied by recording a notice of satisfaction which shall consist of a separate instrument, or that part of the original deed of trust or mortgage re-recorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G.S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. There shall also be entered in the alphabetical indexes kept by the register of deeds, opposite the name of each grantor and grantee of the deed of trust or mortgage, the word "satisfied" followed by a reference to the book and page of the record notice of satisfaction. (1963, c. 1021, s. 1.)

§ 45-38. Entry or recording of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee or mortgagee shall make an additional notation as to which property was sold and which was not sold.

Provided, that in counties in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any process or method which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the foreclosure of each deed of trust or mortgage foreclosed by recording a notice of foreclosure which shall consist of a separate instrument, or that part of the original deed of trust or mortgage re-recorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure. There also shall be entered in the alphabetical indexes kept by the register of deeds, opposite the name of each grantor and grantee to the original deed of trust or mortgage, the word "foreclosed," followed by a reference to the book and page of the record notice of foreclosure. (1923, c. 192, s. 2; C. S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2.)

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 479.

The 1963 amendment added the second paragraph.

Failure of Trustee to Comply Does Not Affect Purchaser.—The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of this or the following

section. *Cheek v. Squires*, 200 N.C. 661, 158 S.E. 198 (1931).

Cancellation without Knowledge of Cestui.—Where the trustor paid the trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge of the cestui que trust, the cancellation was held valid. *Parham v. Hinnant*, 206 N.C. 200, 173 S.E. 26 (1934).

§ 45-39: Repealed by Session Laws 1949, c. 720, s. 5.

§ 45-40. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical grantor index kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfac-

tion has been acknowledged or entered is a deed of trust, or, in lieu of the entries herein provided, the register of deeds or his deputy may denote satisfaction in the grantor index by using a capital "C" or the word "Cancelled," or the word "Satisfied." (1909, c. 658, s. 1; C. S., s. 2595; 1965, c. 771.)

Editor's Note. — The 1965 amendment substituted "grantor index" for "indexes" near the middle of the section, and added all of the language at the end of the section following "is a deed of trust."

§ 45-41. Recorded deed of release of mortgagee's representative. —The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this State may discharge and release the same and all property thereby conveyed by deed of quitclaim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this State. (1909, c. 283, s. 1; C. S., s. 2596.)

Cross Reference.—As to provisions regarding probate and registration of deeds and mortgages, etc., see § 47-1 et seq.

§ 45-42. Release of corporate mortgages by corporate officers.—All mortgages and deeds in trust executed to a corporation may be satisfied and so marked of record as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, assistant to the president, assistant vice-president, manager, credit manager, comptroller, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer or assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; C. S., s. 2597; 1935, c. 271; 1963, c. 193.)

Editor's Note.—The 1963 amendment inserted, immediately following "any vice-president" in the first sentence, "assistant to the president, assistant vice-president, manager, credit manager, comptroller."

§ 45-42.1. Corporate cancellation of lost mortgages by register of deeds.—Upon affidavit of the secretary and treasurer of a corporation showing that the records of such corporation show that such corporation has fully paid and satisfied all of the notes secured by a mortgage or deed of trust executed by such corporation and such payment and satisfaction was made more than twenty-five years ago, and that such mortgage or deed of trust was made to a corporation which ceased to exist more than twenty-five years ago, and such affidavit shall further state that the records of such corporation show that no payments have been made on such mortgage by the corporation executing such mortgage or deed of trust for twenty-five years, the register of deeds of the county in which such mortgage or deed of trust is recorded is authorized and empowered to file such affidavit and record the same in his office and make reference thereto on the margin of the record in which the said mortgage or deed of trust is recorded, and, upon making such entry, the said mortgage or deed of trust shall be deemed to be cancelled and satisfied and the said register of deeds is hereby authorized to cancel the same of record: Provided, that this section shall not apply to any mortgagor corporation except those in which the State of North Carolina owns more than a majority of the capital stock and shall not apply to any mortgage or deed of trust in which the principal amount secured thereby exceeds the sum of fifteen thousand dollars: Provided, such cancellation shall not bar any action to foreclose such

mortgage or deed of trust instituted within ninety days after the same is cancelled. (1945, c. 1090.)

ARTICLE 5.

Miscellaneous Provisions.

§ 45-43. **Real estate mortgage loans; commissions.**—Any individual or corporation authorized by law to do a real estate mortgage loan business may make or negotiate loans of money on notes secured by mortgages or deeds of trust on real estate bearing legal interest payable semiannually at maturity or otherwise, and in addition thereto, may charge, collect and receive such commission or fee as may be agreed upon for making or negotiation of any such loan, not exceeding, however, an amount equal to one and one half percent of the principal amount of the loan for each year over which the repayment of the said loan is extended: Provided, however, the repayment of such loan shall be in annual installments extending over a period of not less than three nor more than fifteen years, and that no annual installment, other than the last, shall exceed thirty-three and one-third percent of the principal amount of loans which are payable in installments extending over a period of as much as three years and less than four years, twenty-five percent of the principal amount of loans which are payable in installments extending over a period of not less than four years nor more than five years, and fifteen percent of the principal amount of loans which are payable in installments extending over a period of more than five years and not more than fifteen years. This section shall only apply to the counties of Ashe, Buncombe, Caldwell, Forsyth, Gaston, Henderson, McDowell, Madison, Rutherford, Watauga, and Yancey. (Ex. Sess. 1924, c. 35; 1925, cc. 28, 209; Pub. Loc. 1925, c. 592, modified by 1927, c. 5; Pub. Loc. 1927, c. 187.)

§ 45-43.1. **Limitations on charges for secondary mortgage residential real estate loans.**—(a) No person, copartnership, association, trust, corporation or any other legal entity shall directly or indirectly charge, take or receive for a loan secured in whole or in part by a mortgage, other than a first mortgage, on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units, a rate of charge, as herein defined, excluding interest at the rate of six percent (6%) per annum, whether payable directly to the lender or to a third party in connection with such loan, which in the aggregate is greater than ten percent (10%) of the principal indebtedness. Provided that where the stated principal sum of the indebtedness is one thousand five hundred dollars (\$1,500.00) or less, the rate of charge may exceed said ten percent (10%) but shall not be greater than one hundred fifty dollars (\$150.00). Provided further that the said rates of charge shall not be made more often than once each thirty-six months by a renewal or additional loan, and shall not be made a second or subsequent time on a new loan within a period of three months from the full payment and satisfaction of the original loan. The borrower shall have the right to anticipate payment of his debt in whole or in part at any time without being required to pay any prepayment or other fee to the lender. The aggregate of the amount or value actually received or held at the time of the loan, plus the sum of all existing indebtedness received of the borrower to the lender, shall be deemed the amount of the loan.

(b) The word "charge," as used in §§ 45-43.1 to 45-43.5, shall include any and every type of charge for compensation, consideration or expense, or for any other purpose whatsoever, including by whatsoever name called, but not by way of limitation, title searches, title reports, title opinions, title guarantees, credit reports, investigation costs, preparation of instruments, placement or discount fees, brokerage fees, recordings, appraisals, insurance of any nature except as provided in subsection "(c)" below, and closing costs, but not including interest at the lawful rate of six percent (6%) per annum.

(c) Evidence of hazard insurance may be required by the lender of the borrower and the premium shall not be considered as a charge. Decreasing term life insurance, in an amount not exceeding the amount of the loan and for a period not exceeding the term of the loan, may also be required by the lender of the borrower but the premium therefor, if included in the loan, shall not bear interest, shall not be included in computing the rate of charge, and shall not exceed the standard rate approved by the Commissioner of Insurance for such insurance. Proof of all insurance issued in connection with loans subject to §§ 45-43.1 to 45-43.5 shall be furnished to the borrower within ten days from the date of application therefor by said borrower.

(d) No charge for or application fee may be allowed whether or not the loan is consummated.

(e) Nothing in §§ 45-43.1 to 45-43.5 shall be construed as authorizing or making lawful the charging of interest on any loan at any greater rate than six percent (6%) per annum or the making of loans in violation of the North Carolina Consumer Finance Act (§ 53-164 et seq.). (1965, c. 1061, s. 1.)

§ 45-43.2. Discharge of loans violating §§ 45-43.1 to 45-43.5; waiver of benefits void.—(a) Any loan made in violation of §§ 45-43.1 to 45-43.5 shall be discharged upon payment or tender by the debtor, or by any person, copartnership, association, trust, corporation or any other legal entity succeeding to his interest in such real estate, of the principal sum remaining due without interest.

(b) Any agreement whereby the borrower waives the benefits of §§ 45-43.1 to 45-43.5 or releases any rights he may have acquired by virtue thereof shall be deemed to be against public policy and void. (1965, c. 1061, s. 2.)

§ 45-43.3. Itemized closing statement to be furnished.—Any person, copartnership, association, trust, corporation or any other legal entity making on its own behalf, or as agent, broker, or in other representative capacity on behalf of any other person, copartnership, association, trust, corporation, or any other legal entity, a loan or real property financing transaction within the regulatory authority of §§ 45-43.1 to 45-43.5, whether lawfully or unlawfully, at the time of the closing shall furnish the debtor or borrower or grantor in the mortgage, deed of trust or any other security instrument, a complete and itemized closing statement which shall show in detail all costs which are defined as a "charge" in § 45-43.1 (b), together with any interest charges, and the disposition of the principal of the loan or security transaction, and the said detailed closing statement shall be signed by the lending agency or a representative of the lending agency, or a responsible officer, in its behalf, and a completed and signed additional copy retained in the files of the lending agency involved and available at all reasonable times to the borrower, the borrower's successor in interest to the security real property, or the authorized agent of the borrower or the borrower's successor, until such time as the security instrument shall be satisfied in full. (1965, c. 1061, s. 3.)

§ 45-43.4. Loans exempt from §§ 45-43.1 to 45-43.5.—Sections 45-43.1 to 45-43.5 shall not apply to loans made by banks, insurance companies, or their duly designated agents compensated directly by the lender, duly licensed credit unions, production credit associations authorized by the Farm Credit Act of 1933, or savings and loan associations authorized to do business in this State, or to loans made by any other lender licensed by, and under the supervision of, the Commissioner of Banks and the State Banking Commission, under the provisions of chapter 53 of the General Statutes, or the Commissioner of Insurance, under the provisions of chapter 58 of the General Statutes. (1965, c. 1061, s. 4.)

§ 45-43.5. Violation of §§ 45-43.1 to 45-43.5 a misdemeanor.—Violation of §§ 45-43.1 to 45-43.5 is hereby made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1965, c. 1061, s. 5.)

§ 45-44. Mortgages held by insurance companies, banks, building and loan associations, or other lending institutions.—A mortgage or deed of trust held by an insurance company, bank, building and loan association, or other lending institution shall be deemed, for the purposes of any regulatory statute applicable to such institutions, to be a first lien on the property despite the existence of prior mortgages or other liens on the same property in all cases where sufficient funds for the discharge of such prior mortgages or other liens shall have been deposited with such lending institution in trust solely for such purpose. Such funds may be deposited either in cash or in obligations of the State of North Carolina or of the United States maturing in sufficient amount on or before the date or dates that the indebtedness secured by such prior mortgages or other liens is to be paid. (1957, c. 1350.)

§ 45-45. Spouse of mortgagor included among those having right to redeem real property.—Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncanceled obligation secured thereby. (1959, c. 879, s. 13.)

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.—Except where otherwise provided in the mortgage or deed of trust or in the note or other instrument secured thereby, or except where the mortgagor, or grantor of a deed of trust otherwise consents:

- (1) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust gives the grantee a legally binding extension of time, or releases the grantee from liability on the obligation, the mortgagor or grantor of the deed of trust is released from any further liability on the obligation.
- (2) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust or trustee acting in his behalf releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater.
- (3) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust makes a binding extension of time of the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property at the time of the extension agreement.
- (4) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust, or trustee acting in his behalf, releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced

on the obligation secured by the mortgage or deed of trust, whichever value is the greater. (1961, c. 356.)

ARTICLE 6.

Uniform Trust Receipts Act.

§ 45-46. **Definitions.**—In this article, unless the context or subject matter otherwise requires:

“Buyer in the ordinary course of trade” means a person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee’s liberty of sale, including one who takes by conditional sale or under a preexisting mercantile contract with the trustee to buy the goods delivered, or like goods, for cash or on credit. “Buyer in the ordinary course of trade” does not include a pledgee, a mortgagee, a lienor, or a transferee in bulk.

“Document” means any document of title to goods.

“Entruster” means the person who has or directly or by agent takes a security interest in goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. A person in the business of selling goods or instruments for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded.

“Goods” means any chattels personal other than: Money, things in action, or things so affixed to land as to become a part thereof.

“Instrument” means

- (1) Any negotiable instrument as defined in the Uniform Negotiable Instruments Law and amendments thereto, or
- (2) Any certificate of stock, or bond or debenture for the payment of money issued by a public or private corporation as part of a series, or
- (3) Any interim, deposit, or participation certificate or receipt, or other credit or investment instrument of a sort marketed in the ordinary course of business or finance, of which the trustee, after the trust receipt transaction, appears by virtue of possession and the face of the instrument to be the owner.

“Instrument” does not include any document of title to goods.

“Lien creditor” means any creditor who has acquired a specific lien on the goods, documents or instruments by attachment, levy, or by any other similar operation of law or judicial process, including a distraining landlord.

“New value” includes new advances or loans made and the renewal and extension of such advances or loans or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under G.S. 45-55.

“Person” means, as the case may be, an individual, trustee, receiver or other fiduciary, partnership, corporation, business trust, or other association, and two or more persons having a joint or common interest.

“Possession,” as used in this article with reference to possession taken or retained by the entruster, means actual possession of goods, documents or instruments, or, in the case of goods, such constructive possession as, by means of tags or signs or other outward marks placed and remaining in conspicuous places, may reasonably be expected in fact to indicate to the third party in question that the entruster has control over or interest in the goods.

“Purchase” means taking by sale, conditional sale, lease, mortgage, or pledge. **legal or equitable.**

“Purchaser” means any person taking by purchase. A pledgee, mortgagee or

other claimant of a security interest created by contract is, insofar as concerns his specific security, a purchaser and not a creditor.

"Security interest" means a property interest in goods, documents or instruments, limited in extent to securing performance of some obligation of the trustee or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only.

"Transferee in bulk" means a mortgagee or a pledgee or a buyer of the trustee's business substantially as a whole.

"Trustee" means the person having or taking possession of goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. The use of the word "trustee" herein shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence other than as provided by this article.

"Value" means any consideration sufficient to support a simple contract. An antecedent or preexisting claim, whether for money or not, and whether against the transferee or against another person, constitutes value where goods, documents or instruments are taken either in satisfaction thereof or as security therefor. (1961, c. 574.)

Cross Reference.—For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

Editor's Note.—For comment on Uni-

form Trust Receipts Act, see 40 N.C.L. Rev. 85 (1961).

Repeal of Article.—Section 2, c. 700, Session Laws 1965, repeals §§ 45-46 to 45-66, effective at midnight June 30, 1967.

§ 45-47. What constitutes trust receipt transaction and trust receipt.—(a) A trust receipt transaction within the meaning of this article is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subsection (c), whereby

- (1) The entruster or any third person delivers to the trustee goods, documents or instruments in which the entruster (i) prior to the transaction has, or for new value (ii) by the transaction acquires or (iii) as the result thereof is to acquire promptly, a security interest, or
- (2) The entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in instruments or documents which are actually exhibited to such entruster, or to his agent in that behalf, at a place of business of either entruster or agent, but possession of which is retained by the trustee; provided, that the delivery under subdivision (1) or the giving of new value under subdivision (2) either
 - a. Be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or
 - b. Be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing.

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

If the trustee's rights in the goods, documents or instruments are subject to a prior trust receipt transaction, or to a prior equitable pledge, G.S. 45-54 and 45-48, respectively, of this article, determine the priorities.

(b) A writing such as is described in subsection (a), subdivision (2), paragraph a, signed by the trustee, and given in or pursuant to such a transaction, is designated in this article as a "trust receipt". No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

(c) A transaction shall not be deemed a trust receipt transaction unless the

possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

- (1) In the case of goods, documents or instruments, for the purpose of selling or exchanging them, or of procuring their sale or exchange; or
- (2) In the case of goods or documents, for the purpose of manufacturing or processing the goods delivered or covered by the documents, with the purpose of ultimate sale, or for the purpose of loading, unloading, storing, shipping, transshipping or otherwise dealing with them in a manner preliminary to or necessary to their sale; or
- (3) In the case of instruments, for the purpose of delivering them to a principal, under whom the trustee is holding them, or for consummation of some transaction involving delivery to a depository or registrar, or for their presentation, collection, or renewal. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-48. Attempted creation or continuance of pledge without delivery or retention of possession.—(a) An attempted pledge or agreement to pledge not accompanied by delivery of possession, which does not fulfill the requirements of a trust receipt transaction, shall be valid as against creditors of the pledgor only as follows:

- (1) To the extent that new value is given by the pledgee in reliance thereon, such pledge or agreement to pledge shall be valid as against all creditors with or without notice, for ten days from the time the new value is given;
- (2) To the extent that the value given by the pledgee is not new value, and in the case of new value after the lapse of ten days from the giving thereof, the pledge shall have validity as against lien creditors without notice, who become such as prescribed in G.S. 45-53, only as of the time the pledgee takes possession, and without relation back.

(b) Purchasers (including entrusters) for value and without notice of the pledgee's interest shall take free of any such pledge or agreement to pledge unless, prior to the purchase, it has been perfected by possession taken.

(c) Where, under circumstances not constituting a trust receipt transaction, a person, for a temporary and limited purpose, delivers goods, documents, or instruments, in which he holds a pledgee's or other security interest, to the person holding the beneficial interest therein, the transaction has like effect with a purported pledge for new value under this section. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-49. Contract to give trust receipt.—(a) A contract to give a trust receipt, if in writing and signed by the trustee, shall, with reference to goods, documents or instruments thereafter delivered by the entruster to the trustee in reliance on such contract be equivalent in all respects to a trust receipt.

(b) Such a contract shall as to such goods, documents, or instruments be specifically enforceable against the trustee; but this subsection shall not enlarge the scope of the entruster's rights against creditors of the trustee as limited by this article. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-50. Validity between the parties.—Between the entruster and the trustee the terms of the trust receipt shall, save as otherwise provided by this article, be valid and enforceable. But no provision for forfeiture of the trustee's interest shall be valid except as provided in subsection (e) of G.S. 45-51. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-51. **Repossession and entruster's rights on default.**—(a) The entruster shall be entitled as against the trustee to possession of the goods, documents or instruments on default, and as may be otherwise specified in the trust receipt.

(b) An entruster entitled to possession under the terms of the trust receipt or of subsection (a) may take such possession without legal process, whenever that is possible without breach of the peace.

(c) (1) After possession taken, the entruster shall, subject to subdivision (2) and subsection (e), hold such goods, documents or instruments with the rights and duties of a pledgee.

(2) An entruster in possession may, on or after default, give notice to the trustee of intention to sell, and may, not less than five days after the serving or sending of such notice, sell the goods, documents or instruments for the trustee's account, at public or private sale, and may at a public sale himself become a purchaser. The proceeds of any such sale, whether public or private, shall be applied (i) to the payment of the expenses thereof, (ii) to the payment of the expenses of retaking, keeping and storing the goods, documents, or instruments, (iii) to the satisfaction of the trustee's indebtedness. The trustee shall receive any surplus and shall be liable to the entruster for any deficiency. Notice of sale shall be deemed sufficiently given if in writing, and either (i) personally served on the trustee, or (ii) sent by postpaid ordinary mail to the trustee's last known business address.

(3) A purchaser in good faith and for value from an entruster in possession takes free of the trustee's interest, even in a case in which the entruster is liable to the trustee for conversion.

(d) Surrender of the trustee's interest to the entruster shall be valid, on any terms upon which the trustee and the entruster may, after default, agree.

(e) As to articles manufactured by style or model, the terms of the trust receipt may provide for forfeiture of the trustee's interest, at the election of the entruster, in the event of the trustee's default, against cancellation of the trustee's then remaining indebtedness; provided, that in the case of the original maturity of such an indebtedness there must be cancelled not less than eighty percent (80%) of the purchase price to the trustee, or of the original indebtedness, whichever is greater; or, in the case of a first renewal, not less than seventy percent (70%), or, in the case of a second or further renewal, not less than sixty percent (60%). (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-52. **General effect of entruster's filing or taking possession.**—

(a) (1) If the entruster within the period of thirty days specified in subsection (a) of G.S. 45-53 files as in this article provided, such filing shall be effective to preserve his security interest in documents or goods against all persons save as otherwise provided by G.S. 45-53, 45-54, 45-55, 45-56, 45-59 and 45-60 of this article.

(2) Filing after the lapse of the said period shall be valid; but in such event, save as provided in subdivision (2) of subsection (b) of G.S. 45-54, the entruster's security interest shall be deemed to be created by the trustee as of the time of such filing, without relation back, as against all persons not having notice of such interest.

(b) The taking of possession by the entruster shall, so long as such possession is retained, have the effect of filing, in the case of goods or documents; and of notice of the entruster's security interest to all persons, in the case of instruments. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-53. Validity against creditors.—(a) The entruster's security interest in goods, documents or instruments under the written terms of a trust receipt transaction, shall without any filing be valid as against all creditors of the trustee, with or without notice, for thirty days after delivery of the goods, documents or instruments to the trustee, and thereafter except as in this article otherwise provided.

But where the trustee at the time of the trust receipt transaction has and retains instruments or documents, the thirty days shall be reckoned from the time such instruments or documents are actually shown to the entruster, or from the time that the entruster gives new value under the transaction, whichever is prior.

(b) Save as provided in subsection (a), the entruster's security interest shall be void as against lien creditors who become such after such thirty-day period and without notice of such interest and before filing.

Unless prior to the acquisition of notice by all creditors filing has occurred or possession has been taken by the entruster, (i) an assignee for the benefit of creditors, from the time of assignment, or (ii) a receiver in equity from the time of his appointment, or (iii) a trustee in bankruptcy or judicial insolvency proceedings from the time of filing of the petition in bankruptcy or judicial insolvency by or against the trustee, shall, on behalf of all creditors, stand in the position of a lien creditor without notice, without reference to whether he personally has or has not, in fact, notice of the entruster's interest. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-54. Limitations on entruster's protection against purchasers.
—(a) Purchasers of Negotiable Documents or Instruments.—

(1) Nothing in this article shall limit the rights of purchasers in good faith and for value from the trustee of negotiable instruments or negotiable documents, and purchasers taking from the trustee for value, in good faith, and by transfer in the customary manner instruments in such form as are by common practice purchased and sold as if negotiable, shall hold such instruments free of the entruster's interest: and filing under this article shall not be deemed to constitute notice of the entruster's interest to purchasers in good faith and for value of such documents or instruments, other than transferees in bulk.

(2) The entrusting (directly, by agent, or through the intervention of a third person) of goods, documents or instruments by an entruster to a trustee, under a trust receipt transaction or a transaction falling within G.S. 45-48 of this article, shall be equivalent to the like entrusting of any documents or instruments which the trustee may procure in substitution, or which represent the same goods or instruments or the proceeds thereof, and which the trustee negotiates to a purchaser in good faith and for value.

(b) Where a buyer from the trustee is not protected under subsection (a) hereof, the following rules shall govern:

(1) Sales by Trustee in the Ordinary Course of Trade.—

a. Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty-day period specified in subsection (a) of G.S. 45-53 of this article, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold and no filing shall constitute notice of the entruster's security interest to such a buyer.

b. No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter.

- (2) **Purchasers Other Than Buyers in the Ordinary Course of Trade.**—In the absence of filing, the entruster's security interest in goods shall be valid, as against purchasers, save as provided in this section; but any purchaser, not a buyer in the ordinary course of trade, who, in good faith and without notice of the entruster's security interest and before filing, either (i) gives new value before the expiration of the thirty-day period specified in subsection (a) of G.S. 45-53, or (ii) gives value after said period, and who in either event before filing also obtains delivery of goods from a trustee shall hold the subject matter of his purchase free of the entruster's security interest; but a transferee in bulk can take only under (ii) of this subdivision (2).
- (3) **Liberty of Sale.**—If the entruster consents to the placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, or allows such goods to be so placed or kept, such consent or allowance shall have like effect as granting the trustee liberty of sale.

(c) As to all cases covered by this section the purchase of goods, documents or instruments on credit shall constitute a purchase for new value, but the entruster shall be entitled to any debt owing to the trustee and any security therefor, by reason of such purchase; except that the entruster's right shall be subject to any setoff or defense valid against the trustee and accruing before the purchaser has actual notice of the entruster's interest. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-55. Entruster's right to proceeds.—Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:

- (1) To the debts described in G.S. 45-54 (c); and also
- (2) To any proceeds; or the value of any proceeds (whether such proceeds are identifiable or not) of the goods, documents or instruments, if said proceeds were received by the trustee within thirty days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankruptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting; and to a priority to the amount of such proceeds or value; and also
- (3) To any other proceeds of the goods, documents or instruments which are identifiable. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-56. Liens in course of business good against entruster.—Specific liens arising out of contractual acts of the trustee with reference to the processing, warehousing, shipping or otherwise dealing with specific goods in the usual course of the trustee's business preparatory to their sale shall attach against the interest of the entruster in said goods as well as against the interest of the trustee, whether or not filing has occurred under this article; but this section shall not obligate the entruster personally for any debt secured by such lien; nor shall it be construed to include the lien of a landlord. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-57. Entruster not responsible on sale by trustee.—An entruster holding a security interest shall not, merely by virtue of such interest or of his having given the trustee liberty of sale or other disposition, be responsible as prin-

cipal or as vendor under any sale or contract to sell made by the trustee. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-58. Filing and refiling concerning trust receipt transaction covering documents or goods.—(a) Any entruster undertaking or contemplating trust receipt transactions with reference to documents or goods is entitled to file a statement, signed by the entruster and the trustee and acknowledged by the trustee before an officer authorized to take acknowledgments, and probated as other instruments are now probated, which shall contain:

- (1) The name and mailing address within this State of both entruster and trustee, or if either the entruster or trustee has no mailing address within the State, the mailing address outside the State; and
- (2) A statement that the entruster is engaged, or expects to be engaged, in financing under trust receipt transactions the acquisition of goods by the trustee; and
- (3) A description of the kind or kinds of goods covered or to be covered by such financing.

(b) The following form of statement (or any other form of statement containing substantially the same information) shall suffice for the purposes of this article.

Statement of Trust Receipt Financing

The entruster, whose mailing address within this State is, [or who has no place of business within this State and whose mailing address outside this State is] is or expects to be engaged in financing under trust receipt transactions the acquisition by the trustee, whose mailing address within this State is of goods of the following description: [coffee, silk, automobiles, or the like.]

[Signed] Entruster
[Signed] Trustee.

(c) The place for filing the statement of trust receipt financing shall be the office of the register of deeds of the county wherein the trustee, if an individual, resides; or if the trustee is a domestic or domesticated corporation which has a registered office in this State, the statement of trust receipt financing must be filed in the county wherein such registered office is located; or if the corporation has no such registered office in this State but does have a principal office in this State as shown by its certificate of incorporation or amendment thereto or legislative charter or, in case of a domesticated corporation, as shown by its statement filed with the Secretary of State, the statement of trust receipt financing must be filed in the county wherein the principal office is said to be located by such certificate of incorporation or amendment thereto or legislative charter or such statement filed with the Secretary of State. If the trustee is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the statement of trust receipt financing shall be filed in the office of the register of deeds of any county wherein the trustee has a place of business.

(d) Presentation for filing of the statement described in subsection (a), and payment of the filing fee, shall constitute filing under this article, in favor of the entruster, as to any documents, or goods falling within the description in the statement which are within one year from the date of such filing, or have been, within thirty days previous to such filing, the subject matter of a trust receipt transaction between the entruster and the trustee.

(e) At any time before expiration of the validity of the filing, as specified in subsection (d), a like statement, as specified in subsection (a), or an acknowledged and probated affidavit by the entruster alone, setting out the information required by subsection (a) and containing the book and page where the original statement is recorded, may be filed in like manner as the original filing. Any filing of such

further statement or affidavit shall be valid in like manner and for like period as an original filing, and shall also continue the rank of the entruster's existing security interest as against all junior interests.

(f) The register of deeds shall index and record each statement of trust receipt financing, or extension statement, in the same manner as chattel mortgages; and for indexing and recording the same, the register of deeds shall receive the same fee as is provided by law for the recording and indexing of short form chattel mortgages.

(g) The statement of trust receipt financing may be cancelled of record at any time by the entruster or by his duly authorized attorney in fact, or upon presentation by the trustee or the entruster of the original statement of trust receipt financing marked satisfied in full by the entruster but such cancellation shall not affect the protection afforded to trust receipts protected by other filings or by other provisions of this article. The cancellation of the original statement of trust receipt financing shall operate as a cancellation of all extensions of that statement. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-59. Limitations on extent of obligation secured.—As against purchasers and creditors, the entruster's security interest may extend to any obligation for which the goods, documents or instruments were security before the trust receipt transaction, and to any new value given or agreed to be given as a part of such transaction; but not, otherwise, to secure past indebtedness of the trustee; nor shall the obligation secured under any trust receipt transaction extend to obligations of the trustee to be subsequently created. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-60. Article not applicable to certain transactions.—This article shall not apply to single transactions of legal or equitable pledge, not constituting a course of business, whether such transactions be unaccompanied by delivery of possession, or involve constructive delivery, or delivery and redelivery, actual or constructive, so far as such transactions involve only an entruster who is an individual natural person, and a trustee entrusted as a fiduciary with handling investments or finances of the entruster; nor shall it apply to transactions of bailment or consignment in which the title of the bailor or consignor is not retained to secure an indebtedness to him of the bailee or consignee. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-61. Election among filing statutes.—As to any transaction falling within the provisions both of this article and of any other act or law requiring or permitting filing or recording, the entruster shall not be required to comply with both, but by complying with the provisions of either at his election may have the protection given by the act complied with; except that buyers in the ordinary course of trade as described in subsection (b) of G.S. 45-54, and lienors as described in G.S. 45-56, shall be protected as therein provided, although the compliance of the entruster be with the filing or recording provisions of another act or law. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-62. Cases not provided for.—In any case not provided for in this article the rules of law and equity, including the law merchant, shall continue to apply to trust receipt transactions and purported pledge transactions not accompanied by delivery of possession. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ 45-63. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ **45-64. Constitutionality.**—If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ **45-65. Short title.**—This article may be cited as the Uniform Trust Receipts Act. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

§ **45-66. Inconsistent laws.**—Notwithstanding the provisions of any general or special law, the provisions of this article shall control; provided, however, that this article shall not affect transactions entered into before June 1, 1961. (1961, c. 574.)

Repeal of Article.—See note to § 45-46.

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

- Sec.
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- Sec.
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- 46-35 to 46-41. [Repealed.]

Article 4.

Partition of Personal Property.

- 46-42. Personal property may be partitioned; commissioners appointed.
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 46-45, 46-46. [Repealed.]

ARTICLE 1.

Partition of Real Property.

§ 46-1. **Partition is a special proceeding.**—Partition under this chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (1868-9, c. 122, s. 33; Code, s. 1923; Rev., s. 2485; C. S., s. 3213.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Editor's Note.—At one time partition could be effected only by a suit in equity of which the several State courts possessing general equity or chancery jurisdiction had cognizance. This was changed in 1868 and the proceedings made special.

Partition Regulated by Statute.—Since 1868, the partition of land between tenants in common has been regulated by statute. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Procedure Prescribed for Special Proceedings Applies.—A proceeding for partition of real or personal property is a

special proceeding of which the clerk has jurisdiction under procedure in all respects the same as that prescribed by law in special proceedings except as modified by this chapter. *Dubose v. Harpe*, 239 N.C. 672, 80 S.E.2d 454 (1954).

Proceedings Are Equitable in Nature.—Partition proceedings have been consistently held to be equitable in nature. *Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).

A tenancy in common is the foundation upon which partition is based. *Smith v. Smith*, 248 N.C. 194, 102 S.E.2d 868 (1958).

Ordinarily a tenant in common in realty or personalty is entitled to partition of the property. *Chadwick v. Blades*, 210 N.C. 609, 188 S.E. 198 (1936).

Chapter Does Not Apply to Partition by Agreement.—This chapter applies to compulsory or judicial partition. It does

not apply to partition by agreement. *Keener v. Den*, 73 N.C. 132 (1875). As to authority of court in partition by agreement, and procedure therein, see *Outlaw v. Outlaw*, 184 N.C. 255, 114 S.E. 4 (1922). See also *Newsome v. Harrell*, 168 N.C. 295, 84 S.E. 337 (1915).

Nonsuit.—When the proceeding for partition becomes adverse to him the plaintiff is not allowed to take a voluntary nonsuit. *Haddock v. Stocks*, 167 N.C. 70, 83 S.E. 9 (1914).

Applied in *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E.2d 554 (1939); *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958).

Cited in *Skinner v. Carter*, 108 N.C. 106, 12 S.E. 908 (1891); *King v. Neese*, 233 N.C. 132, 63 S.E.2d 123 (1951); *Murphy v. Smith*, 235 N.C. 455, 70 S.E.2d 697 (1952); *Nunn v. Gibbons*, 249 N.C. 362, 106 S.E.2d 499 (1959).

§ 46-2. Venue in partition.—The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (1868-9, c. 122, s. 7; Code, s. 1898; Rev., s. 2486; C. S., s. 3214; Ex. Sess. 1924, c. 62, s. 1.)

Waiver of Venue.—Construing §§ 1-82, 1-83 and this section in *pari materia*, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to

be determined by the common law, but by legislative regulation. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E. 20 (1925).

Venue of Proceeding to Partition Property.—See note to § 46-42.

§ 46-3. Petition by cotenant or personal representative of cotenant.—One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28-81, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C. S., s. 3215; 1963, c. 291, s. 2.)

I. In General.

II. Parties.

III. Plea of Sole Seizin.

Cross Reference.

As to procedure for sale or mortgage of property where there is a vested interest and a contingent remainder to uncertain persons, see § 41-11.

I. IN GENERAL.

Editor's Note.—The 1963 amendment inserted "or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28-81."

Jurisdiction of Superior Court.—The superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in terms, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. *Baggett v. Jackson*, 160 N.C. 26, 76 S.E. 86 (1912).

Right of Possession.—A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be

actual. *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943). See *Wood v. Sugg*, 91 N.C. 93, 49 Am. Rep. 639 (1884); *Osborne v. Mull*, 91 N.C. 203 (1884); *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748, 54 Am. St. Rep. 757 (1896); *Spring Green Church v. Thornton*, 158 N.C. 119, 73 S.E. 810 (1912).

Tenancy in common in land is necessary basis for maintenance of special proceeding for partition by petition to the superior court. *Murphy v. Smith*, 235 N.C. 455, 70 S.E.2d 697 (1952).

A tenancy in common is the foundation upon which partition is based. *Smith v. Smith*, 248 N.C. 194, 102 S.E.2d 868 (1958).

Tenant in Common Is Entitled to Partition as Matter of Right.—A tenant in common is entitled as a matter of right to partition of real estate held in common, to the end that he may have and enjoy his share therein in severalty. *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958); *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Tenants in common may make a valid agreement whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. *Chadwick v. Blades*, 210 N.C. 609, 188 S.E. 198 (1936). See 15 N.C.L. Rev. 279.

Right as Against Persons Having Contingent Remainders in Undivided Interests in Land.—Petitioners, owning undivided interest in fee in several tracts of land and also owning life estates in the balance of the undivided interests in the same tracts of land with contingent limitations over to persons not presently determinable, had the right, as against the contingent remaindermen, to partition the several tracts so that petitioners might hold some of the tracts in fee and in common, and thus know the boundaries of the real estate owned by them in fee distinct from the boundaries of that in which they owned life estates with contingent remainder over. *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958).

Petition Omitting Term of Court.—A petition entitled in the original cause, but addressed to the clerk, in special proceedings for partition is not demurrable because it does not give the term of court or any court in the caption. *Hartsfield v. Bryan*, 177 N.C. 166, 98 S.E. 379 (1919).

Failure to Allege Right to Possession.—If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. *Ep-*

ley v. Epley, 111 N.C. 505, 16 S.E. 321 (1892); *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748, 54 Am. St. Rep. 757 (1896).

Where tenants in common allege they are the owners of land and seized of the fee simple title thereto, the law presumes possession. *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943).

Leave to Amend Petition.—On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. *Simmons v. Jones*, 118 N.C. 472, 24 S.E. 114 (1896).

Partition of Part—Inclusion of Other Land.—The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held in common included. *Luther v. Luther*, 157 N.C. 499, 73 S.E. 102 (1911); *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964); *Coats v. Williams*, 261 N.C. 692, 136 S.E.2d 113 (1964). But see § 46-16 and note thereto as to partial partition.

Partition in Kind Is Favored.—Since partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages in pursuing such method. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

But Right May Not Be Used to Injure Another.—Partition of land in kind is a matter of right, but this right of actual partition may not be so used as to injure another. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

There should be a partition in kind unless such partition will cause material and substantial injury to some or all of the parties interested. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Partition Not Proper Remedy for Ouster.—Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. *Thomas v. Garvin*, 15 N.C. 223, 25 Am. Dec. 708 (1833).

Divorced Couple Entitled to Partition.—When marriage is dissolved by divorce, the husband and wife become tenants in common of property formerly held by the entirety, and are entitled to partition. *McKinnon, Currie & Co. v. Caulk*, 167 N.C. 411, 83 S.E. 559, 1915C L.R.A. 396 (1914).

Partition as to Churches.—Churches belonging to an association controlling a school are not entitled to partition. *Spring Green Church v. Thornton*, 158 N.C. 119, 73 S.E. 810 (1912).

Whether Partition or Sale Question of Fact for Court.—Whether or not, in a proceeding instituted under this section, for

partition of land, held by two or more persons as tenants in common, between or among such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. *Talley v. Murchison*, 212 N.C. 205, 193 S.E. 148 (1937).

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale.—The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of each in the money equivalent that could probably be obtained for the whole. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Effect of Adjudication When Title Put in Issue.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. *Buchanan v. Harrington*, 152 N.C. 333, 67 S.E. 747, 136 Am. St. Rep. 838 (1910); *Baugham v. Trust Co.*, 181 N.C. 406, 107 S.E. 431 (1921).

Determinative Circumstances.—On the question of partition or sale, the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

The physical difficulty of division is only a circumstance for the consideration of the court. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Applied in *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E.2d 554 (1939); *Moore v. Baker*, 224 N.C. 133, 29 S.E.2d 452 (1944).

II. PARTIES.

Bringing in Defendants.—Parties claiming to hold in common may be brought in as defendants. *McKeel v. Holloman*, 163 N.C. 132, 79 S.E. 445 (1913).

Sale or Partition of Reversions, Remainders and Executory Interests.—This section is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen, and the life tenant is joined. *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926).

Prior to the enactment of § 46-23, cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943).

Persons Bound.—Persons not parties are not bound. *Henderson v. Wallace*, 72 N.C. 451 (1875). And if named as parties they must be served with process. *Patillo v. Lytle*, 158 N.C. 92, 73 S.E. 200 (1911).

Partition by Infant and Another.—Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. *Lindsay v. Beaman*, 128 N.C. 189, 38 S.E. 811 (1901).

Intervention by Claimant of Paramount Title.—In an action for partition of lands, it is proper to allow another party claiming paramount title to the land to intervene and assert his rights. *Roughton v. Duncan*, 178 N.C. 5, 100 S.E. 78 (1919). But such a claimant may be estopped by his laches. *Thomas v. Garvin*, 15 N.C. 223, 25 Am. Dec. 703 (1833).

Intervention by Judgment Debtor.—See *Edmonds v. Wood*, 222 N.C. 118, 22 S.E.2d 237 (1942).

Administrator Not a Party.—In an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant because he opposes the partition and wishes in the same action to make application to sell the land for debts of the estate. *Garrison v. Cox*, 99 N.C. 478, 6 S.E. 124 (1888).

Judgment Creditors and Mortgagees.—In proceedings for partition, judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is error for the trial judge to dismiss the action as to them. *Holley v. White*, 172 N.C. 77, 89 S.E. 1061 (1916).

The mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land. *Rostan v. Huggins*, 216 N.C. 386, 5 S.E.2d 162, 126 A.L.R. 410 (1939).

Making Additional Party for Purpose of Setting Aside Sale.—An application to be made a party defendant in partition proceedings after confirmation of sale was properly denied, where it was based on deeds from persons who never had claimed any title and accompanied by a motion to set aside the sale to permit his principals to make a bid. *Thompson v. Rospigliosi*, 162 N.C. 145, 77 S.E. 113 (1913).

The presence of an unnecessary party, in

proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. *Baggett v. Jackson*, 160 N.C. 26, 76 S.E. 86 (1912).

Unknown Parties.—See § 46-6.

III. PLEA OF SOLE SEIZIN.

Effect of Plea.—Where the plea of sole seizin is set up, the effect is practically to convert it into an action of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. *Graves v. Barrett*, 126 N.C. 267, 35 S.E. 539 (1900); *Haddock v. Stocks*, 167 N.C. 70, 83 S.E. 9 (1914). Where the plea is set up the proper course is for the court to try title to the land. *Purvis v. Wilson*, 50 N.C. 22, 69 Am. Dec. 773 (1857).

Plea Not Put In before Partition Ordered.—Where, in partition, a plea of sole

seizin is not put in before the order of partition is made, it will be considered as waived. *Wright v. McCormick*, 69 N.C. 14 (1873).

Burden of Proof.—Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common is made out. *Lester v. Harvard*, 173 N.C. 83, 91 S.E. 698 (1917).

Where defendants in partition deny cotenancy and plead sole seizin, the burden is upon plaintiffs to show title in the parties by tenancy in common. *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948).

Cited in *Brittain v. Mull*, 91 N.C. 498 (1884).

§ 46-4. Surface and minerals in separate owners; partitions distinct.—When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interest have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (1905, c. 90; Rev., s. 2488; C. S., s. 3216.)

Applied in *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946).

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.—When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien. (1905, c. 429; Rev., s. 2489; C. S., s. 3217.)

Cross References.—As to homestead and exemptions in sale under execution, see § 1-369 et seq. As to execution, see § 1-302 et seq.

Intervention in Partition Proceeding.—See *Edmonds v. Wood*, 222 N.C. 118, 22 S.E.2d 237 (1942).

§ 46-6. Unknown parties; summons and representation.—If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (1887, c. 284; Rev., s. 2490; C. S., s. 3218.)

Discretion in Appointing Representative Not Reviewable.—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. *Lawrence v. Hardy*, 151 N.C. 123, 65 S.E. 766 (1909).

Purchaser Acquires Good Title.—When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter,

a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. *Lawrence v. Hardy*, 151 N.C. 123, 65 S.E. 766 (1909).

Purchaser Cannot Resist Payment of Purchase Price.—Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title for that the commissioner's deed would not preclude the claim of the missing heir. *Bynum v. Bynum*, 179 N.C. 14, 101 S.E. 527 (1919).

§ 46-7. Commissioners appointed.—The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C. S., s. 3219; Ex. Sess. 1924, c. 62, s. 2.)

Approval by Only Two Appraisers Held Error.—Testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, whereupon the court ordered the two surviving appraisers to complete the appraisal and file a report, which report was later approved by the court. It was held that under the terms of the will and under this section, it is necessary that three ap-

praisers act in the matter, although two of them may file the report, § 46-17, and the court should have appointed a third appraiser, and the approval of the report based upon the findings of but two appraisers was reversible error. *Sharpe v. Sharpe*, 210 N.C. 92, 185 S.E. 634 (1936).

Applied in *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

§ 46-7.1. Compensation of commissioners.—The clerk of the superior court shall fix the compensation of commissioners for the partition or division of lands according to the provisions of G.S. 1-408. (1949, c. 975; 1953, c. 48.)

Local Modification.—Guilford: 1951, c. 977, s. 1; Harnett: 1951, c. 1170; Stokes: 1959, c. 531.

§ 46-8. Oath of commissioners.—The commissioners shall be sworn by a justice of the peace, the sheriff or any deputy sheriff of the county, or any other person authorized to administer oaths, to do justice among the tenants in common in respect to such partition, according to their best skill and ability. (1868-9, c. 122, s. 2; Code, s. 1893; Rev., s. 2492; C. S., s. 3220; 1945, c. 472.)

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

§ 46-9. Delay or neglect of commissioner penalized.—If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner. (1868-9, c. 122, s. 10; Code, s. 1901; Rev., s. 2498; C. S., s. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares.—The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C. S., s. 3222.)

Section Applies Only to Compulsory Partition.—Where the partition was not compulsory but was under an agreement between cotenants, this section is not applicable. *Newsome v. Harrell*, 168 N.C. 295, 84 S.E. 337 (1915); *Outlaw v. Outlaw*, 184 N.C. 255, 114 S.E. 4 (1922).

Actual partition must be on the basis of the division made by commissioners and not otherwise. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Authority of Commissioners and Effect of Partition.—In partition proceedings the duty of the commissioners is to make actual partition among the tenants in common and to make a full report thereof; they have no other function. The allotment of the respective shares in partition proceedings creates no new estate and conveys no title, the sole effect thereof being to sever the unity of possession and to fix the physical boundaries of the tracts. Therefore, no title vests in the commissioners, and after confirmation of their report they have no further authority and purported deeds executed by them to the several tenants convey nothing. *McLamb v. Weaver*, 244 N.C. 432, 94 S.E.2d 331 (1956).

Validity of Action of Two Commissioners.—Where three commissioners are appointed to partition land the action of any two of them is valid. *Thompson v. Shemwell*, 93 N.C. 222 (1885). And this action may consist in filling the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. *Simmons v. Foscue*, 81 N.C. 86 (1879).

But the court's approval of a report based upon the findings of but two appraisers or commissioners was held reversible error in *Sharpe v. Sharpe*, 210 N.C.

92, 185 N.C. 634 (1936). See note to § 46-7.

By the very terms of § 46-17, the signature of two of the commissioners to their report is sufficient. *Thompson v. Shemwell*, 93 N.C. 222 (1885); *Sharpe v. Sharpe*, 210 N.C. 92, 185 S.E. 634 (1936).

Existing Easements.—It would seem that existing easements are not destroyed by a division in partition. See *Jones v. Swindell*, 176 N.C. 34, 96 S.E. 663 (1918).

Improvements.—A tenant in common is entitled to recover against a cotenant for betterments he has placed on the land. *Daniel v. Dixon*, 163 N.C. 137, 79 S.E. 425 (1913). As to statute not applying to tenants in common, see note to § 1-340.

Where no appeal is taken from the order allowing for the improvements, it concludes the plaintiff from having the good faith of the defendant, in making the improvements, inquired into. *Fisher v. Toxaway Co.*, 171 N.C. 547, 88 S.E. 887 (1916).

But where in a partition an excessive portion is allotted to one, which is reduced on a reallocation, he cannot be allowed for improvements made on the excess, as it was his own folly to make them before obtaining a final decree and his deed. *Carland v. Jones*, 55 N.C. 506 (1856).

Equality in value must be afforded by the assessment of an owelty charge. *Moore v. Baker*, 224 N.C. 498, 31 S.E.2d 526 (1944).

Basis of Owelty.—The right to owelty on an unequal partition is based on the implied warranty attaching to each share from all the others. *Nixon v. Lindsay*, 55 N.C. 230 (1855); *Cheatham v. Crews*, 88 N.C. 38 (1883).

Owelty Not Mere Lien Debt. — The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is a tenant in common with the holder of the share in whose favor the de-

cree is entered to the extent of the charge, until the same shall be satisfied. In re Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Owely Is Charge upon Land.—The sums charged upon “the more valuable dividends” in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees of Davidson College, 62 N.C. 261 (1867).

Owely Follows Land.—Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Dobbin v. Rex, 106 N.C. 444, 11 S.E. 260 (1890); Powell v. Weatherington, 124 N.C. 40, 32 S.E. 380 (1899). As to the docketing of owely charges, see § 46-21.

When Land Charged with Payment of Several Shares.—Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

A discharge in bankruptcy does not cancel the charge of owely of partition against the land of the bankrupt. In re Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Procedure to Subject Land Charged.—A motion in the cause for execution is the proper proceeding to subject land charged with owely of partition to the payment thereof. Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

Charges for equality of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Trustees of Davidson College, 62 N.C. 261 (1867); Waring v. Wadsworth, 80 N.C. 345

(1879); Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

Division of Costs.—The costs in proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N.C. 149, 29 S.E. 221 (1898).

Costs Precede Homestead Exemption.—Where in an ex parte proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A, and A failed to pay the costs adjudged against her and the share allotted to her was sold on execution issued on the judgment, and no homestead was allotted to A, who has no other land, and her interest was not worth \$1,000, in an action by the heirs of A against the purchaser at the execution sale, the sale was held to be valid. Hinnant v. Wilder, 122 N.C. 149, 29 S.E. 221 (1898).

Confirmation Necessary to Execution.—No execution can issue to satisfy a charge against land in partition proceedings until the commissioners’ report has been confirmed. In re Ausborn, 122 N.C. 42, 29 S.E. 56 (1898).

Parties to Action to Recover Owely of Partition.—The widow of the party upon whose land a charge is placed is not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N.C. 253 (1874).

Counterclaim.—A cotenant, who is charged in the partition proceedings with owely, may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N.C. 458 (1885).

Cited in Capps v. Capps, 85 N.C. 408 (1881); Thompson v. Thompson, 235 N.C. 416, 70 S.E.2d 495 (1952).

§ 46-11. Owely to bear interest.—The sums of money due from the more valuable dividends shall bear interest until paid. (1868-9, c. 122, s. 8; Code, s. 1899; Rev., s. 2496; C. S., s. 3223.)

§ 46-12. Owely from infant’s share due at majority.—When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (1868-9, c. 122, s. 9; Code, s. 1900; Rev., s. 2497; C. S., s. 3224.)

Charged Land Inherited by Infants.—Owely may be enforced against land inherited by infants from an adult who owned the land when the owely was made a charge against it, though as to land par-

titioned to an infant cotenant owely is not payable until he reaches his majority. Powell v. Weatherington, 124 N.C. 40, 32 S.E. 380 (1899).

§ 46-13. Partition where shareowners unknown or title disputed.—If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, by order of the court, allot their several shares to them in common, as one parcel, provided such division shall not be injurious or detrimental to any cotenant or joint tenant. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, ss. 2, 4; Rev., ss. 2491, 2511; C. S., s. 3225; 1937, c. 98.)

Editor's Note.—While the primary purpose of the partition proceeding is to allot to each of the former cotenants his share of the property in severalty, the 1937 amendment, which added the last sentence, by no means militates against such purpose

but makes it possible for some of the former cotenants, who find it economically desirable, to have their several shares allotted to them as one parcel so that they may again hold as cotenants that parcel of land. 15 N.C.L. Rev. 355.

§ 46-14. Judgments in partition of remainders binding on parties thereto.—Where land is conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, any judgment of partition rendered in an action or special proceeding in the superior court authorizing a division or partition of said lands, and to which the life tenant or tenants, and all other persons then in being, or not in being, take such land as if the contingency had then happened, are parties, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing division or partition of said lands among the respective tenants and remaindermen or executory devisees, will be valid and binding upon all parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1; 1959, c. 1274, s. 1.)

Cited in *Barnes v. Dortch*, 245 N.C. 369, 95 S.E.2d 872 (1957).

§ 46-15: Repealed by Session Laws 1959, c. 879, s. 14, effective July 1, 1960.

Intestate Succession Law. — For new Intestate Succession Law, effective July 1, 1960, see §§ 29-1 to 29-30. As to abolition of dower and curtesy, see § 29-4.

§ 46-16. Partial partition; balance sold or left in common.—In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (1887, c. 214, s. 1; Rev., s. 2506; C. S., s. 3227.)

Intent of Section.—This section does not authorize a partition or a sale of the undivided interest of some of the cotenants, in an entire tract of land, leaving the undivided interest of other cotenants unaffected. *Patillo v. Lytle*, 158 N.C. 92, 73 S.E. 200 (1911), citing *Brooks v. Austin*, 95 N.C. 474 (1886).

Section Inapplicable Where Parties Agree Entire Tract Can Be Partitioned.—Where all parties agree that the entire tract can be partitioned without injury to any of the parties in interest, the provisions of this section and § 46-22 are not applicable to the proceeding. *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964).

§ 46-17. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their

trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in his discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding sixty days. This proviso shall be applicable to proceedings now pending for the partition of real property. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C. S., s. 3228; 1949, c. 16.)

Cross Reference.—See note to § 46-10.

Alteration of Report.—The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes a muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same. *Clinard v. Brummell*, 130 N.C. 547, 41 S.E. 675 (1902).

Findings as to Value Not Reviewable.—The findings of commissioners on value are not subject to review in the appellate court. *Fisher v. Toxaway Co.*, 171 N.C. 547, 88 S.E. 887 (1916).

Two commissioners can make the report under the express terms of this section. *Thompson v. Shemwell*, 93 N.C. 222

(1885); *Sharpe v. Sharpe*, 210 N.C. 92, 185 S.E. 634 (1936).

The mere fact that the commissioners did not file their report within the statutory period of sixty days after notification does not vitiate the report or preclude confirmation. *Thompson v. Thompson*, 235 N.C. 416, 70 S.E.2d 495 (1952).

Commissioners Not Required to Hear Tenants in Common.—There is no statutory requirement that commissioners appointed to partition land shall hear and consider evidence offered by the tenants in common or their contentions prior to or at the time of making partition. *Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).

§ 46-18. Map embodying survey to accompany report.—The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (1868-9, c. 122, s. 4; Code, s. 1895; Rev., s. 2493; C. S., s. 3229.)

Quoted in *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

§ 46-19. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within ten days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C. S., s. 3230; 1947, c. 484, s. 2.)

Proceedings Interlocutory until Confirmation.—Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. *Taylor v. Carrow*, 156 N.C. 6, 72 S.E. 76 (1911).

All orders of the clerk or judge are interlocutory except a final judgment or decree confirming the report of the commissioners. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Effect of Failure to Object.—Where no exceptions were filed and no objections made, plaintiff was entitled to a decree of confirmation as a matter of law. *Roberts v. Roberts*, 143 N.C. 309, 55 S.E. 721 (1906).

Time for Filing Exception.—Exceptions to the report of the commissioners appointed to make partition of land must be filed within twenty [now ten] days after the report is filed. *Floyd v. Rock*, 128 N.C. 10, 38 S.E. 33 (1901).

Sufficiency of Exception.—Where within the required time after filing the report defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a memorandum that defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on

the ground that no exception had been filed within the statutory time. *McDevitt v. McDevitt*, 150 N.C. 644, 64 S.E. 761 (1909).

Confirmation Is for Determination by Clerk and Judge.—If exceptions are filed in apt time, whether the report of the commissioners should be confirmed is for determination by the clerk and, upon appeal from his order, by the judge. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Clerk Has Jurisdiction Initially to Pass upon Exceptions.—Clearly, the clerk has authority and jurisdiction, initially, to pass upon exceptions to the report of the commissioners in a special proceeding for partition. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Powers of Clerk in Hearing on Exceptions.—In a hearing on exceptions to the report of the commissioners the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

The clerk is without authority to alter the report filed either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Nor May Judge Order Partition Different from That Made by Commissioners.—The judge may not, based on his findings as to what would constitute an equitable division, adjudge a partition of the land different from that made by the commissioners. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

He May Confirm Report or Vacate It and Enter Appropriate Interlocutory Orders.—In a de novo hearing before the judge, where the question is whether the report of the commissioners should be confirmed, the judge may confirm or he may vacate and enter appropriate interlocutory orders. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Where the clerk had confirmed the report of the commissioners, the question before the judge was whether the division made by the commissioners was fair and equitable. If so, a final judgment or decree confirming the report of the commissioners should have been entered. If not, the report of the commissioners should have been set aside; and, if set aside, the court by interlocutory order, should have ordered a

new division by commissioners or, if the facts justified, a partition sale. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Confirmation Is Error Where Commissioners Fail to Carry Out Orders.—Where commissioners fail to carry out the orders of the court in some material respect, it is error to confirm their report, especially if it appears that a party or parties have probably suffered injury by reason of such failure. *Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).

Resale after Confirmation.—After confirmation a resale may be ordered for sufficient cause shown; but should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation. *Ex parte White*, 82 N.C. 378 (1880).

Appeals May Be to Different Judges.—When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. *Taylor v. Carrow*, 156 N.C. 6, 72 S.E. 76 (1911).

Jurisdiction of Judge in Chambers.—A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to partition land. *McMillan v. McMillan*, 123 N.C. 577, 31 S.E. 729 (1898).

Effect of Findings of Judge.—Where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the judge of the superior court upon an appeal from a judgment of the clerk affirming the report of commissioners, and the findings of the judge are conclusive and binding if there is any evidence in the record to support them. *West v. West*, 257 N.C. 760, 127 S.E.2d 531 (1962).

Right of Clerk to Set Aside Former Order.—Where it appears of record that the clerk of the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set it aside on the defendant's motion made before him seventeen months thereafter upon allegation of fraud in its procurement, and that the plaintiff had fraudulently prevented the defendant from appearing and defending, to which the plaintiff did not except, the plaintiff's motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed. It was held that the clerk was within

the provisions of this section in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. *Turner v. Davis*, 163 N.C. 38, 79 S.E. 257 (1913).

Statute of Limitations.—Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-

year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. *Cochran v. Colson*, 192 N.C. 663, 135 S.E. 794 (1926).

§ 46-20. Report and confirmation enrolled and registered; effect; probate.—Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. It shall not be necessary for the clerk of court to probate the certified papers required to be registered by this section. (1868-9, c. 122, s. 6; Code, s. 1897; Rev., s. 2495; C. S., s. 3231; 1965, c. 804.)

Editor's Note. — The 1965 amendment added the second sentence.

Effect of Adjudication before Clerk.—In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and those in privity with them, when no appeal has been taken. *Southern State Bank v. Leverette*, 187 N.C. 743, 123 S.E. 68 (1924). Matters not in issue and claims for different rights are not, however, concluded. *Gillans v. Edmonson*, 154 N.C. 127, 69 S.E. 9 (1910).

Color of Title.—The record of the proceedings constitutes color of title. *Lindsay v. Beaman*, 128 N.C. 189, 38 S.E. 811 (1901).

Admissibility of Record in Evidence.—The record of the proceedings is admissible in evidence though not recorded as required by this section. *Lindsay v. Beaman*, 128 N.C. 189, 38 S.E. 811 (1901).

Cited in *Cochran v. Colson*, 192 N.C. 663, 135 S.E. 794 (1926).

§ 46-21. Clerk to docket owelty charges; no release of land and no lien.—In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are cancelled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1; C. S., s. 3232.)

Effect of Failure to Docket.—Failure of the clerk to docket the owelty of partition upon his judgment docket, within seven years after such date, does not affect the

right of plaintiff to enforce payment of the owelty by execution. *Cochran v. Colson*, 192 N.C. 663, 135 S.E. 794 (1926).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.—Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some

or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3233.)

Cross Reference.—As to power of court to enter judgment for money due on judicial sales, see § 1-243.

Tenants in common are entitled to actual partition, if it can be made without injury to any of the co-owners. *Taylor v. Carrow*, 156 N.C. 6, 72 S.E. 76 (1911); *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964). See *Gillespie v. Allison*, 115 N.C. 542, 20 S.E. 627 (1894); *Seawell v. Seawell*, 233 N.C. 735, 65 S.E.2d 369 (1951).

Tenants in common are entitled as a matter of right to partition or to a partition sale if actual partition cannot be made without injury to some of the tenants. *Coats v. Williams*, 261 N.C. 692, 136 S.E.2d 113 (1964), citing *Batts v. Gaylord*, 253 N.C. 181, 116 S.E.2d 424 (1960).

Tenant Entitled to Homestead.—That a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. *Holley v. White*, 172 N.C. 77, 89 S.E. 1061 (1916).

Purchase of Land by Tenant in Common.—A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure anyone to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. *Tuttle v. Tuttle*, 146 N.C. 484, 59 S.E. 1008 (1907). See *Credle v. Baughman*, 152 N.C. 18, 67 S.E. 46 (1910).

Section Is Inapplicable Where Parties Agree Partition Can Be Made.—Where all parties agree that the entire tract can be partitioned without injury to any of the parties in interest, the provisions of § 46-16 and this section are not applicable to the proceeding. *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964).

A sale will not be ordered merely for the convenience of one of the cotenants. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

In the absence of any allegation, proof or finding that an actual partition cannot be had without injury to some or all of the parties, the court has no jurisdiction to order a sale. *Seawell v. Seawell*, 233 N.C. 735, 65 S.E.2d 369 (1951).

The court has no authority to order a sale of land for partition without satisfactory proof of facts showing that an actual partition will cause injury to some or all

of the cotenants. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Issues and Questions of Fact.—In *Ledbetter v. Piner*, 120 N.C. 455, 27 S.E. 123 (1897), it was held that the controverted fact arising on the pleadings as to the advisability of a sale for partition, or an actual division, was not an issue of fact but a question of fact for the decision of the clerk subject to review by the judge on appeal. *Vanderbilt v. Roberts*, 162 N.C. 273, 78 S.E. 156 (1913).

Whether or not, in a proceeding instituted under § 46-3, for partition of the land of tenants in common, there shall be an actual partition, or a sale for partition, involves question of fact to be determined by court. In such proceedings, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact for the trial judge, and not an issue of fact for the jury, and he has the power to order a sale for partition. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

The burden is on the party seeking sale for partition to show the necessity therefor, and where sale for partition is decreed by the court without hearing evidence or finding facts to show the right to sell, the cause will be remanded. *Wolfe v. Galloway*, 211 N.C. 361, 190 S.E. 213 (1937); *Seawell v. Seawell*, 233 N.C. 735, 65 S.E.2d 369 (1951).

The burden is upon those alleging the necessity and desirability of a sale to establish the necessary requisites. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

By "injury" to a cotenant is meant substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale.—The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of each in the money equivalent that could

probably be obtained for the whole. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Determinative Circumstances.—On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

The court must find the facts required by this section in order to support a decree of sale for partition. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).

Effect of Interests of Others.—The owner of an undivided one-half interest in land cannot be denied his rights to have a partition or sale in lieu of partition, because of interests which defendants, other than his cotenants, claiming under him, have acquired in and to his undivided interest. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

Effect of Trust Created by Another Cotenant.—The right of a tenant in common to have the lands sold for a division, under this section, cannot be defeated by a trust creating an interest in the lands by another of the tenants. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

Holders of Judgment Liens Not Necessary Parties.—The holders of judgment liens on land sought to be partitioned or on undivided interests in such land are not necessary parties to a proceeding to partition the land by sale. *Washburn v. Washburn*, 234 N.C. 370, 67 S.E.2d 264 (1951).

The trustee and beneficiaries under a trust created in lands by a tenant in common are proper parties to the proceedings for a sale for division. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

Claims Must Be Determined Before Distribution Ordered.—A defendant who asserted his claims before an order of distribution was made, was entitled as a matter of right to have his claims determined before an order of distribution of the proceeds of the sale was entered. *Roberts v. Barlowe*, 260 N.C. 239, 132 S.E.2d 483 (1963).

Right of Wife of Cotenant to Resist Par-

tition.—The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof, for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, under this section or § 46-3, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale. But she cannot resist the plaintiff's right to a partition nor challenge the power of the court to order sale for partition. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

A wife having a dower interest in property held by her husband as tenant in common may not defeat sale for partition. *Citizens Bank & Trust Co. v. Watkins*, 215 N.C. 292, 1 S.E.2d 853 (1939).

Interest of Trust Beneficiaries Attaches to Proceeds.—The interest of the beneficiaries under a deed of trust upon the interest of a tenant in common in land will, upon its sale under this section, attach to the proceeds and be fully protected in the final judgment or order in the proceedings. *Barber v. Barber*, 195 N.C. 711, 143 S.E. 469 (1928).

Review of Decision.—The action of a judge of the superior court in setting aside the report of partition commissioners, advising actual partition, and ordering a sale, is not reviewable, unless an error of law was committed. *Albemarle Steam Nav. Co. v. Wovell*, 133 N.C. 93, 45 S.E. 466 (1903); *Tayloe v. Carrow*, 156 N.C. 6, 72 S.E. 76 (1911).

Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, an order for sale for partition affects a substantial right, and an appeal will lie to the Supreme Court from such order entered by the judge on appeal from the clerk. *Hyman v. Edwards*, 217 N.C. 342, 7 S.E.2d 700 (1940).

Applied in *Talley v. Murchison*, 212 N.C. 205, 193 S.E. 148 (1937); *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954).

Quoted in *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D. N.C. 1964).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.—The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate. (1887, c. 214, s. 2; Rev., s. 2508; C. S., s. 3234.)

Cross Reference.—See § 41-11.

Rule before Section Adopted.—Before the passage of this section cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Gillespie v. Allison*, 115 N.C. 542, 20 S.E. 627 (1894); *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943). But partition was permitted between the holder of the life estate and the owner in fee. *McEachern v. Gilchrist*, 75 N.C. 196 (1876).

Partition a Matter of Right.—The remainderman petitioner is entitled to partition as a matter of right, unless actual partition cannot be made without injury to some or all of the parties interested. In that case, he is entitled to sale or partition. *Richardson v. Barnes*, 238 N.C. 398, 77 S.E.2d 925 (1953).

Possession Need Not Be Actual.—A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. *Moore v. Baker*, 222 N.C. 736, 24 S.E.2d 749 (1943). See also *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).

Section Not Limited to Sale.—By the wording of this section, that is, “a sale for partition” followed by the words “purposes of partition,” it is apparent that the legislature did not intend to limit the application of the section to sales, and it is held that it is to be construed to include actual partition by the remaindermen, as well as for a sale for division by them. *Baggett v. Jackson*, 160 N.C. 26, 76 S.E. 86 (1912).

Section Enlarges Vested Rights.—A statute giving to remaindermen the right to have partition of lands in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights. *Gillespie v. Allison*, 115 N.C. 542, 20 S.E. 627 (1894).

All Parties Interested Must Unite.—A

sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the persons who may be by any possibility interested unite in asking such a decree. *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918), quoting *Aydlott v. Pendleton*, 111 N.C. 28, 16 S.E. 8 (1892).

If contingent interests are to be affected by the partition they must be represented. *Overman v. Tate*, 114 N.C. 571, 19 S.E. 706 (1894).

Life Estate with Power of Sale.—When lands are devised to the wife for life, giving her control thereof with power to sell, pay debts, etc., this section does not apply, for if applied it would defeat the very purpose as to powers given the wife. *Makely v. Makely*, 175 N.C. 121, 95 S.E. 51 (1918).

The existence of a life estate, even though it be in favor of one of the tenants in common, does not preclude partition of the remainder among the tenants in common. *Smith v. Smith*, 248 N.C. 194, 102 S.E.2d 868 (1958).

Vested Remainderman Entitled to Partition.—Since the enactment of this section, the owner of a fee or vested remainder in real estate as a joint tenant, or tenant in common, is entitled to a partition of the land or sale for partition of the remainder or reversion thereof. But such partition or sale of a vested remainder in real estate shall not interfere with the possession of the life tenant during the existence of his estate. *Bunting v. Cobb*, 234 N.C. 132, 66 S.E.2d 661 (1951).

Holder of Contingent Interest.—Proceedings for partition of lands cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. *Vinson v. Wise*, 159 N.C. 653, 75 S.E. 732 (1912).

Applied in *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941); *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958); *Miller v. McLean*, 252 N.C. 171, 113 S.E.2d 359 (1960); *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964).

§ 46-24. Life tenant as party; valuation of life estate.—In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely. (1887, c. 214, s. 3; Rev., s. 2509; C. S., s. 3235.)

Cross Reference.—As to evaluation of life tenant's interest, see §§ 8-46 and 8-47 and notes thereto.

Life Tenants May Waive Rights.—Un-

der a will providing that “home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided

between the next of kin," single members of the family were entitled to partition of the home place among remaindermen as directed by will, where they showed the court that they no longer desired to retain it as a home, since life tenants could waive the right if they desired to enjoy their share in severalty. *Sides v. Sides*, 178 N.C. 554, 101 S.E. 100 (1919).

While the life tenant during the existence of her estate may waive her rights and consent to the sale of her estate, under this section, this may not be done, against her will, in a partition proceeding. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942).

Life Tenant May Not Maintain Proceedings against Remaindermen.—Life tenants are not tenants in common with remaindermen, and may not maintain partition proceedings against the tenants in common in the remainder. *Richardson v. Barnes*, 238 N.C. 398, 77 S.E.2d 925 (1953).

Estate Durante Viduitate.—This section does not apply to an estate durante viduitate, as there is no practicable rule by which the present value of such an estate can be determined; hence, where land to which an estate durante viduitate attached was sold for partition and the proceeds are in custody of the court below, they cannot be divided among the widow and the re-

maindermen, against the will of the remaindermen, but will remain real estate until partition can be made at the termination of the estate durante viduitate. *Gillespie v. Allison*, 117 N.C. 512, 23 S.E. 438 (1895).

Same—Payment of Interest until Termination of Estate.—Where the tenant of an estate durante viduitate joins with some of the remaindermen for a sale for partition of the lands, this section will be satisfied with the payment to her of the interest upon the proceeds of the lands sold, until the termination of the particular estate by her marriage or death. *Gillespie v. Allison*, 115 N.C. 542, 20 S.E. 627 (1894).

Application of Life Tenant for Sale.—While under this and the preceding section there is authority for a sale for partition, at the instance of the remaindermen, of the reversion, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen. *Ray v. Poole*, 187 N.C. 749, 123 S.E. 5 (1924).

Applied in *Davis v. Griffin*, 249 N.C. 26, 105 S.E.2d 119 (1958); *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

Cited in *Pendleton v. Williams*, 175 N.C. 248, 95 S.E. 500 (1918).

§ 46-25. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (1895, c. 187; Rev., s. 2510; C. S., s. 3236; 1949, c. 34.)

Cross Reference.—As to mortuary tables and present worth of annuities, see §§ 8-46, 8-47.

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 475.

Section Is Permissive.—The statute authorizing partition sale of standing timber is permissive rather than mandatory. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E. 2d 528, 3 A.L.R.2d 571 (1948).

Provision in Judgment Requiring Actual Partition of Timber.—A tenant in common,

without the knowledge or authorization of his cotenants, contracted to sell the timber on the entire tract. Thereafter he joined his cotenants in a timber deed to another person. In an action brought by the grantee in the deed against the vendee in the contract to sell, a provision of the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, was upheld. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

§ 46-26. Sale of mineral interests on partition.—In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (1905, c. 90, s. 2; Rev., s. 2507; C. S., s. 3237.)

The mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. *Carolina Mineral Co. v. Young*, 220 N.C. 287, 17 S.E.2d 119 (1941).

§ 46-27. Sale of land required for public use on cotenant's petition.—When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. (1868-9, c. 122, s. 16; Code, s. 1907; Rev., s. 2518; C. S., s. 3238; 1949, c. 719, s. 2.)

§ 46-28. Sale procedure.—The procedure for a partition sale shall be the same as is provided in article 29A of chapter 1 of the General Statutes. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3239; 1949, c. 719, s. 2.)

§ 46-29: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—This section was repealed in conformity to § 46-28, which makes the procedure for a petition sale the same as is provided in article 29A of chapter 1 of the General Statutes.

§ 46-30. Deed to purchaser; effect of deed.—The deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, and all other parties to the proceeding had therein. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C. S., s. 3241; 1949, c. 719, s. 2.)

Liens against Interest of Tenant in Common.—The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist thereon, and cannot have the proceeds of sale applied to discharge such liens. *Jordan v. Faulkner*, 168 N.C. 466, 84 S.E. 764 (1915).

When Judgment Creditor Not Made

Party.—Where judgment creditors of a tenant in common are not made parties to a partition proceeding, the purchaser buys subject to their liens. *Holley v. White*, 172 N.C. 77, 89 S.E. 1061 (1916). See *Washburn v. Washburn*, 234 N.C. 370, 67 S.E.2d 264 (1951).

§ 46-31. Clerk not to appoint self, assistant or deputy to sell real property.—No clerk of the superior court shall appoint himself or his assistant or deputy to make sale of any property in any proceeding before him. (1868-9, c. 122, s. 15; Code, s. 1906; 1899, c. 161; Rev., s. 2513; C. S., 3242; 1949, c. 719, s. 2.)

Editor's Note.—The purpose of this section is to abolish the practice of clerks appointing themselves to make partition sales. This practice was condemned in

Evans v. Cullens, 122 N.C. 55, 28 S.E. 961 (1898), and thereupon the next legislature prohibited the practice.

§ 46-32: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—This section was repealed in conformity to § 46-28, which makes the procedure for a partition sale the same as is provided in article 29A of chapter 1 of the General Statutes.

§ 46-33. Shares in proceeds to cotenants secured.—Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (1868-9, c. 122, s. 31; Code, s. 1921; Rev., s. 2513; C. S., s. 3244.)

Judgment Creditors Not Entitled to Apply for Share of Proceeds.—Since they are in nowise affected by the partition sale, judgment creditors, who are not parties to the partition proceeding, have no right to apply to the court after final decree to have their debtor's share of the proceeds paid to them. Moreover, they cannot be permitted to intervene for such purpose after the officer or person making the partition sale has put an end to the proceeding by disposing of the proceeds of sale in conformity with the final decree. *Washburn v. Washburn*, 234 N.C. 370, 67 S.E.2d 264 (1951).

§ 46-34. Shares to persons unknown or not sui juris secured.—When a sale is made under this chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the State, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (1868-9, c. 122, s. 17; Code, s. 1908; 1887, c. 284, s. 3; Rev., s. 2516; C. S., s. 3245.)

Effect on Title.—This section does not interfere with the power to free the title and make a valid conveyance of the same. *Bynum v. Bynum*, 179 N.C. 14, 101 S.E. 527 (1919).

Same—Failure to Invest.—A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law, acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands. *Lawrence v. Hardy*, 151 N.C. 123, 65 S.E. 766 (1909).

Consent of Court Necessary to Agreement.—Parties cannot stipulate as to the distribution of the proceeds of a judicial sale without the full knowledge and consent of the court, especially where there

are infants in the case whose rights may be seriously prejudiced by such an agreement. *Lyman v. Southern Coal Co.*, 183 N.C. 581, 112 S.E. 242 (1922).

Infant's Share of Proceeds Remains Realty.—The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. *Bateman v. Latham*, 56 N.C. 35 (1856).

Payment to Guardian.—A payment made by purchaser of lands, under a decree for the sale and partition of lands which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common is proper and in pursuance of the statute. *Howerton v. Sexton*, 104 N.C. 75, 10 S.E. 148 (1889).

Cited in *McCormick v. Patterson*, 194 N.C. 216, 139 S.E. 225 (1927).

ARTICLE 3.

Partition of Lands in Two States.

§§ 46-35 to 46-41: Repealed by Session Laws 1943, c. 543.

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think

the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equally as possible among the tenants in common, or joint tenants. (1868-9, c. 122, s. 27; Code, s. 1917; Rev., s. 2504; C. S., s. 3253.)

Exclusiveness of Remedy.—A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. *Powell v. Hill*, 64 N.C. 169 (1870); *Grim v. Wicker*, 80 N.C. 343 (1879).

One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property because the defendant forcibly took it from the plaintiff's possession; the plaintiff's only remedy is to have the property partitioned. *Thompson v. Silverthorne*, 142 N.C. 12, 54 S.E. 782 (1906).

Injunction or Receiver.—Where, pending a suit for partition of personal property, the defendant threatened the destruction or removal of the property, the court, on the plaintiff's application, might grant an injunction or appoint a receiver. *Thompson v. Silverthorne*, 142 N.C. 12, 54 S.E. 782 (1906).

§ 46-43. Report of commissioners.—The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (1868-9, c. 122, s. 28; Code, s. 1918; Rev., s. 2505; C. S., s. 3254.)

Cited in *Clement v. Ireland*, 129 N.C. 220, 39 S.E. 838 (1901).

§ 46-43.1. Confirmation; impeachment.—If no exception to the report of the commissioners making partition is filed within ten days the report shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceeding for mistake, fraud or collusion, by petition in the cause, but innocent purchasers for full value and without notice shall not be affected thereby. (1953, c. 24.)

Editor's Note.—For brief comment on this section, see 31 N.C.L. Rev. 428 (1953).

§ 46-44. Sale of personal property on partition.—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made as provided in article 29A of chapter 1 of the General Statutes. (1868-9, c. 122, s. 29; Code, s. 1919; Rev., s. 2519; C. S., s. 3255; 1949, c. 719, s. 2.)

Cited in *Chadwick v. Blades*, 210 N.C. 609, 188 S.E. 198 (1936); *Bullman v. Edney*, 232 N.C. 465, 61 S.E.2d 338 (1950).

§§ 46-45, 46-46: Repealed by Session Laws 1949, c. 719, s. 2.

Title to Personalty.—In petitions for the partition of personal property owned in common, where the defendant sets up title in severalty in himself, the title to the property may be tried on the petition. *Edwards v. Bennett*, 32 N.C. 361 (1849).

Venue.—A proceeding for the partition of personal property is the sole remedy of a tenant in common to obtain possession as against a cotenant, and therefore it is governed by the provisions of § 1-76 (4), making the venue the county in which the property sought to be partitioned is located, and not the county of the residence of the petitioner or respondent. *Dubose v. Harpe*, 239 N.C. 672, 80 S.E.2d 454 (1954).

Notes.—The owners of notes, as tenants in common, are entitled to partition. *Central Bank & Trust Co. v. Board of Comm'rs*, 195 N.C. 678, 143 S.E. 252 (1928).

Quoted in *Chadwick v. Blades*, 210 N.C. 609, 188 S.E. 198 (1936).

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ARTICLE 1.

Probate.

§ 47-1. **Officials of State authorized to take probate.**—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, instruments modifying or extending the terms of mortgages or deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases, affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: The several Justices of the Supreme Court, the several judges of the superior court, commissioners of affidavits appointed by the Governor of this State, the Clerk of the Supreme Court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C. S., s. 3293; 1951, c. 772.)

Effect of Disqualification.—If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and encumbrancers. *Quinnerly v. Quinnerly*, 114 N.C. 145, 19 S.E. 99 (1894). But when the incapacity of the acknowledging or probating officer is latent, i.e., does not appear upon the record, one who takes under the grantee in such instrument gets a good title, unless the party claiming the benefit of the defect acknowledged or probate is cognizant of the fact. *Richmond Co. v. Walston*, 187 N.C. 67, 122 S.E. 663 (1924); *County Sav. Bank v. Tolbert*, 192 N.C. 126, 133 S.E. 558 (1926).

Woman Notary Qualified.—A woman is qualified to act as a notary public in North Carolina. *Preston v. Roberts*, 183 N.C. 62, 110 S.E. 586 (1922).

Interest and Relationship.—As to disqualification on the ground of interest and relationship, see § 47-7.

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or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963).

A timber deed in regular form, having a valid assignment of the timber rights by the grantee in the deed endorsed on its back, was duly registered, and the endorsement was transcribed on the records with the deed. Held: Even though the endorsement was sufficient as a conveyance of the timber rights, the endorsement was not acknowledged, and therefore there was no registration of the endorsement so as to defeat the rights of the creditors of the grantee in the deed. *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963).

A contract to sell and convey timber, in order to be enforceable against creditors and purchasers for value, must be probated and registered as provided by this chapter. *Winston v. Williams & Mc-*

Keithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947).
Applied in *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954); *Baker v. Murphrey*, 254 N.C. 506, 119 S.E.2d 398 (1961).
Cited in *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929); *Beck v. Vonnannon*, 237 N.C. 707, 75 S.E.2d 895 (1953); *Phillips v. Gilbert*, 248 N.C. 183, 102 S.E.2d 771 (1953); *Baker v. Murphrey*, 250 N.C. 346, 108 S.E.2d 644 (1959).

§ 47-2. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the day of, 19.... before me the undersigned officer, personally appeared, known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instruments and acknowledged that he executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....
Signature of Officer
.....
Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (1899, c. 235, s. 5; 1905, c. 451; Rev., s. 990; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; C. S., s. 3294; 1943, c. 159, s. 1; c. 471, s. 1; 1945, c. 6, s. 1; 1955, c. 658, s. 1; 1957, c. 1084, s. 1.)

Cross References.—As to commissioner of affidavits and deeds appointed by the Governor, see § 3-1 et seq. As to powers of clerks of courts of record of other states, see § 3-7. As to power of notaries public in and out of State, see § 10-4. As to form of certificate required upon acknowledgment by nonresident official, see §§ 47-44 and 47-45.

Editor's Note.—For comment on the 1943 amendments, see 21 N.C.L. Rev. 323.

Compliance Essential.—This section, prescribing how deeds may be proved and acknowledgments taken in other states as well as in foreign countries, must be followed, or they and the registration thereon will be declared void. New Han-

over Shingle Mills v. Roper Lumber Co., 171 N.C. 410, 88 S.E. 633 (1916).

Commissioner of Deeds.—Prior to the 1913 amendment a probate before a commissioner of deeds of another state was held ineffectual in this State. Wood v. Lewey, 153 N.C. 401, 69 S.E. 268 (1910); New Hanover Shingle Mills v. Roper Lumber Co., 171 N.C. 410, 88 S.E. 633 (1916).

Proof before Notary Public in Another State.—A deed regularly proved before a notary public in South Carolina by authority of this section, is effectual to pass title as against creditors. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Proof in This State by Notary of Another State.—The probate of an instrument taken in this State by a notary public of another state is defective. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Same—Rights of Purchaser Where Record Is Clear.—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record, in the office of the register of deeds in the county wherein the land is situate here, to have been regularly taken in such other state, and there is no

evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Woman Notary Public.—Where it appears from the probate of a deed that it was probated before a woman notary public in another state, it will be assumed that the notary was rightfully appointed and her act will be recognized as valid here. Nicholson v. Eureka Lumber Co., 160 N.C. 33, 75 S.E. 730 (1912).

Validation of Writing Acknowledged before Warrant Officer, etc.—Session Laws 1955, c. 658, s. 2, validated any instrument or writing, required by law to be proved or acknowledged, which prior to April 21, 1955, was proved or acknowledged before an officer of the United States army, United States air force or United States marine corps having the rank of warrant officer or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of warrant officer or higher.

Session Laws 1957, c. 1084, s. 2, validated any instrument or writing required by law to be proved or acknowledged, which prior to June 5, 1957, was proved or acknowledged before an officer of the air force of the United States.

§ 47-2.1. Validation of instruments proved before officers of certain ranks.—Any instrument or writing, required by law to be proved or acknowledged before an officer, which prior to the ratification of this section was proved or acknowledged before an officer of the United States army or United States marine corps having the rank of second lieutenant or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of ensign or higher, is hereby validated and declared sufficient for all purposes. (1945, c. 6, s. 2.)

§ 47-3. Commissioner appointed by clerk for nonresident maker.—When it appears to the clerk of the superior court of any county that any person nonresident of this State desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and take such proof as to a married woman. The commissioner shall make certificate of acknowledgment or proof and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved and shall order the same to be registered. (1869-70, c. 185; Code, s. 1258; Rev., s. 991; C. S., s. 3295; 1945, c. 73, s. 9.)

Cross Reference.—As to acknowledgments before officials of the United States, foreign countries, and sister states, see §§ 3-5, 10-4, 47-2, 47-6, 47-44, 47-45.

§ 47-4. By justice of peace of other than registering county.—If the proof or acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registra-

tion, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (1899, c. 235, s. 4; Rev., s. 992; C. S., s. 3296.)

Cross Reference.—As to form of clerk's certificate, see § 47-44.

Omission to Register Seal Not Fatal.—The execution of a deed was proved before a justice of the peace in Franklin County, and the clerk of the superior court of that county certified the official character of the justice of the peace under his official

seal; the deed was thereupon registered in Granville County upon the fiat of the clerk of the superior court of the county, but the official seal of the clerk of Franklin superior court was not registered. It was held that the registration was valid. *Perry v. Bragg*, 111 N.C. 159, 16 S.E. 10 (1892).

§ 47-5. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297.)

Cross References.—See § 10-9. As to validation of certain acknowledgments of deeds, etc., before a notary public where seal omitted, see §§ 47-52, 47-102. As to validation of certain acknowledgments before officers with seal where seal does not appear of record, see § 47-53.

Name of Notary on Notarial Seal.—The statute does not require that his name or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary. *Deans v. Pate*, 114 N.C. 194, 19 S.E. 146 (1894).

§ 47-6. Officials may act although land or maker's residence elsewhere.—The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this State in which the subject matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (1899, c. 235, s. 13; Rev., s. 994; C. S., s. 3298.)

§ 47-7. Probate where clerk is a party.—All instruments required or permitted by law to be registered to which clerks of the superior court are parties,

Effect of Omission of Justices' Seal.—The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, otherwise regular. *Lineberger v. Tidwell*, 104 N.C. 506, 10 S.E. 758 (1889).

No Seal When Not Required by Statute.—The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution. *Westfelt v. Adams*, 131 N.C. 379, 42 S.E. 823 (1902).

Presumption as to Seal.—When a copy of the certificate of the commissioner of affidavits concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. *Johnson v. Eversole Lumber Co.*, 147 N.C. 249, 60 S.E. 1129 (1908).

or in which such clerks are interested, may be proved or acknowledged and the acknowledgment of any married woman may be taken before any justice of the peace or notary public of the county of said clerk which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs and acknowledgments may also be taken before any judge of the superior court or justice of the Supreme Court, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some justice of the peace or notary public. All probates, adjudications and orders of registration made prior to January first, one thousand nine hundred and thirty, by any such clerk of conveyances or other papers in which said clerk is an interested party, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (1891, c. 102; 1893, c. 3; Rev., s. 995; 1913, c. 148, s. 1; C. S., s. 3299; 1921, c. 92; c. 106, s. 2; 1939, c. 210, s. 1; 1945, c. 73, s. 10.)

Cross References.—As to disqualification of clerk to act, see § 2-17. See also § 47-7.

Officer Party Trustee or Cestui Que Trust.—An acknowledgment before an officer who was a party, trustee or cestui que trust in the deed is invalid. *Long v. Crews*, 113 N.C. 256, 18 S.E. 499 (1893);

McAllister v. Purcell, 124 N.C. 262, 32 S.E. 715 (1899).

Relation to Parties Not Disqualification.—Probate taken before an officer is not invalid simply because he is related to the parties. *McAllister v. Purcell*, 124 N.C. 262, 32 S.E. 715 (1899).

§ 47-8. **Attorney in action not to probate papers therein.**—No practicing attorney at law has power to administer any oaths to a person to any paper-writing to be used in any legal proceedings in which he appears as attorney. (Rev., s. 2350; Ex. Sess. 1908, c. 105, s. 2; C. S., s. 3300.)

§ 47-9. **Probates before stockholders in building and loan associations.**—No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939, by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; C. S., s. 3301; 1939, c. 136.)

§ 47-10. **Probate before stockholders or directors in banking corporations.**—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, was a stockholder or director in such banking corporation. (1929, c. 302, s. 1.)

Acknowledgment before Bank Official. executed on the equity in lands in order
—Under this section where a mortgage is to secure endorsers on a note against loss

and the note is discounted at a bank, the contract to secure the endorers against loss is a collateral agreement between the makers and endorers to which the bank is not a party, and the acknowledg-

ment to the mortgage taken by an official of the bank is valid. *Watkins v. Simonds*, 202 N.C. 746, 164 S.E. 363 (1932).

§ 47-11. Subpoenas to maker and subscribing witnesses.—The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpoena for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpoena shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpoena he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Code, s. 1268; 1897, c. 28; 1899, c. 235, s. 16; Rev., s. 996; C. S., s. 3302.)

Cross Reference.—As to power of clerk to punish for contempt, see § 5-6.

§ 47-12. Proof of attested instrument by subscribing witness.—Except as provided by G.S. 47-12.2, the execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that the maker either signed the instrument in his presence or acknowledged to him the execution thereof. Nothing in this section in anywise affects any of the requirements set out in G.S. 52-12. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1953, c. 1078, s. 1.)

Editor's Note.—For brief comment on the 1951 act, see 29 N.C.L. Rev. 411. As to earlier amendatory acts, see 15 N.C.L. Rev. 337 and 25 N.C.L. Rev. 406.

Registration of improperly acknowledged or defectively probated deed imports no

constructive notice and the deed will be treated as if unregistered. *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963).

Applied in *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954).

§ 47-12.1. Proof of attested instrument by proof of handwriting.—(a) If all subscribing witnesses have died or have left the State or have become of unsound mind or otherwise incompetent or unavailable, the execution of such instrument, except as provided by G.S. 47-12.2, may be proved for registration, before any official authorized by law to take proof of such an instrument, by a statement under oath that the affiant knows the handwriting of the maker and that the purported signature of the maker is in the handwriting of the maker, or by a statement under oath that the affiant knows the handwriting of a particular subscribing witness and that the purported signature of such subscribing witness is in the handwriting of such subscribing witness.

(b) Nothing in this section in anywise affects any of the requirements set out in G.S. 52-12. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1.)

§ 47-12.2. Subscribing witness incompetent when grantee or beneficiary.—The execution of an instrument may not be proved for registration by a subscribing witness who is the grantee or beneficiary therein nor by proof of his

signature as such subscribing witness. Nothing in this section invalidates the registration of any instrument registered prior to April 9, 1935. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1.)

§ 47-13. Proof of unattested writing.—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married women. (1899, c. 235, s. 11; Rev., s. 998; C. S., s. 3304; 1945, c. 73, s. 12.)

Cross References.—As to proof by attesting witnesses of instruments not required to be attested, see § 8-38. As to proof of handwriting by comparison as evidence, see § 8-40.

Admission to Probate by Proof of Handwriting of the Maker.—A deed having no subscribing witness, may be admitted to probate and registration upon proof of the handwriting of the maker; or, if the subscribing witness be dead, upon proof of his handwriting. *Black v. Justice*, 86 N. C. 504 (1882), overruling *Rollins v. Henry*, 78 N. C. 342 (1878).

Proof of Writing of Nonresident by Resident Party.—Where the parties to an instrument requiring registration are non-residents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. *LeRoy v. Jacobosky*, 136 N. C. 443, 48 S. E. 796 (1904).

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. *New Home Bldg. Supply Co. v. Nations*, 259 N. C. 681, 131 S. E. 2d 425 (1963).

§ 47-13.1. Certificate of officer taking proof of instrument.—The person taking proof of an instrument pursuant to G.S. 47-12, 47-12.1 or 47-13 shall execute a certificate on or attached to the instrument being proved, certifying to the fact of proof substantially as provided in the certificate forms set out in G.S. 47-43.2, 47-43.3 and 47-43.4, and such certificate shall be prima facie evidence of the facts therein certified. (1951, c. 379, s. 2; 1953, c. 1078, s. 2.)

§ 47-14. Clerk to pass on certificate and order registration.—When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C. S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2.)

Cross Reference.—As to form of adjudication and order of registration, see § 47-37.

Elements of Adjudication.—If the certificate is not found in due form, the instrument is rejected. If the certificate is adjudged in due form, then the clerk admits to probate, i.e., probates it, passes upon the certificate as furnishing proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof as certified. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177 (1890).

Adjudication Mandatory.—The requirement of this section that the clerk or deputy clerk shall pass upon the sufficiency of the probate of a deed is mandatory and not directory. *Woodlief v. Woodlief*, 192 N. C. 634, 135 S. E. 612 (1926). And the omission of such official to adjudicate upon the probate to a deed for lands situated here will invalidate the conveyance as against the rights of purchasers and creditors. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922).

In *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 810 (1922), two lines of decisions, one holding that this section

is directory, the other holding that it is mandatory, are reviewed and distinguished. The first series, to which belong *Holmes v. Marshall*, 72 N.C. 37 (1875); *Young v. Jackson*, 92 N.C. 144 (1885); *Darden v. Neuse & Trent River Steamboat Co.*, 107 N.C. 437, 12 S.E. 46 (1890); and *Heath v. Lane*, 176 N.C. 119, 96 S.E. 889 (1918), hold that inasmuch as every clerk of the superior court in North Carolina has equal jurisdiction with every other clerk in respect to probate matters, where the clerk of the court of any county in the State takes the acknowledgment of a deed and orders it to registration, it is not absolutely necessary that the certificate of this clerk be passed upon by the clerk of the court of the county in which the land is situated. In the other series of cases, which includes *Simmons v. Gholson*, 50 N.C. 401 (1858); *Evans v. Etheridge*, 99 N.C. 43, 5 S.E. 386 (1888); *White v. Connelly*, 105 N.C. 65, 11 S.E. 177 (1890); and *Cozad v. McAden*, 148 N.C. 10, 61 S.E. 633 (1908), the section is held to be mandatory, but in these cases the probate was taken before some officer other than the clerk of court, judges of the superior court, or justices of the Supreme Court. In *Darden v. Neuse & Trent River Steamboat Co.*, 107 N.C. 437, 12 S.E. 46 (1890), the court apparently limits the doctrine that the statute is directory to cases in which deeds have been acknowledged before other clerks, judges, or justices of the Supreme Court.

Same — Qualification of the Rule. — While it is held that such act of adjudication and order of registration are directory upon the clerk of the superior court of the county wherein the land is situated, it is so only where the fiat or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. *Champion Fibre Co. v. Cozad*, 183 N.C. 600, 112 S.E. 810 (1922).

Same—Where Probate Taken by Foreign Commissioner of Deeds.—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another state, registered without the fiat or order for registration by a clerk of the superior court within the State, and clothed with authority to do so by statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those

claiming under him. *Champion Fibre Co. v. Cozad*, 183 N.C. 600, 112 S.E. 810 (1922).

Use of Words "In Due Form" Not Essential to Adjudication.—The adjudication by the clerk of the superior court that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and "will be upheld without regard to mere form." *Devereux v. McMahon*, 102 N.C. 284, 9 S.E. 635 (1889).

Where the acknowledgment was before an officer authorized to take it and the probate was in fact in due form, the omission of the clerk to adjudge in just so many words that the probate was "in due form" when in substance he did so adjudge, was not sufficient ground to exclude the deed. *Deans v. Pate*, 114 N.C. 194, 19 S.E. 146 (1894).

Adjudication Exercise of Judicial Function.—When the clerk of the superior court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution before him, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function. *White v. Connelly*, 105 N.C. 65, 11 S.E. 177 (1890).

Substantial Compliance Sufficient.—A substantial compliance with this section and § 47-37 is all that is necessary to be observed by the clerk of the superior court of the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state; and when objection to the validity of registration is made on that ground, and it appears of record on appeal that the certificate made in such other state is in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N.C. 635, 66 S.E. 663 (1910).

Registration No Evidence of Adjudication without Signed Certificate of Clerk.—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence that the clerk or his deputy has complied with the provisions of this section. The

curative statutes, §§ 47-49, 47-86, 47-87, 47-88, and 47-89, have no application. *Woodlief v. Woodlief*, 192 N.C. 634, 135 S.E. 612 (1926).

No Adjudication When Instrument Proved before Clerk.—It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate, and order the instrument to be registered. *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164 (1911).

Certificate of Probate or Acknowledgment Is Necessary Even if Probate Made before Clerk.—The statutes of North Carolina require, as the method of authentication and warrant to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or indorsed upon the deed, even though probate is had before the clerk of the superior court, and where no sufficient certificate was attached to or indorsed upon an instrument, it could not be shown by parol that proper proof was made before the clerk. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

Adjudication of Instrument Probated in Another State.—When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with this and § 47-37, for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N.C. 635, 66 S.E. 663 (1910).

§ 47-14.1. Repeal of laws requiring private examination of married women.—All deeds, contracts, conveyances, leaseholds or other instruments executed from and after February 7, 1945, shall be valid for all purposes without the separate, privy, or private examination of a married woman where she is a party to or a grantor in such deed, contract, conveyance, leasehold or other instrument, and it shall not be necessary nor required that the separate or privy examination of such married woman be taken by the certifying officer. From and after February 7, 1945, all laws and clauses of laws contained in any section

Certificate of Clerk for Registration of Grant by State Not Required.—The certificate of the clerk of the court, required as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a grant; the great seal of the State being sufficient authority for such registration. *Ray v. Stewart*, 105 N.C. 472, 11 S.E. 182 (1890).

Presumption of Regularity from Clerk's Certificate.—Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing, that it was in due form. *Darden v. Neuse & Trent River Steamboat Co.*, 107 N.C. 437, 12 S.E. 46 (1890).

Defective Corporate Deed Invalid Notwithstanding Adjudication.—A corporate deed of trust was executed by the trustee, as well as the corporation, and bore a notary's certificate of proof of the trustee's execution, and a certificate of the clerk that the instrument had been duly proved, "as appears from the foregoing seals and certificate, which are adjudged to be in due form and according to law," but no certificate as to the proof of execution by the corporation was attached. It was held, under this section that the clerk's certificate was invalid, and did not entitle the deed to registration. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

Ancient Document Rule.—Plaintiffs claimed the locus in quo under seven years adverse possession under color and under twenty years adverse possession. Defendants objected to certain deeds in plaintiffs' chain of color of title on the ground that they were improperly registered and did not comply with this and § 47-17. It was held the deeds, having been on record for some thirty years, were competent under the ancient document rule to be submitted to the jury on the claim of adverse possession for twenty years, and error, if any, in admitting the deeds as color of title was not prejudicial under the facts. *Owens v. Blackwood Lumber Co.*, 212 N.C. 133, 193 S.E. 219 (1937).

of the General Statutes requiring the privy or private examination of a married woman are hereby repealed. (1945, c. 73, s. 21; 1951, c. 893, s. 1.)

Section Does Not Repeal § 52-12.—This section, which formerly appeared as § 47-116, does not repeal § 52-12. *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955).

§ 47-15. Probate of husband's deed where wife insane.—When a deed executed by a married man whose wife is insane or a lunatic, and whose homestead has been allotted, together with the certificate of the clerk of the superior court or with the certificate of the superintendent of the insane institution of the state where the wife is confined in conformity to § 39-14 under the chapter Conveyances, is offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed is acknowledged or proved, the clerk shall adjudge whether the certificate of the superintendent or the clerk is in due form, and if adjudged to be in due form he shall order the registration of the deed and certificate. (1905, c. 138, s. 2; Rev., s. 1000; 1919, c. 20; C. S., s. 3306.)

§ 47-16. Probate of corporate deeds, where corporation has ceased to exist.—It is competent for the clerk of the superior court in any county in this State, on proof before him upon the oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this State, to adjudge and order that such contract or instrument be registered as by law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this State. (1911, c. 44, s. 1; C. S., s. 3307.)

Cross Reference.—As to forms of probate for deeds and other conveyances by corporations, see § 47-41.

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.—All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony. (29, Ch. II, c. 3; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; R. C., c. 37, s. 1; Code, s. 1245; 1885, c. 147, s. 3; 1905, c. 277; Rev., s. 979; C. S., s. 3308.)

Section Applies to All Deeds.—The construction first put upon this statute was, that it only applied to such deeds as operated at common law by livery of seizin. *Hogan v. Strayhorn*, 65 N.C. 279 (1871). But the North Carolina courts have since extended the construction so as to bring all deeds of conveyance within the purview of the statute. *Ivy v. Granberry*, 66 N.C. 224 (1872); *Love v. Harbin*,

87 N.C. 249 (1882); *Jones v. Jones*, 164 N.C. 320, 80 S.E. 430 (1913). See *Bryan v. Eason*, 147 N.C. 284, 61 S.E. 71 (1908); 1 N.C.L. Rev. 155.

Registration has the effect of livery of seizin. *Hinton v. Moore*, 139 N.C. 44, 51 S.E. 787 (1905); *Jones v. Jones*, 164 N.C. 320, 80 S.E. 430 (1913).

Formal Deed Regarded as Feoffment in Enforcing Parol Trust.—In properly con-

stituted cases indicating the propriety of equitable relief in declaring and enforcing a parol trust, the formal deed by which the legal title is held is regarded as a feoffment not inconsistent with the trust sought to be established. *Thompson v. Davis*, 223 N.C. 792, 28 S.E.2d 556 (1944).

Where it appears from the face of a corporate deed that the corporate seal has not been affixed, an order admitting it to probate as a conveyance is unauthorized and registration thereon is invalid; for it is well settled that registration had upon an unauthorized probate is invalid and ineffectual to pass title against creditors and purchasers. However, the order of probate is sufficient to authorize its registration as a contract to convey under § 47-18. *Haas v. Rendleman*, 62 F.2d 701 (4th Cir. 1933).

Enforcing Defectively Framed Conditional Contract.—Called upon to choose between enforcing a defectively framed yet recognizable conditional contract, or treating it as a nullity for security purposes, the former is the choice indicated, there being no specific statutory requirement to use a precise formula of words. *Mickel-Hopkins*,

Inc. v. Frassinetti, 278 F.2d 301 (4th Cir. 1960).

Subsequently Acquired Title—Estoppel.—See article in 1 N.C.L. Rev. 153, as to relation of this section to the doctrine of estoppel and rebutter where the grantor at the time of conveyance has no interest in the property conveyed but subsequently acquires title thereto.

Registration between Parties Not Necessary to Validity of Conveyance.—See note to § 47-18.

Evidence Supporting Judgment for Recovery of Land.—Evidence showing good record title in plaintiff, without any record evidence of title in defendant, held to support judgment for plaintiff for recovery of land. *Knowles v. Wallace*, 210 N.C. 603, 188 S.E. 195 (1936).

Applied in *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954).

Cited in *General Motors Acceptance Corp. v. United States*, 23 F.2d 799 (4th Cir. 1928); *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929); *Owens v. Blackwood Lumber Co.*, 212 N.C. 133, 193 S.E. 219 (1937); *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 12 (1938).

§ 47-17.1. Documents accepted for probate or recordation in certain counties to designate draftsman; exceptions.—The clerks of the superior courts of the counties named below shall not accept for probate or recordation any papers or documents, with the exception of holographic wills, executed after July 1, 1953, unless there shall appear on the cover page of said papers or documents following the words "drawn by" the signature of the person who drafted said papers or documents, or unless in some other manner the cover page shall clearly designate the draftsman of such document: Provided that papers or documents prepared in other counties of North Carolina or in other states or countries for probate or recordation in any of said counties, or papers or documents prepared by any party to such papers or documents may be accepted for probate or recordation without such designation on the cover page of such papers or documents. This section shall apply to the following counties only: Alamance, Alexander, Buncombe, Catawba, Chatham, Cherokee, Cumberland, Davidson, Duplin, Durham, Gaston, Gates, Graham, Johnston, Lincoln, Madison, McDowell, Mecklenburg, Montgomery, New Hanover, Orange, Perquimans, Randolph, Rowan, Surry, Swain, Transylvania, Union, Wake, Watauga and Wilkes. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312, 548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830.)

Local Modification.—Alamance: 1957, c. 1290; Onslow: 1959, c. 783.

Editor's Note.—The first 1965 amendment made this section applicable to Chatham County, the second 1965 amendment to Swain County, and the third 1965

amendment to Montgomery and Union counties.

For similar act applicable to Caldwell, Camden, Chowan, Currituck, Pasquotank, Rutherford and Vance counties, see Session Laws 1955, c. 273, amended by c. 575.

§ 47-18. Conveyances, contracts to convey and leases of land. — (a) No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or

if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) This section shall not apply to contracts, leases or deeds executed prior to March 1, 1885, until January 1, 1886; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Code, s. 1245; 1885, c. 147, s. 1; Rev., s. 980; C. S., s. 3309; 1959, c. 90.)

- I. In General.
- II. Registration as between Parties.
- III. What Instruments Affected.
- IV. Rights of Persons Protected.
- V. Notice.
- VI. Effect of Defective Registration.
- VII. Unregistered Deed as Color of Title.

Cross Reference.

As to the statute of frauds with reference to contracts for sale of land, leases, etc., see § 22-2.

I. IN GENERAL.

Editor's Note.—As to priority by recordation, see 27 N.C.L. Rev. 376. As to effect of recordation on title by estoppel, see 27 N.C.L. Rev. 376. For note on rights of lessees under oral leases, see 31 N.C.L. Rev. 498 (1953).

The object of registration in the county where the land lies is to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. *Warren v. Williford*, 148 N.C. 474, 62 S.E. 697 (1908); *Weston v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912); *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942); *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954).

This section is intended to remedy the evil of uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. *Bell v. Couch*, 132 N.C. 346, 43 S.E. 911 (1903).

Purpose Is to Enable a Safe Reliance upon the Records.—The purpose of this section is to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. *Grimes v. Guion*, 220 N.C. 676, 18 S.E.2d 170 (1942).

This section was enacted for the purpose of providing a plan and a method by

which an intending purchaser or encumbrancer can safely determine just what kind of a title he is in fact obtaining. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

The purpose of this section is to point out to prospective purchasers the one place where they must go to find the condition of land titles—the public registry. *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957).

Section Supplements § 22-2.—See note to § 22-2.

Where the Index Is Sufficient.—The purpose of the registration laws is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry, but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim, the proviso of this section being applicable only to deeds executed prior to December 1, 1885. *Dorman v. Goodman*, 213 N.C. 406, 196 S.E. 352 (1938).

Section Settles Priorities.—In construing the Connor Act of 1885, codified as this section, the court said: "The primary purpose and intent of the legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations." *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923).

The recording of a deed is essential to its validity only as against creditors and purchasers for a valuable consideration. *Ballard v. Ballard*, 230 N.C. 629, 55 S.E.2d 316 (1949); *Dulin v. Williams*, 239 N.C. 33, 79 S.E.2d 213 (1953).

The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor. *Bourne v.*

Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Date of Registration Controls Title.—

Under this section a grantee in a deed acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument. *Sills v. Ford*, 171 N.C. 733, 88 S.E. 636 (1916); *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954); *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957).

First Registration Prevails. —

Among two or more contracts to sell land, the one first registered will confer the superior right. *Combes v. Adams*, 150 N.C. 64, 63 S.E. 186 (1908); *Dulin v. Williams*, 239 N.C. 33, 79 S.E.2d 213 (1953); *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954); *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957).

As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965).

An unregistered deed does not convey complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor. *Glass v. Lynchburg Shoe Co.*, 212 N.C. 70, 192 S.E. 899 (1937).

This section and § 47-20 as originally enacted may be construed interchangeably in view of the similarity of their terminology. *Cowen v. Withrow*, 112 N.C. 736, 17 S.E. 575 (1893).

This section and § 47-20 as originally enacted were intended to uproot all secret liens, trusts, unregistered mortgages, etc., and it has been held that no notice, however full and formal, will supply the place of registration. *Hooker v. Nichols*, 116 N.C. 157, 21 S.E. 207 (1895), citing *Robinson v. Willoughby*, 70 N.C. 358 (1874).

Liberal Construction of Subsection (b). The words of now subsection (b) should receive a liberal construction so as to give full force and effect to the spirit and intention of the section. *Cowen v. Withrow*, 112 N.C. 736, 17 S.E. 575 (1893).

Effect of Reference to Unregistered Encumbrance. — A reference to an unregistered encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject thereto. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965).

Principles applicable to sufficiency of references necessary to impart vitality to a prior unregistered encumbrance may be stated as follows: (1) The creditor holding the prior unregistered encumbrance must

be named and identified with certainty; (2) the property must be conveyed "subject to" or in subordination to such prior encumbrance; (3) the amount of such prior encumbrance must be definitely stated; and (4) the reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965), holding reference to a lease in a deed not sufficient to make the registered deed subordinate to the unregistered lease.

Quitclaim Deed.—A subsequently dated but prior recorded deed, including a quitclaim deed supported by consideration, takes precedence over a prior dated but subsequently recorded fee simple deed. *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957).

Necessity for Recording Condemnation Judgment in Favor of United States.—A careful consideration of the Conformity Act, § 1-237, in relation to docketing judgments of federal courts and of the Registration Statute of North Carolina, § 47-18, does not sustain the position that a condemnation judgment in favor of the United States must be recorded in the county where the land lies, and cross-indexed in order to protect its ownership in land that it has acquired. The government stands in a position quite different from an individual, and if the statute normally applies to an individual, it may not be applicable against the United States. *United States v. Norman Lumber Co.*, 127 F. Supp. 518 (M.D.N.C. 1955).

Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 1-117 must be construed in *pari materia*, and while the *lis pendens* statutes do not affect the registration laws, the converse is not true. *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N. C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Effect of Connor Act.—Under this section a conveyance of land, made prior to the 1885 amendment, known as the Connor Act, is not valid against creditors or bona fide purchasers, unless registered before January 1, 1886. *Phillips v. Hodges*, 109 N.C. 248, 13 S.E. 769 (1891).

Registration Does Not Cure Lack of Mental Capacity.—Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under this section can give no effect to the invalid deed, and the valid deed, though

subsequently registered, will be effective. *Thompson v. Thomas*, 163 N.C. 500, 79 S.E. 896 (1913).

Where plaintiff's deed was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper-writing executed by plaintiff's grantor, this section does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper-writing giving defendant a life estate was not registered, since the protection of this section extends only to creditors and purchasers for value. *Twitty v. Cochran*, 214 N.C. 265, 199 S.E. 29 (1938).

Conversion in Partition Proceedings—Registration before Confirmation of Sale.

—In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. *McLean v. Leitch*, 152 N.C. 266, 67 S.E. 490 (1910).

Registered Deed Good Although Deed to Grantor Was Unregistered.—Upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. *Durham v. Pollard*, 219 N.C. 750, 14 S.E.2d 818 (1941).

Applied in *Fidelity & Cas. Co. v. Massachusetts Mut. Life Ins. Co.*, 74 F.2d 881 (4th Cir. 1935); *McCollum v. Smith*, 233 N.C. 10, 62 S.E.2d 483 (1950).

Quoted in *Tucker v. Almond*, 209 N.C. 333, 183 S.E. 407 (1936).

Cited in *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928), holding the section not applicable; *Threlkeld v. Malcragson Land Co.*, 198 N.C. 186, 151 S.E. 99 (1930); *Jones v. Rhea*, 198 N.C. 190, 151 S.E. 255 (1930); *Tocci v. Nowfall*, 220 N.C. 550, 18 S.E.2d 225 (1942); *Ricks v. Batchelor*, 225 N.C. 8, 33 S.E.2d 68 (1945); *Carolina Power & Light Co. v. Bowman*, 228 N.C. 319, 45 S.E.2d 531 (1947); *Pearce v. Hewitt*, 261 N.C. 408, 134 S.E.2d 662 (1964).

II. REGISTRATION AS BETWEEN PARTIES.

Instruments Are Good between Parties

without Registration.—A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. *Hinton v. Moore*, 139 N.C. 44, 51 S.E. 787 (1905); *Warren v. Williford*, 148 N.C. 474, 62 S.E. 697 (1908); *Western v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912); *Glass v. Lynchburg Shoe Co.*, 212 N.C. 70, 192 S.E. 899 (1937).

Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. *Hargrove v. Adcock*, 111 N.C. 166, 16 S.E. 16 (1892).

An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939).

The manifest purpose of this section is to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands inter se to litigate their rights under the rules of evidence in force. *Hargrove v. Adcock*, 111 N.C. 166, 16 S.E. 16 (1892).

Formerly registration was necessary even as between the parties. This was the rule prior to the 1885 amendment, known as the Connor Act. *White v. Holly*, 91 N.C. 67 (1884); *Hargrove v. Adcock*, 111 N.C. 166, 16 S.E. 16 (1892).

Registration after Commencement of Action.—As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence. *Hudson v. Jordan*, 108 N.C. 10, 12 S.E. 1029 (1891).

Comparison with § 47-20.—The Connor Act, the 1885 amendment to this section, has substantially the same legal effect upon deeds that the act of 1829, codified as § 47-20, had upon mortgages and deeds in trust, leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors. *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915), citing *Robinson v. Willoughby*, 70 N.C. 358 (1874).

The registration laws are not for the protection of the grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. *Patter-*

son v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

Contract Specifically Enforceable between Parties.—A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchasers for value. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

III. WHAT INSTRUMENTS AFFECTED.

Section Restricted to Instruments in Writing Capable of Registration.—This section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and are required to be in writing. *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923).

This section is restricted to written instruments capable of registration. *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923); *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925); *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939).

Parol and Implied Trusts Are Not Affected.—Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of this section. *Wood v. Tinsley*, 138 N.C. 507, 51 S.E. 59 (1905); *Sills v. Ford*, 171 N.C. 733, 88 S.E. 636 (1916); *Pritchard v. Williams*, 175 N.C. 319, 95 S.E. 570 (1918); *Roberts v. Massey*, 185 N.C. 164, 116 S.E. 407 (1923); *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923); *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925); *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939).

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section, are not included. *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923).

A declaration of trust is not required to be registered as against creditors, by virtue of the provisions of this section. *Crossett v. McQueen*, 205 N.C. 48, 169 S.E. 829 (1933).

A building restriction, being an easement which must be created by a grant, is within this section. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925).

A contract to convey standing timber constitutes a contract to convey land within the meaning of this section. *Winston v. Williams & McKeithan Lumber Co.*, 227 N.C. 339, 42 S.E.2d 218 (1947); *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R. 571 (1948); *Dulin v. Williams*, 239 N.C. 33, 79 S.E.2d 213 (1953).

Agreement for Division of Proceeds of Sale.—An instrument which is neither a conveyance of land, nor a contract to convey, nor lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land and authority to one to take entire control and management of sales of land for the parties is not required to be registered. *Lenoir v. Valley River Mining Co.*, 113 N.C. 513, 18 S.E. 73 (1893).

Assignment of Rents.—Rents accrued are choses in action and an assignment thereof need not be recorded. Rents accruing are incorporeal hereditaments and, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. *First & Citizens Nat'l Bank v. Sawyer*, 218 N.C. 142, 10 S.E.2d 656 (1940).

Lost and Unlost Deeds.—This section applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that the plaintiff's grantor deeded the land in controversy to W. in 1891 and that the said deed had been lost before registration, where the plaintiff was purchaser for value of said title under registered conveyances. *Hinton v. Moore*, 139 N.C. 44, 51 S.E. 787 (1905).

Where the corporate seal has not been affixed to a corporate deed, an order admitting it to probate as a conveyance is unauthorized but is sufficient to authorize its registration as a contract to convey. *Haas v. Rendleman*, 62 F.2d 701 (4th Cir. 1933).

The use of the words "unregistered deed" in subsection (b) is in their broad generic sense and has reference to the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. *McNeill v. Allen*, 146 N.C. 283, 59 S.E. 689 (1907).

Exclusive Right to Sell Given to Broker.—Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by this section, third parties may deal with the locus as if there were no contract, since no notice, however full and formal,

will take the place of registration. *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949).

Plaintiff broker alleged that he had been given exclusive contract to sell certain property, that he secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the prospect, after the expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split commission. It was held that the absence of allegation that plaintiff's option was registered the complaint failed to state a cause of action. *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949).

Grants.—This section does not apply to grants, the registration of which is regulated by §§ 146-47 and 146-48. *Wyman v. Taylor*, 124 N.C. 426, 32 S.E. 740 (1899).

Lease in Writing.—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing. *Mauney v. Norvell*, 179 N.C. 628, 103 S.E. 372 (1920).

A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965).

Effect of Exception of Short-Term Parol Leases.—The fact that parol leases for not more than three years are excepted from the operation of this section is not to be interpreted as meaning that a lessee under such lease is protected at all hazards or that his rights are superior to those of a bona fide purchaser for value from the lessor. These short-term parol tenancies are merely exempted from the operation of the section. This being so, one must look for guidance to the law as it stood prior to the passage of this section and as it now stands where the section has no application. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E.2d 634 (1953).

Assignment of Lease for More than Three Years.—Though not mentioned in either § 22-2 or this section, an assignment of a lease for more than three years must, to be enforceable, be in writing and to protect against creditors or subsequent purchasers, must be recorded. *Herring v. Volume Merchandise, Inc.*, 249 N.C. 221, 106 S.E.2d 197 (1958).

Mere Personal Contract.—This section

requires recordation of all deeds, contracts to convey, and leases for more than three years affecting the title to real property. But it neither requires nor authorizes the registration of a mere personal contract. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Mortgage.—A mortgage has been held to come within the term "conveyance" as used in this section. *First Nat'l Bank v. Sauls*, 183 N.C. 165, 110 S.E. 865 (1922). See § 47-20 and note.

Wills Not Affected.—This section has no application to wills. *Cooley v. Lee*, 170 N.C. 18, 86 S.E. 720 (1915); *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919).

The general term "conveyance" as used in this section cannot be construed to include wills. *Bell v. Couch*, 132 N.C. 346, 43 S.E. 911 (1903).

It is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. *Harris v. Dudley Lumber Co.*, 147 N.C. 631, 61 S.E. 604 (1908).

Purchaser from Devisee Prevails against Unregistered Deed.—This section requiring conveyances of land, contracts to convey, and leases to be recorded, applies when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value. *Bell v. Couch*, 132 N.C. 346, 43 S.E. 911 (1903).

IV. RIGHTS OF PERSONS PROTECTED.

In General.—By virtue of this section only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years. *Warren v. Williford*, 148 N.C. 474, 62 S.E. 697 (1908); *Gosney v. McCullers*, 202 N.C. 326, 162 S.E. 746 (1932); *Virginia-Carolina Joint Stock Land Bank v. Mitchell*, 203 N.C. 339, 166 S.E. 69 (1932); *Case v. Arnold*, 215 N.C. 593, 2 S.E.2d 694 (1939); *Durham v. Polard*, 219 N.C. 750, 14 S.E.2d 818 (1941).

In *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939), it was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, under this and § 47-20, and as to them the mortgagee is not entitled to reformation.

Right to Easement.—Under this section

where a grantor conveys land by registered deed creating an easement in land reserved by grantor his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. *Walker v. Phelps*, 202 N.C. 344, 162 S.E. 727 (1932).

Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for more than three years and is not recorded. *Hildebrand Mach. Co. v. Post*, 204 N.C. 744, 169 S.E. 629 (1933).

This section protects purchasers for value against an unregistered contract to convey land, that is, where an owner of land contracts to convey land, such contract, until registered in the county where the land lies, is ineffective as against any who purchases for value from him. *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949).

Allegations that third persons conspired to deprive plaintiff of his rights under an unregistered option does not state a cause of action against such third persons, since in the absence of registration such third persons have a legal right to deal with the property as if there were no option and an agreement to do a lawful act cannot constitute a wrongful conspiracy. *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949).

Creditors Put upon the Same Plane as Purchasers.—No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, and against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Volunteers and Donees Not Protected.—This section for lack of timely registration, only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. *Tyner v. Barnes*, 142 N.C. 110, 54 S.E. 1008 (1906).

While the cancellation of a preexisting debt may be sufficient consideration to constitute the grantee in a registered deed

from the debtor a purchaser for value within the protection of the Connor Act, so as to take free from the claim of the grantee in a prior unregistered deed from the debtor, where the debtor transfers the property without consideration to a third person, who in turn transfers the property to the creditor without any consideration moving from the creditor to such third person, the creditor cannot maintain that the cancellation of the debt constitutes him a purchaser for value so as to be protected under the Connor Act, since his deed from the third person is not supported by any consideration, and it is required that the creditor be a "purchaser for value from the donor, bargainor, or lessor" in order to be protected. *Sansom v. Warren*, 215 N.C. 432, 2 S.E.2d 459 (1939).

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the National Bankruptcy Act, and acquires a valid title as against the holder of the unregistered deed, under this section. *Lynch v. Johnson*, 171 N.C. 611, 89 S.E. 61 (1916).

Dower Where Title Divested Prior to Marriage.—Where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower. She is not a purchaser. *Haire v. Haire*, 141 N.C. 88, 53 S.E. 340 (1906).

Possessor under Unregistered Contract to Convey—Rights to Improvements.—One who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor, under a duly registered deed. *Wood v. Tinsley*, 138 N.C. 507, 51 S.E. 59 (1905); *Haas v. Smith*, 235 N.C. 341, 69 S.E.2d 714 (1952).

As to a purchaser for value, from the common grantor, the rule applies to one in possession, under an unregistered deed, who has enhanced the value of the land by improvements, although made in good faith. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925). Expressions in *Kelly v. Johnson*, 135 N.C. 647, 47 S.E. 674 (1904), conflicting with these views, were obiter and were corrected by *Wood v. Tinsley*, 138 N.C. 507, 51 S.E. 59 (1905).

Tort-Feasor neither a Purchaser nor a Creditor.—A tort-feasor, whose negligence

has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, §§ 47-18, 47-20, and 47-23, and an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925).

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable consideration. *Brem v. Lockhart*, 93 N.C. 191 (1885).

Priorities between Unregistered Deed and Execution of Judgment.—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. *Wimes v. Hufham*, 185 N.C. 178, 116 S.E. 402 (1923).

Purchaser under Execution Sale—Prior Purchaser in Possession.—The purchaser at execution sale who registers his deed prior to a deed from the defendant in execution to his wife, which was executed before the sale, acquires the title to the land; and the wife in possession of the land conjointly with her husband at the time of the sale and of the execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law. *Cowen v. Withrow*, 109 N.C. 636, 13 S.E. 1022 (1891).

Extent of Judgment Creditor's or Execution Sale Purchaser's Right.—A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. *Bristol v. Hallyburton*, 93 N.C. 384 (1885); *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923).

Rights of Creditor Whose Judgment Docketed between Execution and Registration of Prior Deed.—The grantee, in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed. *Board of Comm'rs v. Micks*, 118 N.C. 162, 24 S.E. 729 (1896).

Execution Purchaser with Notice Prior to 1885, Subordinate to Prior Unregistered Deed.—The provision of subsection (b) that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." *Cowen v. Withrow*, 112 N.C. 736, 17 S.E. 575 (1893).

Priority of Judgment Obtained before Registration of Prior Deed.—Where a judgment is obtained against a grantor of land subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. *Maxton Realty Co. v. Carter*, 170 N.C. 5, 86 S.E. 714 (1915).

The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Same—Agreement between Parties as to Registration.—Under the provisions of this section the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. *Francis v. Herren*, 101 N.C. 497, 8 S.E. 353 (1888); *Bostic v. Young*, 116 N.C. 766, 21 S.E. 552 (1895); *Board of Comm'rs v. Micks*, 118 N.C. 162, 24 S.E. 729 (1896); *Colonial Trust Co. v. Sterchie Bros.*, 169 N.C. 21, 85 S.E. 40 (1915).

Same — Judgment against Grantee.—Where a judgment has been obtained and docketed against the grantee, the lien

thereof immediately attaches upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. *Colonial Trust Co. v. Sterchie Bros.*, 169 N.C. 21, 85 S.E. 40 (1915).

Collateral Attack by Creditors for Want of Registration.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings, instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. *Brem v. Lockhart*, 93 N.C. 191 (1885); *Boyd v. Turpin*, 94 N.C. 137 (1886); *Francis v. Herren*, 101 N.C. 497, 8 S.E. 353 (1888).

V. NOTICE.

No Notice Will Supply Want of Registration.—No notice, however full or formal, will supply the want of registration of a deed. *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903). See *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929); *Knowles v. Wallace*, 210 N.C. 603, 188 S.E. 195 (1936); *Smith v. Turnage-Winslow Co.*, 212 N.C. 310, 193 S.E. 685 (1937); *Case v. Arnold*, 215 N.C. 593, 2 S.E.2d 694 (1939); *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942); *Grimes v. Guion*, 220 N.C. 676, 18 S.E.2d 170 (1942); *State Trust Co. v. Braznell*, 227 N.C. 211, 41 S.E.2d 744 (1947); *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948); *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949); *Dulin v. Williams*, 239 N.C. 33, 79 S.E.2d 213 (1953); *Dula v. Parsons*, 243 N.C. 32, 89 S.E.2d 797 (1955); *Hayes v. Ricard*, 245 N.C. 687, 97 S.E.2d 105 (1957); *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963). See note to § 47-20.

Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965).

This section provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel. *Patterson*

v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

Where defendant alleged that she went into possession of the land, paid taxes and made improvements under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff, seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and that defendant was in possession thereunder, it was held that the parol agreement was ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration as required by this section. *Grimes v. Guion*, 220 N.C. 676, 18 S.E.2d 170 (1942).

Record of Nonrecordable Instrument Does Not Constitute Notice.—The record of an instrument does not constitute constructive notice, if it is not of a class which is authorized or required by law to be recorded. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

The registration of an instrument operates as constructive notice only when the statute authorizes its registration; and then only to the extent of those provisions which are within the registration statutes. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Registration Is Not Notice as to After-Acquired Interest.—A written contract executed by a tenant in common, without the knowledge or authorization of his cotenants, to sell the timber on the entire tract, was recorded. The tenant in common later acquired an additional interest in the land. It was held that registration was constructive notice to all subsequent purchasers as to the tenant's original interest, but the vendee's right to demand conveyance of the timber as to the after-acquired interest rested upon the personal contract of the vendor, which was not required to be recorded by this section, and therefore registration was not notice to subsequent purchasers as to such after-acquired title. *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Effect of Defective Probate.—See paragraphs under succeeding analysis line.

Doctrine of Estoppel Not Applicable.—The equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, un-

der this section, supply the place of registration. *Sexton v. Elizabeth City*, 169 N.C. 385, 86 S.E. 344 (1915).

Provision as to Possession.—A deed to lands registered under this section, conveys title as against any unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession; the provision of this section as to such possession is restricted to deeds executed prior to December 1, 1885. *Lanier v. Roper Lumber Co.*, 177 N.C. 200, 98 S.E. 593 (1919). See *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903).

A deed executed prior to the act of 1885, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act. *Laton v. Crowell*, 136 N.C. 377, 48 S.E. 767 (1904).

The mere possession of the locus in quo under an unregistered ninety-nine year lease or any other circumstances is not sufficient notice to the owner of the fee under a valid paper chain of title. *Dye v. Morrison*, 181 N.C. 309, 107 S.E. 138 (1921).

VI. EFFECT OF DEFECTIVE REGISTRATION.

Registration of Defectively Probated Deed Ineffective.—The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. *Allen v. Burch*, 142 N.C. 524, 55 S.E. 354 (1906).

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929).

Deed Executed Outside of State.—The registration of a deed executed outside of the State with defective probate is without authority and ineffective for any purpose; such a deed previously executed and so registered, unless probated and registered prior to January 1, 1866, takes effect to pass the legal title only from the date of lawful registration, and is invalid as

against a conveyance made and registered in the meantime under a decree of court against the grantor which left in him no title to pass thereunder. *United States v. Hiawasse Lumber Co.*, 202 Fed. 35 (4th Cir. 1912).

When Probate Appears in Conformity with Law.—While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in some other state and there is no evidence that the grantee in the commissioner's deed under the foreclosure of a mortgage had actual notice of the defect. *County Sav. Bank v. Tolbert*, 192 N.C. 126, 133 S.E. 558 (1926).

VII. UNREGISTERED DEED AS COLOR OF TITLE.

In General.—Formerly an unregistered deed was in all cases color of title if sufficient in form. *Hunter v. Kelly*, 92 N.C. 285 (1885). But after the passage of the Connor Act in 1885 it was held in *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900), that an unregistered deed was not color of title.

The question was again considered in *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903), and the ruling in *Austin v. Staten* was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the court has since then consistently adhered to the latter decision. *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906); *Burwell v. Chapman*, 159 N.C. 209, 74 S.E. 685 (1912); *Gore v. McPherson*, 161 N.C. 638, 77 S.E. 835 (1913); *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915).

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903). Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by this section. *Roberts v. Massey*, 185 N.C. 164, 116 S.E. 407 (1923); *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Adverse Possession Under Deeds Forfeign to True Title.—The principle, that

under this section an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906), distinguishing *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900).

As against Subsequent Deed Duly Registered.—Where one makes a deed for land for a valuable consideration and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027 (1915).

§ 47-19. Unregistered deeds prior to January, 1920, registered on affidavit.—Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand nine hundred and twenty, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (1885, c. 147, s. 2; 1905, c. 277; Rev., s. 981; 1913, c. 116; 1915, cc. 13, 90; C. S., s. 3310; Ex. Sess. 1924, c. 56; 1951, c. 771.)

Affidavit in Case of Corporation.—Where a corporation is the holder of such a deed, the affidavit under this section may properly be made by its president. *Richmond Cedar Works v. Pinnix*, 208 Fed. 785 (E.D.N.C. 1913).

Affirmation of Belief That Deed Is Bona Fide.—The probate of a deed dated in 1845 upon an affidavit that the affiant claims

As against Judgment Creditors.—The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the source of title being a common one, nor can the grantee establish his rights to betterments. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Registration as Affecting Commencement of Limitations.—The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. *Dye v. Morrison*, 181 N.C. 309, 107 S.E. 138 (1921).

title under the said deed and that the maker of said deed and the witnesses thereto are dead, and that he cannot make proof of their handwriting, is defective, in that it does not appear by the affidavit that the "affiant believes such a deed to be a bona fide deed and executed by the grantor therein named." *Allen v. Burch*, 142 N.C. 524, 55 S.E. 354 (1906).

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.—No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this article, unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25 of the General Statutes) and duly filed pursuant thereto. (1829, c. 20; R. C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C. S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8.)

- I. In General.
- II. Registration as between Parties.
- III. Instruments Affected.

- IV. Rights of Persons Protected.
- V. Notice.
- VI. Place of Registration.

Cross References.

See note to § 47-18. As to form of chattel mortgage, see § 45-1. As to discharge of record of mortgages and deeds of trust, see § 45-37. As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

I. IN GENERAL.

Editor's Note. — The 1953 amendment, effective January 1, 1954, rewrote this section and made it applicable to conditional sales contracts. The amendatory act also added §§ 47-20.1 to 47-20.3, repealed former § 47-23 and amended § 59-2. Section 5 of the amendatory act provides that it shall not be applicable to mortgages, deeds of trust or conditional sales registered prior to such effective date.

The 1965 amendment, effective at midnight June 30, 1967, added at the end of the section the language following "this article."

For comment on the 1953 amendatory act, see 31 N.C.L. Rev. 429 (1953).

For comment on persons protected by this section, see 28 N.C.L. Rev. 305.

For article on bankruptcy and the automobile dealer, involving the effect of this section, see 34 N.C.L. Rev. 312 (1956).

As to effect of recordation statutes on mortgages and sales of automobiles on credit, see 26 N.C.L. Rev. 173. As to mortgages, deeds of trust and other encumbrances created on personal property while such property is located in another state, see § 44-38.1, discussed in 27 N.C.L. Rev. 440.

The object of this section is to prevent fraud, and to that end it requires the registration of incumbrances so that purchasers and creditors may have notice of their existence and nature, and all persons may see for what the encumbrances were created. When the registration is made, the means of knowledge thus furnished enables creditors of the mortgagor to avail themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditors all the benefit they can reasonably ask or that the law intended. *Starke v. Etheridge*, 71 N.C. 240 (1874).

This section and § 47-18 were intended to uproot all secret liens, trusts, unregistered mortgages, etc. *Hooker v. Nichols*, 116 N.C. 157, 21 S.E. 207 (1895), citing *Robinson v. Willoughby*, 70 N.C. 358 (1874). See § 47-18 and note.

Section Liberally Construed.—This section is liberally construed. *General Motors Acceptance Corp. v. Mayberry*, 195 N.C. 508, 142 S.E. 767 (1928).

Identical Construction with § 47-18.—In view of the practical identity of the terminology of this section and § 47-18, the construction put upon them will be identical. *Francis v. Herren*, 101 N.C. 497, 8 S.E. 353 (1888); *Cowan v. Withrow*, 112 N.C. 736, 17 S.E. 575 (1893).

This section regulates priorities as between written instruments affecting the title to property and other legal claims. *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949).

The courts of this State have adopted a strict policy in regard to notice and registration in order to encourage immediate and proper recording. 15 N.C.L. Rev. 166.

In its interpretation of the North Carolina recording statutes, the Supreme Court of that State has insisted on strict compliance. *McKnight v. M. & J. Fin. Corp.*, 247 F.2d 112 (4th Cir. 1957).

Substantial Compliance Required.—The probate and registration of deeds and mortgages are entirely statutory, and creditors and purchasers are entitled to rely upon at least a substantial compliance with the statute. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

Instrument Effective from Time of Registration.—A mortgage deed, not registered within time, when registered operates from the time of registration only, and has no relation back to its date. *Davison v. Beard*, 9 N.C. 520 (1823).

Priority is given to the mortgage first recorded, by virtue of this section. *Wayne Nat'l Bank v. National Bank*, 197 N.C. 68, 147 S.E. 691 (1929). As to priority in proceeds of insurance on property, see note under § 58-160.

Determination of Priorities between Mortgages by the Time of Filing.—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. *Blacknall v. Hancock*, 182 N.C. 369, 109 S.E. 72 (1921).

Want of Registration at Any Particular Time Does Not Avoid Instruments.—This section does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. *McKinnon v. McLean*, 19 N.C. 79 (1836).

Execution Lien Superior to Unrecorded Mortgage.—Where the assignee of a note and mortgage securing the purchase price

of an automobile failed to record the mortgage before an execution was issued in order to satisfy a judgment secured by a creditor, the lien of execution is superior to the assignee's chattel mortgage. *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949).

Mortgagees in unregistered mortgage have no priority as against assets of corporate mortgagor in receivership. This is so for the reason that by adjudication of insolvency and the appointment of the receiver, the creditors at large of the corporation, represented by the receiver, became in legal contemplation creditors for a valuable consideration within the meaning of this section and, therefore, the deed of trust as to the receiver is void. *Eno Inv. Co. v. Protective Chems. Lab.*, 233 N.C. 294, 63 S.E.2d 637 (1951).

"At law," formerly appearing in this section, was construed in *Hooker v. Nichols*, 116 N.C. 157, 21 S.E. 207 (1895).

Effect of Defective Registration. — A defective registration is no registration and is void; and hence does not prevent the rights of subsequent purchasers for value from attaching upon the property. *Cowan v. Dale*, 189 N.C. 684, 128 S.E. 155 (1925).

Registration of Chattel Mortgages. — The statute only requires mortgages of personal property to be reduced to writing and registered as affecting creditors and purchasers for value. *Butts v. Screws*, 95 N.C. 215 (1886).

Section Construed with Former § 47-23. — See *Jordan v. Wetmur*, 202 N.C. 279, 162 S.E. 610 (1932).

Sale of Mortgaged Property Left with Mortgagor — Waiver by Mortgagor. — Where the mortgagor of an automobile sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale. It was held, that an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he required the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which was left with the mortgagor for sale. *Rogers v. Booker*, 184 N.C. 183, 113 S.E. 671 (1922).

Bankruptcy Act. — Recordation was not perfected in the county of the registered office of a bankrupt, and this is an indispensable requisite to obtain precedence for

conditional sales contracts over lien creditors. *Gordon Johnson Co. v. Dawes*, 338 F.2d 628 (4th Cir. 1964).

For cases construing this section in connection with the provisions of the Bankruptcy Act relating to preferences, see *Brigman v. Covington*, 219 Fed. 500 (4th Cir. 1915); *Commercial Cas. Ins. Co. v. Williams*, 37 F.2d 326 (4th Cir. 1930); *In re Cunningham*, 64 F.2d 296 (4th Cir. 1933); *In re Finley*, 6 F. Supp. 105 (M.D.N.C. 1933); *Hartford Acc. & Indem. Co. v. Coggin*, 78 F.2d 471 (4th Cir. 1935), reversing *Coggin v. Hartford Acc. & Indem. Co.*, 9 F. Supp. 785 (M.D.N.C. 1935).

Applied in *Ward v. Southern Sand & Gravel Co.*, 33 F.2d 773 (M.D.N.C. 1929); *First Nat'l Bank v. Raleigh Sav. Bank & Trust Co.*, 37 F.2d 301 (4th Cir. 1930); *Commercial Cas. Ins. Co. v. Williams*, 37 F.2d 326 (4th Cir. 1930); *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Quoted in *Franklin Nat'l Bank v. Ramsey*, 252 N.C. 339, 113 S.E.2d 723 (1960).

Cited in *John Hetherington & Sons v. Rudisill*, 28 F.2d 713 (4th Cir. 1928); *Andrews Music Store v. Boone*, 197 N.C. 174, 148 S.E. 39 (1929); *Threlkeld v. Malcragson Land Co.*, 198 N.C. 186, 151 S.E. 99 (1930); *In re Wallace*, 212 N.C. 490, 193 S.E. 819 (1937); *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 12 (1938); *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942); *Universal Fin. Co. v. Clary*, 227 N.C. 247, 41 S.E.2d 760 (1947); *General Fin. & Thrift Corp. v. Guthrie*, 227 N.C. 431, 42 S.E.2d 601 (1947); *Home Fin. Co. v. O'Daniel*, 237 N.C. 286, 74 S.E.2d 717 (1953); *Handley Motor Co. v. Wood*, 237 N.C. 318, 75 S.E.2d 312 (1953); *In re Steele*, 122 F. Supp. 948 (E.D.N.C. 1954); *Haworth v. General Motors Acceptance Corp.*, 238 F.2d 203 (4th Cir. 1956).

II. REGISTRATION AS BETWEEN PARTIES.

Valid without Registration. — As between the parties, a mortgage is valid without registration. *Leggett v. Bullock*, 44 N.C. 283 (1853); *Ellington v. Raleigh Bldg. Supply Co.*, 196 N.C. 784, 147 S.E. 307 (1929); *In re Finley*, 6 F. Supp. 105 (M.D.N.C. 1933).

The decisions of the Supreme Court of North Carolina interpreting this statute, which are binding upon federal courts in this respect, clearly hold that an unrecorded mortgage or deed of trust is valid under this section as between the parties and as against general creditors, unless the

claims of the general creditors have become fastened upon the property, as by insolvency or bankruptcy proceedings, before the recording takes place. In *re Cunningham*, 64 F.2d 296 (4th Cir. 1933), citing *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915); *Hinton v. Williams*, 170 N.C. 115, 86 S.E. 994 (1915); *Observer Co. v. Little*, 175 N.C. 42, 94 S.E. 526 (1917).

An unregistered instrument is valid as between the parties. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957).

In case of a mortgage of personal property, the right of property is conveyed to the mortgagee by a perfect title, which title is liable to be defeated by the payment of the mortgage debt, and if the mortgagee takes possession of the property, he takes it as his own, and not as the mortgagor's. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely. *McCreary Tire & Rubber Co. v. Crawford*, 253 N.C. 100, 116 S.E.2d 491 (1960).

Personal Representative Occupies Intestate's Position.—As between the original parties, the lien of an unregistered mortgage holds priority. *Leggett v. Bullock*, 44 N.C. 283 (1853); *Deal v. Palmer*, 72 N.C. 582 (1875); *Wallace v. Cohen*, 111 N.C. 103, 15 S.E. 892 (1892). And the personal representative of a deceased mortgagor stands in the shoes of the latter. Hence, the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. *McBrayer v. Harrill*, 152 N.C. 712, 68 S.E. 204 (1910).

The personal representative takes only that title which the deceased had in the property at the time of his death, and an unrecorded mortgage lien has the same status as against the personal representative that it had against the deceased, regardless of whether the estate is solvent or insolvent. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957).

Intended Primarily to Protect Creditors and Purchasers. — This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. *South*

Georgia Motor Co. v. Jackson, 184 N.C. 328, 114 S.E. 478 (1922).

III. INSTRUMENTS AFFECTED.

Instrument Sufficient to Put Interested Person on Notice of Conditional Sales Contract.—An instrument which was recorded and indexed as a chattel mortgage or conditional sales contract, and which in its concluding sentence characterized itself as "this conditional contract," was sufficient to put an interested person on notice of the conditional sales contract intended by the parties, and would be given effect as such a contract against the buyer's trustee in bankruptcy, notwithstanding the fact that when the instrument was prepared by piecing together portions of several printed contract forms to make one document, lines expressly providing for retention of title in the seller had been inadvertently covered over. *Mickel-Hopkins, Inc. v. Frassinetti*, 278 F.2d 301 (4th Cir. 1960), reversing *In re Coble*, 177 F. Supp. 277 (M.D.N.C. 1959).

An equitable assignment of accounts receivable is not within the protective provisions of this section. *Presley E. Brown Lumber Co. v. Textile Banking Co.*, 248 N.C. 308, 103 S.E.2d 334 (1958).

Section 20-57 does not supplant registration statute. *Southern Auto. Fin. Co. v. Pittman*, 253 N.C. 550, 117 S.E.2d 423 (1960), decided under former § 47-23. But see present §§ 20-58 to 20-58.10 as to security interests in motor vehicles.

Absolute Sale.—When the circumstances of a given transaction amount to an absolute sale of goods, rather than a mortgage, such transaction is valid without registration as against the persons protected under this section. *Chemical Co. v. Johnson*, 98 N.C. 123, 3 S.E. 723 (1887).

It is not necessary under this section that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser. *Carolina Coach Co. v. Begnell*, 203 N.C. 656, 166 S.E. 903 (1932).

A bill of sale of property, absolute on its face but intended as a mortgage, is void as against a purchaser for valuable consideration, by force of this section requiring mortgages, etc., to be registered. *Dukes v. Jones*, 51 N.C. 14 (1858).

Road Contractor's Application Contracts as Chattel Mortgages. — Application contracts of road contractor containing a conveyance whereby the contractor as of the date thereof assigns, transfers, and conveys to the surety, all his right, title,

and interest in the tools, plant, equipment, and materials that he may then or thereafter have upon the work, authorizing and empowering the surety and its agents to enter upon and take possession thereof, are chattel mortgages within the meaning of this recordation statute. *Hartford Acc. & Indem. Co. v. Coggin*, 78 F.2d 471 (4th Cir. 1935), reversing on other grounds *Coggin v. Hartford Acc. & Indem. Co.*, 9 F. Supp. 785 (M.D.N.C. 1935).

Agreement in Substance a Chattel Mortgage.—A bankrupt, having several textile mills, in order to provide working capital agreed that claimants, who were factors, should advance on its goods, in process of manufacture, in transit, in the hands of finishers, and in the possession of customers until paid for, and that the goods should be subject to advances to him, made generally by claimants against all merchandise in and produced at enumerated mills. It was held that the agreement was to be in effect a chattel mortgage, and not an equitable lien, and hence such contract, not being recorded as required, was not a valid lien against the creditors of the bankrupt. *In re Southern Textile Co.*, 174 Fed. 523 (2nd Cir. 1909).

Instrument Executed in Another State.—The Uniform Sales Act of the state wherein property was purchased and a conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of this section and former § 47-23, since the statutes make no exception in favor of a conditional sales contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N.C. 443, 53 S.E.2d 520 (1949). See § 44-38.1.

Same — Personal Property in State Temporarily.—Where personal property subject to a conditional sales contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a situs here within the meaning of our registration statute, and such lien is not required to be registered in any county of this State. *Universal C. I. T. Credit Corp. v. Walters*, 230 N.C. 443, 53 S.E.2d 520 (1949). See § 44-38.

Where a transaction is in effect a pledge of security for borrowed money, it is not a chattel mortgage requiring registration under this section as against creditors and third persons. *Bundy v. Commercial Credit Co.*, 202 N.C. 604, 163 S.E. 676 (1931).

Advancement of Money to Pay Off Lien.—This section does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. *Wallace v. Benner*, 200 N.C. 124, 156 S.E. 795 (1931).

Preferred Stock Giving Lien.—Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with this section requiring registration. *Ellington v. Raleigh Bldg. Supply Co.*, 196 N.C. 784, 147 S.E. 307 (1929).

Purchase-Money Deed of Trust Registered Prior to Deed.—Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the husband alone executes a purchase-money deed of trust on the lands which is registered prior to the registration of the deed in fee to the wife, the records are insufficient to show that the husband had any interest in the land, and the purchase-money deed of trust is ineffective as against creditors or subsequent purchasers for value from the wife, and where the husband and wife thereafter executed a mortgage, which is duly registered, the mortgagee is entitled to foreclose same upon default as against those claiming title by foreclosure under the purchase-money deed of trust, and this result is not affected by the fact that the mortgage, in the clause warranting title, referred to the purchase-money deed of trust by page number of the registry book, since such reference does not constitute even constructive notice in that the records would not have shown that the husband had any interest in the land, and since no notice, however full and formal, will supply want of registration. *Smith v. Turnage-Winslo*, 212 N.C. 310, 193 S.E. 685 (1937).

IV. RIGHTS OF PERSONS PROTECTED.

The word "creditors" as used in this section means those who have acquired a lien by judicial process or other means. *Community Credit Co. of Lenoir, Inc. v. Norwood*, 257 N.C. 87, 125 S.E.2d 369 (1962).

The word creditor, as used in this section, does not mean a general creditor; it means a lien creditor—one who has a recorded mortgage, or has possession of the chattel for the purpose of securing mort-

gagor's debt. *Wachovia Bank & Trust Co. v. Wayne Fin. Co.*, 262 N.C. 711, 138 S.E.2d 481 (1964).

This section does not protect every creditor against unrecorded mortgages. It protects only (1) purchasers for a valuable consideration from the mortgagor, and (2) creditors who have first fastened a lien upon the property in some manner sanctioned by law. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957).

Creditors and Purchasers for Value.—No distinction is made in the statute between creditors and purchasers for value. *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939).

This section is designed to protect creditors and purchasers for value against any adverse claim founded on an unrecorded lien. *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949).

Unregistered mortgages are of no validity whatsoever as against creditors and purchasers for value. And they take effect as against such interested third parties from and after registration just as if they had been executed then and there. *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949).

Same — Reformation of Mortgage. — Through mistake a mortgage was executed to secure \$15 instead of \$1,500, and was so recorded. Later, creditors of the mortgagor obtained judgments against him which were duly recorded. It was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, and as to them the mortgagee was not entitled to reformation. *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939).

General Creditors. — It is well settled by the decisions in this State that, unless a general creditor has secured a specific lien on the property of the mortgagor or grantor, before the registration of the deed or mortgage, it is valid as against general creditors from its registration. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915). See *In re Cunningham*, 64 F.2d 296 (4th Cir. 1933); *In re Finley*, 6 F. Supp. 105 (M.D.N.C. 1933).

In order for a creditor to avail himself of this section, it is very generally understood that he must by some judicial process or method take steps to fasten his claim upon the property. In one or more of the decisions on the subject, it is said that he should be "armed with legal process" for the purpose. *Observer Co. v. Little*, 175 N.C. 42, 94 S.E. 526 (1917).

Before a creditor can defeat the lien of a mortgage properly registered he

must acquire a prior lien by way of judgment, as against land, and by levying an execution against personal property. *Coggin v. Hartford Acc. & Indem. Co.*, 9 F. Supp. 785 (M.D.N.C. 1935), rev'd on other grounds in *Hartford Acc. & Indem. Co. v. Coggin*, 78 F.2d 471 (4th Cir. 1935).

A general creditor must yield to the lien of a chattel mortgage from the moment of its registration, unless the lien can be successfully assailed as a fraudulent conveyance. *Coggin v. Hartford Acc. & Indem. Co.*, 9 F. Supp. 785 (M.D.N.C. 1935), rev'd on other grounds in *Hartford Acc. & Indem. Co. v. Coggin*, 78 F.2d 471 (4th Cir. 1935).

Same—In Bankruptcy Proceedings.—In *Holt v. Crucible Steel Co.*, 224 U.S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756 (1912), the court discussed a similar statute, holding that, as no creditor had fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy, by which the title passed to the trustee, the mortgage was valid as against him. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same, as required by such statute. *In re Franklin*, 151 Fed. 642 (E.D.N.C. 1907).

Trustee under Deed of Assignment for Benefit of Creditors.—Our decisions are to the effect that the trustee under a deed of assignment for the benefit of creditors is a purchaser for a valuable consideration within the meaning of this section, and that, upon adjudication of insolvency and the appointment of a receiver, the unsecured creditors, then represented by the receiver, are deemed to have fastened a lien on the insolvent's property. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957), citing *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949), and *Eno Inv. Co. v. Protective Chems. Lab.*, 233 N.C. 294, 63 S.E.2d 637 (1951).

Judgment Creditor.—Under this section a deed of trust is of no validity whatever as against a judgment creditor unless registered. *Bostic v. Young*, 116 N.C. 766, 21 S.E. 552 (1895).

Attachment Creditors.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditors' lien, but only on property situated in the county where the mortgage was registered. *Williamson v. Biting*, 159 N.C. 321, 74 S.E. 808 (1912).

Creditors of Mortgagor and Not of Mortgagee. — An unregistered mortgage

or deed of trust is void as against creditors of the mortgagor, and not of the mortgagee. *Chemical Co. v. Johnson*, 98 N.C. 126, 3 S.E. 723 (1887).

Death of Mortgagor.—The rights of secured and unsecured creditors alike are fixed at the instant of the debtor's death, and the circumstance of death cannot have the effect of fastening a lien upon property of the estate in favor of unsecured creditors. Thus, the mortgagee under an unrecorded chattel mortgage on after-acquired property has a lien on the property as against the administratrix of the mortgagor's estate superior to the claim of general creditors of the estate who had not fastened a lien upon the property at the time of intestate's death. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E.2d 267 (1957).

Preexisting Debt a Valuable Consideration.—As to liens coming within the purview of this section, a preexisting debt is a valuable consideration and is sufficient to support the claim of a creditor who has fastened his lien upon the property of his debtor. *M. & J. Fin. Corp. v. Hodges*, 230 N.C. 580, 55 S.E.2d 201 (1949).

Rights of Chattel Mortgagee.—When a creditor takes a chattel mortgage from his debtor as security for the payment of his debt and causes the mortgage to be registered in the county where the debtor resides or in the county where the personal property is situated in case the debtor resides out of the State, he acquires property rights in the personal property covered by his mortgage. These rights entitle the creditor to sell the mortgaged property for the satisfaction of his debt, and are tantamount to a specific lien on specific property within the purview of the decisions interpreting 31 U.S.C.A. § 191 relating to priority of debts due the United States from an insolvent. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

An unrecorded chattel mortgage is given no effect against lien creditors under North Carolina law. *McKnight v. M. & J. Fin. Corp.*, 247 F.2d 112 (4th Cir. 1957).

Where a mortgagor is permitted to retain possession of chattels, the mortgagee acquires no lien as against purchasers or creditors, but from the registration of the instrument. *Wachovia Bank & Trust Co. v. Wayne Fin. Co.*, 262 N.C. 711, 138 S.E.2d 481 (1964).

The common-law rule that the title of the mortgagee is good as against any person in possession has been altered by this section only to the extent of protecting

against an unregistered lien creditors and those purchasers who deraign title from the mortgagor. *Friendly Fin. Corp. v. Quinn*, 232 N.C. 407, 61 S.E.2d 192 (1950).

Also Rule as to Title of Conditional Vendor.—The common-law rule that title of conditional vendor is good as against any person in possession has been altered by this section only to the extent of protecting against unregistered lien creditors and those purchasers who deraign title from the conditional vendee, and this section does not extend protection to purchasers who are strangers to the vendor's title. *Friendly Fin. Corp. v. Quinn*, 232 N.C. 407, 61 S.E.2d 192 (1950), decided under former § 47-23.

Purchasers Not Entitled to Protection of Statutes.—Where the resident purchaser of an automobile, which was subject to a conditional sale contract executed in another state, failed to show that his title was acquired directly or by mesne conveyances from the conditional vendee, he was not entitled to the protection of this section and former § 47-23 since he had the burden of showing that he was a purchaser within the protection of the statutes, and mere possession alone was insufficient for that purpose. *Friendly Fin. Corp. v. Quinn*, 232 N.C. 407, 61 S.E.2d 192 (1950). See §§ 20-58 to 20-58.10 as to security interests in automobiles.—Ed. Note.

Collateral Attack by Creditors Not Warranted.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. *Brem v. Lockhart*, 93 N.C. 191 (1885); *Boyd v. Turpin*, 94 N.C. 137 (1886); *Francis v. Herren*, 101 N.C. 497, 8 S.E. 353 (1888).

Mortgagee for Future and Contingent Debts.—A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent. The mortgagee in such case is deemed a purchaser for value, and his rights are not affected by a prior unregistered mortgage. *Moore v. Ragland*, 74 N.C. 343 (1876).

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for a valuable consideration. *Brem v. Lockhart*, 93 N.C. 191 (1885).

Subsequent Purchasers Whose Deeds Are Registered.—A mortgage not registered in time is ineffectual against pur-

chasers subsequent to the mortgage whose conveyances are registered before the mortgage. *Cowan v. Green*, 9 N.C. 384 (1823). See analysis line VI "Place of Registration" in this note.

Priority between Chattel Mortgagee and Creditor Purchasing Property.—

While the sale of property to a creditor in possession in partial payment of a pre-existing debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage in view of this section. *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934).

Priority between Mortgage Filed and Judgment Rendered at Same Term.—G executed a mortgage upon his land; the mortgage was filed for registration during a term of the superior court, at a subsequent day of which a judgment was rendered against him and duly docketed. It was held that the lien of the judgment was prior to that of the mortgage. *Fleming v. Graham*, 110 N.C. 374, 14 S.E. 922 (1892).

Mortgagee for Purchase Price Has Priority over Subsequent Mortgage.—A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. *Allen v. Stainback*, 186 N.C. 75, 118 S.E. 903 (1923).

Where mortgagee of automobile permits mortgagor to keep it on display for sale with others, and the mortgage sufficiently describes the property, giving the serial and motor numbers and is duly registered under the provisions of this section, the mortgagee does not lose his right of lien as against a subsequent purchaser from the mortgagor. *Whitehurst v. Garrett*, 196 N.C. 154, 144 S.E. 835 (1928).

Tort Feasor as Purchaser or Creditor.—See *Harris v. Seaboard Air Line Ry.*, 190 N.C. 480, 130 S.E. 319 (1925).

Trustee in Bankruptcy.—A mortgagee who failed to register his mortgage has no rights to the property mortgaged as against the trustee in bankruptcy of a corporation, to which the mortgagor sub-

sequently conveyed the property in consideration of stock in such corporation. *Holt v. Albert Pick & Co.*, 25 F.2d 378 (4th Cir. 1928).

Same—When Right of Surety Superior.

—Where no creditor has secured a lien upon the property of a road contractor prior to bankruptcy, the transfer of possession of the property to the surety-mortgagee before bankruptcy had the same effect under the North Carolina law as if the mortgage had been recorded. *Cowan v. Dale*, 189 N.C. 684, 128 S.E. 155 (1925). It follows that the right of the surety to the property transferred is superior to the claim of the trustee in bankruptcy. *Hartford Acc. & Indem. Co. v. Coggin*, 78 F.2d 471 (4th Cir. 1935).

Interest of Innocent Party in Unregistered Mortgage Not Subject to Confiscation.—

Failure to register purchase-money mortgage on automobile did not subject the interest of an innocent mortgagee to confiscation under statute relating to seizure of automobile engaged in illegal transportation of liquor. *South Georgia Motor Co. v. Jackson*, 184 N.C. 328, 114 S.E. 478 (1922).

V. NOTICE.

Constructive Notice to All the World.

—Under this section deeds of trust and mortgages on real and personal property, when properly probated and registered, are constructive notice to all the world. *Whitehurst v. Garrett*, 196 N.C. 154, 144 S.E. 835 (1928).

This section is designed to give notice of chattel mortgages to third persons. *Sheffield v. Walker*, 231 N.C. 556, 58 S.E.2d 356 (1950).

And former § 47-23 was designed to give notice of conditional sales to third persons. *Sheffield v. Walker*, 231 N.C. 556, 58 S.E.2d 356 (1950).

This section and former § 47-23 were designed to give notice to persons of the classes mentioned therein, and to prevent fraud and deception by protecting them from the effects of secret liens and from losses which they might otherwise sustain by relying upon the possession and apparent ownership of the chattels in the vendee. *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950).

Putting Third Persons upon Inquiry.—

Record of unsatisfied mortgage is sufficient notice to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts which such inquiry would have disclosed. *Collins v. Davis*, 132 N.C. 106, 43 S.E. 579 (1903).

Registration upon a defective probate does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. *Todd, Schenck & Co. v. Outlaw*, 79 N.C. 235 (1878).

Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

No Notice Will Supply Registration.—The Supreme Court has consistently held that no notice, however full and formal, will supply the place of registration required by this section. *Robinson v. Wiloughby*, 70 N.C. 358 (1874); *Hooker v. Nichols*, 116 N.C. 157, 21 S.E. 207 (1895); *Blacknall v. Hancock*, 182 N.C. 369, 109 S.E. 72 (1921); *Avery County Bank v. Smith*, 186 N.C. 635, 120 S.E. 215 (1923); *Whitehurst v. Garrett*, 196 N.C. 154, 144 S.E. 835 (1928); *Mills v. Kemp*, 196 N.C. 309, 145 S.E. 557 (1928); *Salassa v. Western Carolina Title & Mortgage Co.*, 196 N.C. 501, 146 S.E. 83 (1929); *Weeks v. Adams*, 196 N.C. 512, 146 S.E. 130 (1929); *Ellington v. Raleigh Bldg. Supply Co.*, 196 N.C. 784, 147 S.E. 307 (1929); *Duncan v. Gulley*, 199 N.C. 552, 155 S.E. 244 (1930); *Lawson v. Key*, 199 N.C. 664, 155 S.E. 570 (1930); *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963).

Instrument First Registered Prevails.—A registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. *Duncan v. Gulley*, 199 N.C. 552, 155 S.E. 244 (1930).

Where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice aliunde advantage the holder of the mortgage first executed. *Story v. Slade*, 199 N.C. 596, 155 S.E. 256 (1930), distinguishing *Williams v. Lewis*, 158 N.C. 571, 74 S.E. 17 (1912).

A mortgage given for the purchase money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has

notice thereof. *Quinnerly v. Quinnerly*, 114 N.C. 145, 19 S.E. 99 (1894).

Where Fraud Is Used.—Where one who knows of a prior unregistered deed of trust or mortgage, procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. *Traders Nat'l Bank v. Lawrence Mfg. Co.*, 96 N.C. 298, 3 S.E. 363 (1887).

When Subsequent Mortgage Recites Prior Encumbrance.—Where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of the prior encumbrance; and it establishes a trust in equity in favor of the prior encumbrancer even though the prior mortgage is not registered. *Avery County Bank v. Smith*, 186 N.C. 635, 120 S.E. 215 (1923), citing *Blacknall v. Hancock*, 182 N.C. 369, 109 S.E. 72 (1921), and distinguishing *North State Piano Co. v. Spruill & Brother*, 150 N.C. 168, 63 S.E. 723 (1909).

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgagee is entitled to the possession of the land. *Bank v. Vass*, 130 N.C. 590, 41 S.E. 791 (1902).

Where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference to a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. *Lawson v. Key*, 199 N.C. 664, 155 S.E. 570 (1930).

Recording and indexing a mortgage executed by one not the owner of the property mentioned therein will not give constructive notice binding upon third parties dealing with the true owner. It is, at least as to third parties, as though no mortgage had been made. *McKnight v. M. & J. Fin. Corp.*, 247 F.2d 112 (4th Cir. 1957).

Mortgage for Future Advances—Effect of Actual Notice.—Where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B defectively registered, it was held that if after the execution of the plaintiff's mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with actual notice of prior mortgages in equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. *Todd, Schenck & Co. v. Outlaw*, 79 N.C. 235 (1878).

VI. PLACE OF REGISTRATION.

Editor's Note.—The cases cited below were decided under this section as it formerly read and under former § 47-23.

Meaning of "Residence."—The word "residence" as formerly used in this section and in former § 47-23 imparts less than domicile and more than physical presence in the character of a mere transient, and means a fixed abode for the time being, or actual personal residence. *Sheffield v. Walker*, 231 N.C. 556, 58 S.E.2d 356 (1950).

County of Actual Personal Residence.—The provisions of this section and former § 47-23 that a conditional sales contract or chattel mortgage be registered in the county of the residence of the vendee or mortgagor require registration in the county of his residence as distinguished from domicile to effectuate the purpose of the statutes to give notice to interested parties. *Sheffield v. Walker*, 231 N.C. 556, 58 S.E.2d 356 (1950).

The requirement that a conditional sales contract or chattel mortgage is to be recorded in the county where its maker has his actual personal residence is based on the legislative realization that persons "interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered." *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950); *Sheffield v. Walker*, 231 N.C. 556, 58 S.E.2d 356 (1950).

The mere fact that a person has personal property in a certain county does not constitute residence. The purpose of the statute is to have the deed of trust or mortgage of personalty registered in the county where the donor, bargainor, or mortgagor has actual personal residence. *Harris v. Al-*

len, 104 N.C. 86, 10 S.E. 127 (1889); *Bank of Colerain v. Cox*, 171 N.C. 76, 87 S.E. 967 (1916); *Industrial Discount Corp. v. Radecky*, 205 N.C. 163, 170 S.E. 640 (1933).

Subsequent Change of Residence or Removal of Property.—Where a chattel mortgage or conditional sales contract is registered in the proper county, subsequent change of residence of the mortgagor or vendee, or subsequent removal of the property to another county of the State, does not affect the lien, there being no requirement of a second registration in this State in either of these events. *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950).

Mortgage Must Be Registered in County Where Land Lies.—See *King v. Portis*, 77 N.C. 25 (1877).

Where Land Lies in Two or More Counties.—A mortgage of a tract of land described by metes and bounds and registered in one county only, both mortgagor and mortgagee believing the whole tract to be situated in such county, when in fact a part of said tract is situated in an adjoining county, is inoperative as against creditors and purchasers for value beyond the limits of the county in which it was registered. *King v. Portis*, 77 N.C. 25 (1877).

Registration in Another County of No Effect.—A chattel mortgage or conditional sales contract is valid as against creditors or purchasers for value as of the time of registration in the proper county, and registration in any county other than that specified by law is of no effect. *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950).

Chattel Situated Where Regularly Used.—A chattel is situated within the meaning of the registration statutes where it is regularly used day by day, or where it is regularly kept when not in actual use. *Montague Bros. v. Shepherd Co.*, 231 N.C. 551, 58 S.E.2d 118 (1950).

Situs Required before or after Foreign Registry.—Section 47-20 lends itself to the interpretation that where chattel mortgages are made by nonresidents it intends to leave within its protection only those mortgages on personal property and similar lien contracts, including conditional sales under former § 47-23, which are registered in the county of the situs in this State, whether that situs be acquired before or after foreign registry. *Associates Discount Corp. v. McKinney*, 230 N.C. 727, 55 S.E.2d 513 (1949).

Where the mortgagor of personal property changes his residence, a new registration of the mortgage is not required. *Weaver v. Chunn*, 99 N.C. 431, 6 S.E. 370

(1888); *Harris v. Allen*, 104 N.C. 86, 10 S.E. 127 (1889).

Where a mortgage on personal property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another

and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute. *Bank of Colerain v. Cox*, 171 N.C. 76, 87 S.E. 967 (1916).

§ 47-20.1. **Place of registration; real property.** — To be validly registered pursuant to G. S. 47-20, a deed of trust or mortgage of real property must be registered in the county where the land lies, or if the land is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land lies in order to be effective as to the land in that county. (1953, c. 1190, s. 2.)

§ 47-20.2. **Place of registration; personal property.**—(a) As used in this section:

- (1) "Mortgage" includes a deed of trust and a conditional sales contract; unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25) and duly filed pursuant thereto;
- (2) "Mortgagor" includes a grantor in a deed of trust and a conditional sales vendee.

(b) To be validly registered pursuant to G.S. 47-20, a mortgage of personal property must be registered as follows:

- (1) If the mortgagor is an individual:
 - a. Who resides in this State, the mortgage must be registered in the county where the mortgagor resides when the mortgage is executed.
 - b. Who resides outside this State, the mortgage must be registered in each county in this State where any of the tangible mortgaged property is located at the time the mortgage is executed, in order to be effective as to such property; and if any of the mortgaged property consists of a chose in action which arises out of the business transacted at a place of business operated by the mortgagor in this State, then the mortgage must be registered in the county where such place of business is located.
- (2) If the mortgagor is a partnership, either limited or unlimited:
 - a. Which has a principal place of business in this State, the mortgage must be registered in the county where such place of business is located at the time the mortgage is executed.
 - b. Which does not have a principal place of business in this State but has any place of business in this State, the mortgage must be registered in every county in this State where any such place of business is located at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
 - c. Which has no place of business in the State, the mortgage must be registered in every county in this State where a partner resides at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
 - d. Which has no place of business in this State, and no partner

residing in this State, the mortgage must be registered in each county in this State where any of the mortgaged property is located when the mortgage is executed, in order to be effective as to the property in such county.

(3) If the mortgagor is a domestic corporation:

- a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
- b. Which having been formed prior to July 1, 1957, has no such registered office but does have a principal office in this State as shown by its certificate of incorporation, or amendment thereto, or legislative charter, the mortgage must be registered in the county where the principal office is said to be located by such certificate of incorporation, or amendment thereto, or legislative charter when the mortgage is executed.

(4) If the mortgagor is a foreign corporation:

- a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
- b. Which, having been domesticated prior to July 1, 1957, has no such registered office in this State, but does have a principal office in this State, the mortgage must be registered in the county where the principal office is said to be located by the statement filed with the Secretary of State in its application for permission to do business in this State or other document filed with the Secretary of State showing the location of such principal office in this State when the mortgage is executed.
- c. Which has not been domesticated in this State, the mortgage must be registered in the same county or counties as a mortgage executed by a nonresident individual.

(5) If the personal property concerned is a vehicle required to be registered under the motor vehicle laws of the State of North Carolina, then the provisions of this section shall not apply but the security interest arising from the deed of trust, mortgage, conditional sales contract, or lease intended as security of such vehicle may be perfected by recordation in accordance with the provisions of G.S. 20-58 through 20-58.10. (1953, c. 1190, s. 2; 1957, c. 979, ss. 1, 2; 1961, c. 835, s. 12; 1965, c. 700, s. 8.)

Cross Reference.—As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Editor's Note.—The act inserting this section became effective on January 1, 1954, and by section 5 it is provided that the act "shall not be applicable to mortgages, deeds of trust or conditional sales contracts registered prior to the effective date."

The 1957 amendment rewrote (3) and (4) of subsection (b). Section 3 of the amendatory act provides that any mortgage registered before July 1, 1957, shall not be affected by the amendment.

The 1965 amendment, effective at midnight June 30, 1967, added the language

following the first semicolon in subdivision (1) of subsection (a).

For comment on this section, see 31 N.C.L. Rev. 429 (1953).

Place of Registration.—For decisions relating to place of registration, see note to § 47-20.

Prior to the 1957 amendment, the actual location of the principal office of a corporation rather than the location set out in the certificate of incorporation was held to govern the place of registration. *Haworth v. General Motors Acceptance Corp.*, 238 F.2d 203 (4th Cir. 1956).

Applied in *National Bank v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965).

§ 47-20.3. Place of registration; instruments covering both personal property and real property.—To be validly registered pursuant to G.S. 47-20, a mortgage, deed of trust or conditional sales contract, or any com-

bination of these, of both personal property and real property must be registered pursuant to the provisions of G.S. 47-20.1 for the real property covered by the instrument and pursuant to the provisions of G.S. 47-20.2 for the personal property covered by the instrument, and in each case the registration must be indexed in the records designated for the particular type of property involved. (1953, c. 1190, s. 2.)

§ 47-20.4. Place of registration; chattel real.—To be validly registered pursuant to G.S. 47-20, a deed of trust or mortgage of a leasehold interest or other chattel real must be registered in the county where the land involved lies, or if the land involved is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land involved lies in order to be effective as to the land in that county. (1959, c. 1026, s. 1.)

§ 47-21. Blank or master forms of mortgages, etc.; embodiment by reference in instruments later filed.—It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed with the register of deeds, he shall record the same, and shall index the same in the manner now provided by law for the indexing of instruments recorded in his office, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be five (\$5.00) dollars.

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Alleghany, Ashe, Avery, Beaufort, Bladen, Camden, Carteret, Chowan, Cleveland, Columbus, Dare, Gates, Granville, Guilford, Halifax, Iredell, Jackson, Martin, Moore, Orange, Perquimans, Sampson, Stanly, Swain, Transylvania, Vance, Washington and Watauga counties. (1935, c. 153.)

Editor's Note.—For a discussion of this section, see 13 N.C.L. Rev. 395, where it is stated that the statute covers bills of sale, conditional sales and various other security devices, such as trust receipts.

§ 47-22. Counties may provide for photographic or photostatic registration.—The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in the office of the clerk of the superior court and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose leaf binders. (1941, c. 286.)

Editor's Note. — For comment on this section, see 19 N.C.L. Rev. 513. For subsequent statute providing for photographic recording, see §§ 153-9.1 to 153-9.7.

§ 47-23: Repealed by Session Laws 1953, c. 1190, s. 3.

§ 47-24. Conditional sales or leases of railroad property.—When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the

vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

- (1) The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.
- (2) Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.
- (3) Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three. (1883, c. 416; Code, s. 2006; Rev., s. 984; 1907, c. 150, s. 1; C. S., s. 3313.)

§ 47-25. Marriage settlements.—All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (1785, c. 238; R. C., c. 37, ss. 24, 25; 1871-2, c. 193, s. 12; Code, ss. 1269, 1270, 1281; 1885, c. 147; Rev., s. 985; C. S., s. 3314.)

Cross Reference.—As to marriage settlements, void as to existing creditors, see § 39-18.

Place of Registration.—Registration of a marriage settlement, embracing the slaves of a feme, was held to be properly made in the county where the feme resided and the slaves were, at the time the instrument was executed. *Latham v. Bowen*, 52 N.C. 337 (1860).

Registration in Another State.—An antenuptial contract entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband, although the property was removed to North Carolina and changed from what it originally was when the contract was signed. *Hicks v. Skinner*, 71 N.C. 539 (1874).

Registration Three Years after Execution.—A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors, whose debts were contracted after such registration. *Johnston v. Malcom*, 59 N.C. 120 (1860).

Law at Time of Execution Governs.—

§ 47-26. Deeds of gift.—All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for

Where a marriage took place, and a deed was made between husband and wife prior to 1868, it was governed by the law as it then existed and was not affected by the changes in the marital relations brought about by the Constitution of 1868 and the statutes passed in pursuance thereof, although the deed was not registered until 1884. *Walton v. Parish*, 95 N.C. 259 (1886).

Deed of Dual Character.—A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered. *Johnston v. Malcom*, 59 N.C. 120 (1860).

Agreement Not a Marriage Settlement.—An agreement by which the husband consents that the wife may convert one tract of land, which is in nowise subject to the claims of his creditors, into another tract of land, and in which, in order to enable her to make the conversion, he stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land, is not a marriage settlement falling within the section. *Teague v. Downs*, 69 N.C. 280 (1873).

value only from the time of registration. (1789, c. 315, s. 2; R. C., c. 37, s. 18; Code, s. 1252; 1885, c. 147; Rev., s. 986; C. S., s. 3315.)

A deed of gift is absolutely void when not registered within two years after its making. Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928), affirming 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927); Ferguson v. Ferguson, 225 N.C. 375, 35 S.E.2d 231 (1945).

After two years the legislature is without power to bring a deed to life again by the enactment of a statute lengthening the period in which it may be registered. Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928), affirming 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927). See Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942).

The time of the registration of deeds of gift under this section was not affected by § 146-64 which extended the time in which certain instruments could be registered until September 1, 1926. Booth v. Hairston, 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927), aff'd, 195 N.C. 8, 141 S.E. 480 (1928).

Title Vests in Grantor. — Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void ab initio and title vests in grantor. Winstead v. Woolard, 223 N.C. 814, 28 S.E.2d 507 (1944); Kirkpatrick v. Sanders, 261 F.2d 480 (4th Cir. 1958).

"Making" as used in this section means date of execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered. Turlington v. Neighbors, 222 N.C. 694, 24 S.E.2d 648 (1943); Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

Unregistered Deed Void Regardless of Fraud.—Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by this section, it is void, and may be set aside in an action by creditors of the grantor regardless of whether it was executed in fraud of creditors. Reeves v. Miller, 209 N.C. 362, 183 S.E. 294 (1936).

Acknowledgment after Lapse of Period Not Re-execution.—Where the owner of lands executed a deed of gift thereto and delivered same to the grantee, and some three and a half years thereafter he acknowledged the deed and filed same for registration, the acknowledgment was not a re-execution of the deed, and the deed of gift, not having been registered within two years of its execution, was void, and may not be revived by curative act of the legislature. Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942).

Registration as Notice. — The registration of the prior voluntary deed is notice to the subsequent purchaser. Taylor v. Eatman, 92 N.C. 602 (1885).

Consideration Not Sufficient to Remove Deed from Operation of Section. — The agreement by a wife to perform ordinary marital duties is not sufficient consideration to remove a deed made to her from the operation of this section. Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951).

Evidence held to show instrument executed for valuable consideration and therefore not void under this section. Cannon v. Blair, 229 N.C. 606, 50 S.E.2d 732 (1948).

Recorded Deed of Gift Is Valid without Consideration.—A deed of gift, duly signed and delivered, is an executed contract. If recorded within the time prescribed by this section it is valid, as between the parties and their heirs, without consideration, good or valuable. Edwards v. Batts, 245 N.C. 693, 97 S.E.2d 101 (1957).

A deed deposited in escrow with third party to be recorded after death of grantors and which was not recorded until over two years after its execution was void. Harris v. Briley, 244 N.C. 526, 94 S.E.2d 476 (1956).

Applied in Allen v. Allen, 209 N.C. 744, 184 S.E. 485 (1936); Batchelor v. Mitchell, 238 N.C. 351, 78 S.E.2d 240 (1953).

Cited in Blades v. Wilmington Trust Co., 207 N.C. 771, 178 S.E. 565 (1935).

§ 47-27. Deeds of easements.—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not

recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

- (1) It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.
- (2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.
- (3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.
- (4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to chapter 291 of the Public Laws of 1935 [G.S. §§ 117-6 to 117-27], to record any deeds or agreements for rights-of-way acquired subsequent to one thousand nine hundred and thirty-five, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750; 1959, c. 1244.)

Local Modification. — Alleghany, Harnett, Lee, Surry, Wilkes: C. S. 3316; Halifax, Martin: 1939, c. 45.

The provision of this section exempting decrees of condemnation from the requirement of registration is not repealed by the 1919 and 1943 amendments, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement notwithstanding the absence of registration. *Carolina Power & Light Co. v. Bowman*, 228 N.C. 319, 45 S.E.2d 531 (1947).

The provision of this section exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration supersedes the

provisions of § 40-19 that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of § 1-228 that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds. *Carolina Power & Light Co. v. Bowman*, 228 N.C. 319, 45 S.E.2d 531 (1947).

Priority of Duly Recorded Easement.—Where the owner of land conveys a portion thereof together with an easement over his remaining lands by deed duly recorded, grantees of the servient tenement, directly or by mesne conveyances, take title subject to the duly recorded easement, notwithstanding that no deed in their chain of title refers to such easement. *Waldrop v.*

Brevard, 233 N.C. 26, 62 S.E.2d 512 (1950).

Easement obtained by Highway Commission prior to June 1, 1959, need not be recorded. Kaperonis v. North Carolina

State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Quoted in Borders v. Yarbrough, 237 N.C. 540, 75 S.E.2d 541 (1953).

§ 47-28. Powers of attorney.—Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Code, s. 1249; 1899, c. 235, s. 15; Rev., s. 987; C. S., s. 3317.)

Cross Reference.—As to form for acknowledgment of instrument executed by attorney in fact, see § 47-43.

§ 47-29. Recording of bankruptcy records.—A copy of the petition with the schedules omitted beginning a proceeding under the United States Bankruptcy Act, or of the decree of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in such proceeding, shall be recorded in the office of any register of deeds in North Carolina, and it shall be the duty of the register of deeds, on request, to record the same. The register of deeds shall be entitled to the same fees for such registration as he is now entitled to for recording conveyances. (1939, c. 254.)

Editor's Note.—For comment on this section, see 17 N.C.L. Rev. 344.

§ 47-30. Plats and subdivisions; mapping requirements. — (a) **Size Requirements.**—All land maps presented to the register of deeds for recording in the registry of a county in North Carolina after January 1, 1960, shall have an outside marginal size of not more than twenty-one inches by thirty inches nor less than eight and one-half inches by eleven inches, including one and one-half inches for binding on the left margin and one-half inch border on each of the other sides. Where size of land areas, or suitable scale to assure legibility require, maps may be placed on two or more sheets with appropriate match lines. All counties currently operating under statutes or other laws setting forth regulatory size will be allowed to continue to use such sizes as are currently in use until June 30, 1963, on or before which time they shall modify their size to conform to those shown above.

(b) **Maps to Be Reproducible.** — All maps presented for recording shall be a reproducible map in cloth, linen, film, or other permanent material and submitted in this form. Such recorded map shall be maintained in map files and a direct or photographic copy shall be placed in the map book maintained for that purpose and properly indexed for use.

(c) **Information Contained in Title of Map.**—The title of each map shall contain the following information: Property designation, name of owner, location to include township, county and State, the date or dates the survey was made; scale in feet per inch in words or figures and bar graph; name, address, registration number and seal of engineer or surveyor.

(d) **Certificate; Form.**—There shall appear on each map a certificate by the person making the survey, or on each map where no survey was made, or a certificate by the person under whose supervision such survey or such map was made, stating the origin of the information shown on the map, including deeds and any recorded data shown thereon. If a complete survey was made, the error of closure as calculated by latitudes and departures must be shown. Any lines on the map that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the

person preparing the map. All maps to be recorded shall be probated as required by law for the registration of deeds.

The certificate required above shall include the source of information for the survey and data indicating the accuracy of closure of the map, and shall be in substantially the following form: "I, certify that this map was (drawn by me) (drawn under my supervision) from (an actual survey made by me) (an actual survey made under my supervision) (deed description recorded in Book, page, Book, page., etc.) (other); that the error of closure as calculated by latitudes and departures is 1 :; that the boundaries not surveyed are shown as broken lines plotted from information found in Book, page.; that this map was prepared in accordance with G.S. 47-30 as amended. Witness my hand and seal this day of, A. D., 19.

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Surveyor or Engineer"

Failure of the surveyor to comply with the requirements of this statute shall not preclude recordation provided that the officer accepting the map for recordation shall require the presence on the map of the surveyor's seal and the surveyor's certificate of acknowledgment.

(e) Showing Method of Computation.—If area of land parcels is shown, the method of computation used by the surveyor must be shown. Area "by estimation" is not acceptable, nor is the area copied from another source.

(f) Map to Contain Specific Information.—Every map shall contain the following specific information :

- (1) An accurately positioned north arrow coordinated with any bearings shown on the map. Indication shall be made as to whether the north index is true, magnetic or grid.
- (2) The azimuth or courses and distances as surveyed of every line shall be shown including offset lines where actually used in the field. Distances shall be in feet and decimals thereof; other units of measure may be placed in parentheses if desired.
- (3) All map lines shall be by horizontal (level) measurements. All information shown on the map shall be correctly plotted to the scale shown. Enlargement of portions of a map are acceptable in the interest of clarity, where shown as inserts on the same sheet.
- (4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature of the curve to the point of tangent shall be shown as standard curve data, or as a traverse of chords around the curve.
- (5) Where a subdivision of land is set out on the map, all streets and lots shall be carefully plotted with dimension lines indicating widths and all other pertinent information necessary to re-establish in the field.
- (6) Where control corners have been established in compliance with G.S. 39-32.1, 2, 3, and 4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the map. All other corners which are marked by monument or natural object shall be so identified on all maps, and all corners of adjacent owners in the boundary lines of the subject tract which are marked by monument or natural object must be shown with a distance from one or more of the subject tract's corners.
- (7) The names of adjacent landowners and lot block and subdivision designations shall be shown where they have been determined and verified by the surveyor.
- (8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown, and locating,

offset or traverse lines shall be plotted in broken lines with azimuths or courses and distances shown on the map.

- (9) Where the map is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to a monument of some United States or State Agency Survey System, such as the United States Coast and Geodetic Survey Systems, where such monument is within 2,000 feet of said corner. Where the North Carolina Grid System coordinates of said monument have been published by the North Carolina Department of Conservation and Development, the coordinates of the referenced corner shall be computed and shown in X and Y ordinates on the map. Where such a monument is not available, the tie shall be made to some pertinent and permanent recognizable landmark or identifiable point.

(g) Recording of Map.—A map, when proven and probated as provided herein as deeds and other conveyances, when presented for recording, shall be recorded in the Map Book and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any map herein authorized shall have the same effect as if the description of the lands as indicated on the record of the map were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the recording of any map made prior to January 1, 1960.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded map.

(j) The provisions of this section shall not apply to boundary maps of areas annexed by municipalities nor to maps of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Union, Vance, Warren, Washington, Watauga and Yadkin. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1.)

Local Modification.—Davie, as to subsection (f) (3): 1961, c. 609; Wilson: 1957, c. 1137.

Editor's Note. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 513.

As to validation of registration of plats prior to the 1953 amendment, see § 47-108.10.

The first 1963 amendment inserted, near the beginning of the second paragraph of subsection (d), "include the source of information for the survey and data indicating the accuracy of closure of the map, and shall." It also added the third paragraph of subsection (d).

The second 1963 amendment inserted "Mitchell" in subsection (k).

The third 1963 amendment deleted "Bladen" from subsection (k).

The fourth 1963 amendment inserted "Rockingham" in subsection (k).

The fifth 1963 amendment inserted subsection (j).

The 1965 amendment inserted "Clay" in the list of counties in subsection (k).

This section was designed to regulate priorities as between two conflicting dedications, and does not affect the general principles of dedication and acceptance and the owner's right of revocation. *Wittson v. Dowling*, 179 N.C. 542, 103 S.E. 18 (1920).

This section was enacted in view of the decision in *Sexton v. Elizabeth City*, 169 N.C. 385, 86 S.E. 344 (1915), in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. *Wittson v. Dowling*, 179 N.C. 542, 103 S.E. 18 (1920).

§ 47-30.1. Plats and subdivisions; alternative requirements.—In a county to which the provisions of G.S. 47-30 do not apply, any person, firm or corporation owning land may have a plat thereof recorded in the office of the register of deeds if such land or any part thereof is situated in the county, upon proof upon oath by the surveyor making such plat or under whose supervision such plat was made that the same is in all respects correct according to the best of his knowledge and belief and was prepared from an actual survey by him made, or made under his supervision, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct according to the best of his knowledge and belief and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. (1961, c. 534, s. 1; c. 985.)

Editor's Note.—Session Laws 1961, c. 534, s. 2, provides that any plat recorded in accordance with the provisions of G.S. 47-30.1 in a county to which the provisions of G.S. 47-30 do not apply, between December 31, 1959, and May 30, 1961, is

hereby in all respects validated and confirmed.

Session Laws 1961, c. 985, extended the application of this section to plats or surveys made under the surveyor's supervision.

§ 47-31. Certified copies may be registered; used as evidence.—A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the State. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319.)

Cross References.—As to court records as proof of destroyed instruments, see §§ 98-12, 98-13. As to certified copies of registered instruments as evidence, see § 8-18. As to certified copies of deeds, mortgages, etc., as evidence and for registry, see § 8-20.

Registration of Copies in Proper County Allowed.— This section allows certified copies of deeds erroneously registered to be recorded in the proper counties. *Weston v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912).

Proper Registration of Original Presumed.—It is to be assumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. *Starke v. Etheridge*, 71 N.C. 240 (1874); *Love v. Hardin*, 87 N.C. 249 (1882); *Strickland v. Draughan*, 88 N.C. 315 (1883).

Copy of Contract Used in Evidence to Prove Lost Original.—For proof of the

loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. *Mauney v. Crowell*, 84 N.C. 314 (1881).

Certified Copy 100 Years Old May Be Registered though Mutilated.—Under this section a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to probate and registration, though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions. *Richmond Cedar Works v. Stringfellow*, 236 Fed. 264 (E.D.N.C. 1916).

Cited in United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938).

§ 47-32. Photographic copies of plats, etc.; fees of clerk.— After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of

superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map. The clerk of superior court shall be allowed a fee to be fixed by the county commissioners, to be taxed in the bill of costs, which fee shall cover the cost of making said photographic copy and all services of the clerk in connection therewith.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2.)

Cross Reference.—For subsequent statute providing for photographic recording, see §§ 153-9.1 to 153-9.7.

Editor's Note.—The first 1963 amendment substituted "may" for "shall" in three places in the first sentence.

The second 1963 amendment deleted "Bladen" from the last paragraph.

The third 1963 amendment inserted "Rockingham" in the list of counties.

The 1965 amendment inserted "Clay" in the list of counties in the last paragraph of this section.

§ 47-32.1. Photostatic copies of plats, etc.; fees of clerk; alternative provisions.—In a county to which the provisions of G.S. 47-32 do not apply, the following alternative provisions shall govern photostatic copies of plats filed in special proceedings:

In all special proceedings in which a plat, map or blueprint shall be filed as a part of the papers, the clerk of the superior court may have a photostatic copy of said plat, map or blueprint made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blueprint. The clerk of the superior court shall be allowed a fee to be fixed by the county commissioners not exceeding the sum of five dollars (\$5.00) to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1961, c. 535, s. 1.)

Editor's Note.—The 1961 act inserting this section renumbered former § 47-32.1 to appear as § 47-32.2.

Session Laws 1961, c. 535, s. 2, provides that any plat filed as part of the papers in a special proceeding in accordance with

the provisions of G.S. 47-32.1, in a county to which the provisions of G.S. 47-32 do not apply, between December 31, 1959, and May 30, 1961, is hereby in all respects validated and confirmed.

§ 47-32.2. Violation of § 47-30 or 47-32 a misdemeanor. — Any person, firm or corporation wilfully violating the provisions of § 47-30 or 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss.

3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3.)

Editor's Note.—The first 1963 amendment deleted "Bladen" from the last paragraph.

The 1965 amendment added "Clay" in the list of counties in the last paragraph of this section.

The second 1963 amendment inserted "Rockingham" in the list of counties.

§ 47-33. Certified copies of deeds made by alien property custodian may be registered.—Any copy of a deed made, or purporting to be made, by the United States alien property custodian duly certified pursuant to title twenty-eight, section six hundred sixty-one of United States Code by the department of justice of the United States, with its official seal impressed thereon, when the said certified copy reveals the fact that the execution of the original was acknowledged by the alien property custodian before a notary public of the District of Columbia, and that the official seal of the alien property custodian by recital was affixed or impressed on the original, and further reveals it to have been approved, as to form, by general counsel, and the copy also shows that the original was signed and approved by the acting chief, division of trusts, and was witnessed by two witnesses, shall, when presented to the register of deeds of any county wherein the land described therein purports to be situate, be recorded by the register of deeds of such county without other or further proof of the execution and/or delivery of the original thereof, and the same when so recorded shall be indexed and cross-indexed by the register of deeds as are deeds made by individuals upon the payment of the usual and lawful fees for the registration thereof. (1937, c. 5, s. 1.)

§ 47-34. Certified copies of deeds made by alien property custodian admissible in evidence.—The record of all such recorded copies of such instruments authorized in § 47-33 shall be received in evidence in all the courts of this State and the courts of the United States in the trial of any cause pending therein, the same as though and with like effect as if the original thereof had been probated and recorded as required by the law of North Carolina, and the record in the office of register of deeds of such recorded copy of such an instrument shall be presumptive evidence that the original of said copy was executed and delivered to the vendee, or vendees therein named, and that the original thereof has been lost or unintentionally destroyed without registration, and in the absence of legal proof to the contrary said so registered copy shall be conclusive evidence that the United States alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-35. Register to fill in deeds on blank forms with lines.—Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1; C. S., s. 3320.)

§ 47-36. Errors in registration corrected on petition to clerk.—Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases.

(1790, c. 326, ss. 2, 3, 4; R. C., c. 37, s. 28; Code, s. 1266; Rev., s. 1008; C. S., s. 3321.)

Cross Reference.—As to correction of grants, see § 146-46 et seq.

Proceedings Exclusive.—The proceedings provided for by this section are exclusive. *Hopper v. Justice*, 111 N.C. 418, 16 S.E. 626 (1892).

Grantor Cannot Call upon Grantee to Correct Mistake.—Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under this section and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum. *Old-*

ham v. First Nat'l Bank, 85 N.C. 241 (1881).

Register May Correct Own Mistake.—The order of registration by the clerk is a continuous one, with which the register of deeds may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. *Brown v. Hutchinson*, 155 N.C. 205, 71 S.E. 302 (1911).

The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. *Brown v. Hutchinson*, 155 N.C. 205, 71 S.E. 302 (1911).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. **Adjudication and order of registration.**—The form of adjudication and order of registration required by § 47-14 shall be substantially as follows: North Carolina, County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This day of, A. D.....
(Official seal.)

.....
(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered." (1899, c. 235, s. 7; 1905, c. 344; Rev., ss. 1001, 1010; C. S., s. 3322.)

It is a sufficient compliance with this section for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to

law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." *Kleybolte & Co. v. Black Mountain Timber Co.*, 151 N.C. 635, 66 S.E. 663 (1910).

Applied in *Clark v. Butts*, 240 N.C. 709, 83 S.E.2d 885 (1954).

§ 47-38. **Acknowledgment by grantor.**—Where the instrument is acknowledged by the grantor or maker, or where a married woman is a grantor or maker, the form of acknowledgment shall be in substance as follows: North Carolina, County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the day of (year).

(Official seal.)

.....
(Signature of officer.)

(Rev., s. 1002; C. S., s. 3323; 1945, c. 73, s. 13.)

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the stat-

ute. *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 12 (1938).

"Acknowledgment" describes the act of

personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 12 (1938).

An acknowledgment taken over a telephone does not meet the statutory requirements. *Southern State Bank v. Summer*, 187 N.C. 762, 122 S.E. 848 (1924).

Position of Name of Justice.—It is not necessary to the validity of the probate of

a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. *Brown v. Hutchinson*, 155 N.C. 205, 71 S.E. 302 (1911).

Cited in *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929).

§ 47-39. Form of acknowledgment of conveyances and contracts between husband and wife.—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the provisions of § 52-12 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this (day of month), A. D. (year).

(Official seal.)

.....
(Signature of officer.)

(1899, c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14; 1957, c. 1229, s. 2.)

Cross References.—As to conveyances by husband and wife, see § 39-7 et seq. For repeal of laws requiring private examination of married women, see § 47-14.1.

§ 47-40. Husband's acknowledgment and wife's acknowledgment before the same officer.—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

I (here give name of official and his official title), do hereby certify that (here give names of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument.

(1899, c. 235, s. 8; 1901, c. 299; Rev., s. 1004; C. S., s. 3325; 1945, c. 73, s. 15.)

Cross Reference. — As to necessity of seal of probating officer when such officer has an official seal, see § 47-5.

§ 47-41. Corporate conveyances.—The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the deed or other instrument is executed by the president or vice-president of the corporation, is sealed with its common, or corporate seal, and is attested by its secretary or assistant secretary, or, in case of a bank, by its secretary, assis-

tant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

.....
 (State and county, or other description
 of place where acknowledgment is taken)

I,,
 (Name of officer taking (Official title of officer
 acknowledgment) taking acknowledgment)

certify that personally
 (Name of secretary, assistant secretary,
 cashier or assistant cashier)

came before me this day and acknowledged that he (or she) is
 (Secretary, assistant secretary,
 cashier or assistant cashier)

of, a corporation, and that by authority duly given
 (Name of corporation)

and as the act of the corporation, the foregoing instrument was signed in its name
 by its, sealed with its corporate seal, and attested
 (President or vice-president)

by himself (or herself) as its
 (Secretary, assistant secretary,
 cashier or assistant cashier)

My commission expires
 (Date of expiration of commission as notary public)

Witness my hand and official seal, this the day of,
 (Month)
 (Year)

.....
 (Signature of officer taking acknowledgment)

(Official seal, if officer taking
 acknowledgment has one)

- (1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."
- (2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment.
- (3) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.

If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:
 North Carolina, County.

This day of, A. D., personally came before me (here give the name and official title of the officer who signs this certificate, A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such sub-

scribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this day of (year).
(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:
North Carolina, County.

This day of, A. D., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the day of (year).
(Official seal.)

.....
(Signature of officer.)

North Carolina, County.

This is to certify that on the day of, 19....., before me personally came (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that is the president (or vice-president), and is the secretary (or assistant secretary) of the, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the day of (year).
(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This day of A. D., personally came before me (here give name and official title of officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said cor-

poration by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

.....
(Signature of officer.)

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

.....
(Name of state)

.....
(County)

I,
(Name of officer taking proof) (Official title of officer taking proof)

of , certify that
(County) (Name of state)

..... personally appeared before
(Name of subscribing witness)

me, and being duly sworn, stated that in his presence

.....
(Name of president, secretary or treasurer of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

WITNESS my hand and official seal, this day of

....., 19.....
(Month) (Year)

.....
(Signature of official taking proof)

.....
(Official title of official taking proof)

My commission expires
(Date of expiration of official's commission)

(1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; Rev., s. 1005; 1907, c. 927, s. 1; C. S., s. 3326; 1939, c. 20, ss. 1, 2; 1943, c. 172; 1947, c. 75, s. 1; 1949, c. 1224, s. 1; 1953, c. 1078, s. 4; 1955, c. 1345, s. 5.)

Cross References.—As to validation of certain corporate acknowledgments, see §§ 47-70, 47-71, 47-72, 47-73. As to probate of deeds by examination of subscribing witness in certain cases where corporation has ceased to exist, see § 47-16.

Editor's Note.—For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 440.

Power of Directors to Mortgage Corporate Property.—This section appears to recognize inferentially the power of a

board of directors to mortgage the corporate property. *Wall v. Rothrock*, 171 N.C. 388, 88 S.E. 633 (1916).

Reference to Forms of Probate Sufficient in Law.—This section providing that it shall not exclude "other forms of probate which would be deemed sufficient in law," can only refer to forms of probate deemed sufficient by the common law, under which a certificate, showing that the officer whose duty it was to affix the seal acknowledged that he did so, is suf-

ficient. *National Bank v. Hill*, 226 Fed. 102 (E.D.N.C. 1915).

Substantial Compliance Sufficient.—The probate of a deed of a corporation is sufficient if it substantially shows the facts required by this section which expressly provides that the form prescribed “shall not exclude other forms of probate.” *Board of Comm’rs v. Wills & Sons*, 236 Fed. 362 (E.D.N.C. 1916).

Where the probate of a corporation’s deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922).

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. *Merchants’ & Farmers’ Bank v. Pearson*, 186 N.C. 609, 120 S.E. 210 (1923).

Same—Seal of Corporation.—It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as “the grantor, for the

purpose therein expressed,” it is sufficient; and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word “seal” enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the “seal” seems to be cured under the provisions of § 47-72, and as to signatures of the officials by § 47-73. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922).

What Does Not Constitute Substantial Compliance.—When it does not appear from the probate of a corporation’s deed to lands that the seal affixed is the common seal of the corporation, or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with this section, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. *Withrell v. Murphy*, 154 N.C. 82, 69 S.E. 748 (1910).

A corporation’s deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be “his” act and deed, as such. *Withrell v. Murphy*, 154 N.C. 82, 69 S.E. 748 (1910).

Acknowledgment of Individuals Instead of Officers.—The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers, is fatally defective and its registration, in consequence, is a nullity. *Bernhardt v. Brown*, 122 N.C. 587, 29 S.E. 884 (1898).

§ 47-42. Attestation of bank conveyances by secretary or cashier.—(a) In all forms of proof and certificates for deeds and conveyances executed by banking corporations, either the secretary or the cashier of said banking corporation shall attest such instruments.

(b) All deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated. (1939, c. 20, s. 2½; 1957, c. 783, s. 4.)

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.—When an instrument purports to be signed by parties acting through another by virtue of the execution of a power of attorney, the following form of certificate shall be deemed sufficient, but shall not exclude other forms which would be deemed sufficient in law:

North Carolina, County.

I (here give name of the official and his official title), do hereby certify that (here give name of attorney in fact), attorney in fact for (here give names of parties who executed the instrument through attorney in fact), personally ap-

peared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of parties who executed the instrument through attorney in fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and the county and state of recordation), on the (day of month, month, and year of recordation), and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said (here give name of attorney in fact) acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney in fact).

WITNESS my hand and official seal, this day of,
(year)

(Official seal.)

.....
Signature of Officer

(1941, c. 238.)

Cross References.—For amendment of registration of power of attorney, see § this section, see § 47-43.1 and note. As to 47-28.

§ 47-43.1. Execution and acknowledgment of instruments by attorneys or attorneys in fact.—When an instrument purports to be executed by parties acting through another by virtue of a power of attorney, it shall be sufficient if the attorney or attorney in fact signs such instrument either in the name of the principal by the attorney or attorney in fact or signs as attorney or attorney in fact for the principal; and if such instrument purports to be under seal, the seal of the attorney in fact shall be sufficient. For such instrument to be executed under seal, the power of attorney must have been executed under seal. (1949, c. 66, s. 1.)

Editor's Note.—Section 1 of the act inserting the above section provides that § 47-43 is amended by adding § 47-43.1 at the end thereof. Section 2 of the act, read in conjunction with section 4, provides that all instruments executed prior to February 11, 1949, which satisfy the requirements of the act, and are otherwise valid as to form and substance, shall be deemed sufficient and valid in law.
For brief comment on this section, see 27 N.C.L. Rev. 421.

§ 47-43.2. Officer's certificate upon proof of instrument by subscribing witness.—When the execution of an instrument is proved by a subscribing witness as provided by G.S. 47-12, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF
(Name of state)
..... COUNTY
I,, a
(Name of officer taking proof) (Official title of officer taking proof)
of COUNTY,, certify that
(Name of state)
..... personally appeared before me this day,
(Name of subscribing witness)
and being duly sworn, stated that in his presence
(Name of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

WITNESS my hand and official seal, this the day of
19.....
(Year)

.....
(Signature of officer taking proof)
.....
(Official title of officer taking proof)

My commission expires
(Date of expiration of officer's commission)

Provided, however, that when instruments have been recorded upon proof of execution of the instrument by certificate of a judicial officer, showing that execution was proven by oath and examination of the subscribing witness, the date of such examination, and the signature of the officer taking the proof, such proof of execution shall be deemed sufficient on all instruments filed for registration prior to March 15, 1961. (1951, c. 379, s. 3; 1953, c. 1078, s. 3; 1955, c. 1345, s. 6; 1961, c. 237.)

§ 47-43.3. **Officer's certificate upon proof of instrument by proof of signature of maker.**—When the execution of an instrument is proved by proof of the signature of the maker as provided by G.S. 47-12.1 or as provided by G. S. 47-13, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF
(Name of state)

..... COUNTY

I,, a
(Name of officer taking proof) (Official title of officer taking proof)

of COUNTY,, certify that
(Name of state)

..... personally appeared before me this day,
(Name of person familiar with maker's handwriting)

and being duly sworn, stated that he knows the handwriting of
..... and that the signature to the foregoing
(Name of maker)

instrument is the signature of
(Name of maker)

WITNESS my hand and official seal, this the day of
19.....
(Year)

.....
(Signature of officer taking proof)
.....
(Official title of officer taking proof)

My commission expires
(Date of expiration of officer's commission)

(1951, c. 379, s. 3.)

§ 47-43.4. **Officer's certificate upon proof of instrument by proof of signature of subscribing witness.**—When the execution of an instrument is proved by proof of the signature of a subscribing witness as provided by G.S. 47-12.1, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF
(Name of state)

..... COUNTY

I, , a
(Name of officer taking proof) (Official title of officer taking proof)

of COUNTY,, certify that
(Name of state)

..... personally appeared before me this day,
(Name of person familiar with
handwriting of subscribing witness)

and being duly sworn, stated that he knows the handwriting of

....., and that the signature of,
(Name of subscribing witness) (Name of subscribing witness)

as a subscribing witness to the foregoing instrument is the signature of

(Name of subscribing witness)

WITNESS my hand and official seal, this the day of

....., 19.....
(Month) (Year)

.....
(Signature of officer taking proof)

.....
(Official title of officer taking proof)

My commission expires
(Date of expiration of officer's commission)

(1951, c. 379, s. 3.)

§ 47-44. **Clerk's certificate upon probate by justice of peace.**—When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this State, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of and State (or territory) of, and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this day
of, A. D.
(Official seal.)

.....
(Signature of officer.)

(1899, c. 235, s. 8; Rev., s. 1006; C. S., s. 3327.)

§ 47-45. Clerk's certificate upon probate by nonresident official without seal.—When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

..... County.
I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of and state of (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.
In witness whereof, I hereunto set my hand and official seal, this day of, A. D.
(Official seal.)

.....
(Signature of Clerk.)
(1899, c. 235, s. 8; Rev., s. 1007; C. S., s. 3328.)

§ 47-46. **Verification; form of entry.**—The registers of deeds in the several counties of the State shall, after each instrument or document has been transcribed on the record, verify the record with the original and the entry of record shall read “Recorded and Verified,” and the same shall be without extra charge. (1929, c. 320, s. 1.)

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. **Defective order of registration; “same” for “this instrument”.**—Where instruments were admitted to registration prior to March 2, 1905, and the clerk’s order for the registration used the word “same” in place of “this instrument,” the said registrations are good and valid. (1905, c. 344; Rev., s. 1010; C. S., s. 3329.)

§ 47-48. **Clerk’s certificate failing to pass on all prior certificates.**—When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to January first, one thousand nine hundred and sixty-four. (1917, c. 237; C. S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001.)

Editor’s Note. — The 1965 amendment substituted “one thousand nine hundred and sixty-four” for “one thousand nine hundred and forty-five” in the second sentence.

§ 47-49. **Defective certification or adjudication of clerk, etc., admitting to registration.**—In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the State of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and suffi-

cient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgments of said instruments were correct or in due form. (1919, c. 248; C. S., s. 3331.)

§ 47-50. Order of registration omitted.—In all cases prior to December 31, 1960, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C. S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79.)

§ 47-51. Official deeds omitting seals.—All deeds executed prior to April, 1, 1959, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C. S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408.)

§ 47-52. Defective acknowledgment on old deeds validated.—The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bears date prior to January first, one thousand nine hundred and seven (1907) where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal, and where the certificate of said officer appears otherwise to be genuine. (1933, c. 439.)

§ 47-53. Probates omitting official seals, etc. — In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or

other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, one thousand nine hundred and sixty-one: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C. S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500.)

Editor's Note. — The 1965 amendment substituted "one thousand nine hundred and sixty-one" for "one thousand nine hundred and fifty-one" in the last sentence.

§ 47-53.1. Acknowledgment omitting seal of notary public.—Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1963. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412.)

Cross Reference.—As to other sections relating to absence of notarial seal, see §§ 47-102, 47-103.

Editor's Note. — The 1963 amendment substituted "1963" for "1953" at the end of the section.

§ 47-54. Registration by register's deputies or clerks.—All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's deputy or clerk, and signed in the name of the register of deeds by the deputy or clerk, or signed by the deputy in his own name and not in the name of the register of deeds, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed in the name of the register of deeds by such register. (1911, c. 184, s. 1; C. S., s. 3335; 1953, c. 849; 1963, c. 203.)

Local Modification.—Montgomery: 1955, c. 1223.

Editor's Note. — The 1963 amendment rewrote this section.

§ 47-55. Before officer in wrong capacity or out of jurisdiction.—All deeds, conveyances, or other instruments permitted by law to be registered in this State, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the State, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1; C. S., s. 3336.)

Deeds, etc., Ordered to Be Registered by Certain Justices Validated. — Public Laws 1927, c. 189, s. 2, provides that all deeds, conveyances, or other instruments permitted by law to be registered in this State which have been probated or ordered to be registered by any of the several justices of the peace appointed under Public Laws 1921, c. 237, since the first Monday in April, nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said chapter, are hereby declared to have been duly

proved, probated and recorded, and to be valid.

Validating Acts Not to Affect Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates, while good, as between the parties and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. *Gordon v. Collett*, 107 N.C. 362, 12 S.E. 332 (1890); *Williams v. Kerr*, 113 N.C. 306, 18 S.E. 501 (1893).

§ 47-56. Before justices of peace, where clerk's certificate or order of registration defective.—In every case where it appears from the record of the office of any register of deeds in this State that a justice of the peace in this State or any other state of the United States, has taken and certified the proof of any instrument required by the law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered prior to the first day of January, 1963, in the county where the lands described in the instrument are located, without a certificate or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are hereby validated. (1907, c. 83, s. 1; C. S., s. 3337; 1951, c. 35; 1963, c. 1014.)

Local Modification.—Clay: 1933, c. 530.

Editor's Note. — The 1963 amendment inserted "or any other state of the United States" near the beginning of the section

and substituted "1963" for "one thousand nine hundred and fifty-one" near the middle of the section.

§ 47-57. Probates on proof of handwriting of maker refusing to acknowledge.—All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (1897, c. 28; Rev., s. 1026; C. S., s. 3338.)

§ 47-58. Before judges of Supreme Court or superior courts or clerks before 1889.—Wherever the judges of the Supreme Court or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (1871-2, c. 200, s. 1; Code, s. 1260; 1889, c. 252; 1891, c. 484; Rev., s. 1009; C. S., s. 3339.)

In General.—This section was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. *Weston v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912).

Constitutionality.—This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. *Gordon v. Collett*, 107 N.C. 362, 12 S.E. 332 (1890).

Liberal Construction. — The statutes validating defective probates and registrations of deeds are remedial, and must be liberally construed to embrace all cases

fairly within their scope. *Weston v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912).

Defective Probates of County Courts Embraced.—Where it is argued by counsel that this section does not refer to probates taken by the county courts, but to those of the clerks of said courts, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. *Weston v. Roper Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912).

Intentional Breaches of Authority Not Validated.—There was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in miscon-

ceiving the extent of the power affirmatively conferred by law, but in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. *Freeman v. Person*, 106 N.C. 251, 10 S.E. 1037 (1890).

Probate of Interested Officer.—This section has been considered in *Freeman v. Person*, 106 N.C. 251, 10 S.E. 1037 (1890), and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. *White v. Connelly*, 105 N.C. 63, 11 S.E. 177 (1890).

Acts of Deputy Clerks.—At the time, and prior to the enactment of this section, deputy clerks could not take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they

and the judges of the courts had authority to do so, and in many instances they undertook to exercise such authority. To cure errors in this respect, and render effectual many official acts done by honest misapprehension of the law, the legislature enacted this section. *Tatom v. White*, 95 N.C. 453 (1886). As to authority of deputy clerks to take probate on instruments, see § 47-1.

This section validates probates of deeds and privy examinations taken before a deputy clerk prior to January 1, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. *Gordon v. Collett*, 107 N.C. 362, 12 S.E. 332 (1890).

Scope of Original Section.—This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to February 12, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code in 1883. *Tatom v. White*, 95 N.C. 453 (1886).

§ 47-59. Before clerks of inferior courts.—All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate an order of registration, shall be valid. This section shall apply only to the counties of Ashe, Beaufort, Bertie, Buncombe, Cumberland, Duplin, Edgecombe, Granville, Greene, Halifax, Hertford, Iredell, Lenoir, Martin, Mecklenburg, New Hanover, Northampton, Robeson and Wayne. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, one thousand eight hundred and ninety-three. (1885, cc. 105, 108; 1889, cc. 143, 463; Rev., ss. 1020, 1021; C. S., s. 3340.)

§ 47-60. Order of registration by judge, where clerk party.—All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the Supreme Court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid. (1893, c. 3, s. 2; Rev., s. 1011; C. S., s. 3342.)

§ 47-61. Order of registration by interested clerk.—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to which the clerks of the superior courts are parties, or in which they have an interest, and which have been registered on the order of such clerks or their deputies, or by assistant clerks of the superior courts, on proof of acknowledgment taken before such clerks, assistant clerks, deputy clerks, justices of the peace or notaries public, be, and the same are declared valid. (1891, c. 102; 1899, c. 258; 1905, c. 427; Rev., s. 1015; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; C. S., s. 3343; 1935, c. 235.)

§ 47-62. Probates before interested notaries.—The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments. (Ex. Sess., 1908, c. 105, s. 2; C. S., s. 3344.)

Cross Reference.—See § 47-95.

§ 47-63. Probates before officer of interested corporation.—In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C. S., s. 3345.)

Cross Reference.—See § 47-92.

The grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, but a chattel mortgage to a bank

will not be declared void because the acknowledgment thereof was taken by its cashier. *Bank of Duplin v. Hall*, 203 N.C. 570, 166 S.E. 526 (1932).

§ 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1945.—No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and forty-five, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. (Ex. Sess. 1913, c. 41; C. S., s. 3346; 1929, c. 24, s. 1; 1943, c. 135; 1945, c. 860.)

§ 47-65. Clerk's deeds, where clerk appointed himself to sell.—All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, one thousand nine hundred and five, in any proceeding before him in which he has appointed himself or his deputy to make the sale of real property or other property are hereby validated. (1911, c. 146, s. 1; C. S., s. 3347.)

§ 47-66. Certificate of wife's "previous" examination.—All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed. (1893, c. 130; Rev., s. 1016; C. S., s. 3348.)

§ 47-67. Probates of husband and wife in wrong order.—All probates prior to March 6, 1893, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated. (1893, c. 293; Rev., s. 1017; C. S., s. 3349.)

Cross Reference.—As to order of acknowledgment being immaterial, see § 39-8.

Rights of Third Parties Acquired before

Statute Cannot Be Divested. — If third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with

notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. *Smith v. Castrix*, 27 N.C. 318 (1844); *Robinson v. Willoughby*, 70 N.C. 358 (1874); *Gordon v. Collett*, 107

N.C. 362, 12 S.E. 332 (1890); *Long v. Crews*, 113 N.C. 256, 18 S.E. 499 (1893); *Williams v. Kerr*, 113 N.C. 306, 18 S.E. 501 (1893); *Quinnerly v. Quinnerly*, 114 N.C. 145, 19 S.E. 99 (1894); *Barrett v. Barrett*, 120 N.C. 127, 26 S.E. 691 (1897).

§ 47-68. Probates of husband and wife before different officers.—Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this State or one in this State and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this State, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word “probate,” as used in this section, shall include privy examination of the wife. (1895, c. 120; Rev., s. 1018; 1907, c. 34, s. 1; C. S., s. 3350.)

Cross Reference. — As to acknowledgment before different officers at different times and places, see § 39-8.

§ 47-69. Wife free trader; no examination or husband's assent.—In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. (Ex. Sess. 1913, c. 54, s. 1; C. S., s. 3351.)

Applied in *Foster v. Williams*, 182 N.C. 632, 109 S.E. 834 (1921).

§ 47-70. By president and attested by treasurer under corporate seal.—All deeds and conveyances for lands in this State, made by any corporation of this State, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the State of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this State where the title of said lands shall come in controversy. (1905, c. 307; Rev., s. 1028; C. S., s. 3352.)

§ 47-71. By president and attested by witness before January, 1900.—Any deed or conveyance for land in this State, made prior to January first, one thousand nine hundred, by the president of any corporation duly chartered under the laws of this State, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be ad-

mitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this State at the date of the execution of said deed. (1909, c. 859, s. 1; C. S., s. 3353.)

§ 47-71.1. Corporate seal omitted prior to January, 1963. — Any corporate deed, or conveyance of land in this State, made prior to January 1, 1963, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015.)

Editor's Note. — The 1963 amendment substituted "1963" for "1957" near the beginning of the section.

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1963.—In all cases prior to the first day of January, one thousand nine hundred and sixty-three, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; C. S., s. 3354; 1927, c. 126; 1963, c. 1094.)

Editor's Note. — The 1963 amendment substituted "one thousand nine hundred and sixty-three" for "one thousand nine hundred and twenty-seven."

§ 47-73. Probated and registered on oath of subscribing witness.—In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2; C. S., s. 3355.)

§ 47-74. Certificate alleging examination of grantor instead of witness.—Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated. (1925, c. 84.)

§ 47-75. Proof of corporate articles before officer authorized to probate.—All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages, are ratified. (1901, c. 170; Rev., s. 1027; C. S., s. 3356.)

§ 47-76. Before officials of wrong state.—In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or

other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probates and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. (1905, c. 505; Rev., s. 1013; C. S., s. 3357.)

§ 47-77. Before notaries and clerks in other states.—All deeds and conveyances made for lands in this State which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of Congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (1883, c. 129, ss. 1, 2; Code, ss. 1262, 1263; 1885, c. 11; Rev., ss. 1022, 1023; 1915, c. 213; C. S., s. 3358.)

Constitutionality. — The legislature has the constitutional right to enact statutes making valid deeds theretofore invalid by reason of defective probate, when no vested rights are impaired. *Penland v. Barnard*, 146 N.C. 378, 59 S.E. 1109 (1907).

Registration upon Certificate of Commissioner of Deeds from Another State.—A deed registered in the proper county upon the certificate of a commissioner of

deeds from another state must have the fiat from the clerk ordering it to be registered, or the registration will be invalid. This defect is not cured by this section. *Cozard v. McAden*, 148 N.C. 10, 61 S.E. 633 (1908). See § 47-81.

Applied, as to deed probated in Tennessee in 1869, in *Penland v. Barnard*, 146 N.C. 378, 59 S.E. 1109 (1907).

§ 47-78. Acknowledgment by resident taken out of State. — When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this State has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (1895, c. 181; Rev., s. 1019; C. S., s. 3359.)

§ 47-79. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this State, executed prior to January 1, 1923, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this State, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this State in the county where the lands conveyed are sit-

uated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon are validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C. S., s. 3360; 1951, c. 1134, s. 1.)

§ 47-80. Sister state probates without governor's authentication.—In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this State then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (1901, c. 39; Rev., s. 1014; C. S., s. 3361.)

§ 47-81. Before commissioners of deeds.—Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. (1913, c. 39, s. 2; C. S., s. 3362.)

Section Cannot Interfere with Vested Rights.—This section is remedial in character and beneficent in purpose, yet it will not be permitted to impair or to interfere with the vested rights of others. *Champion Fibre Co. v. Cozard*, 183 N.C. 600, 112 S.E. 810 (1922).

This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. *Champion Fibre Co. v. Cozard*, 183 N.C. 600, 112 S.E. 810 (1922).

§ 47-81.1. Before commissioner of oaths.—All deeds, mortgages or other instruments required to be registered, which prior to March 5, 1943, have been probated by a commissioner of oaths and ordered registered, are hereby validated and confirmed as properly probated and registered instruments. (1943, c. 471, s. 2.)

§ 47-81.2. Before army, etc., officers.—In all cases where instruments and writings have been proved or acknowledged before any officer of the army of the United States or United States marine corps having the rank of captain or higher, before any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, such proofs or acknowledgments, where valid in other respects, are hereby ratified, confirmed and declared valid. (1943, c. 159; s. 2.)

§ 47-82. Foreign probates omitting seals.—In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice-consul, vice-consul general or commercial agent

of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this State, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. (1913, c. 69, s. 1; C. S., s. 3363.)

§ 47-83. **Before consuls general.**—Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen hundred and thirteen, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. (Ex. Sess. 1913, c. 72, s. 2; C. S., s. 3364.)

§ 47-84. **Before vice-consuls and vice-consuls general.**—The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this State prior to January first, one thousand nine hundred and five, upon the certificate of any vice-consul or vice-consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice-consul or vice-consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (1905, c. 451, s. 2; Rev., s. 1024; C. S., s. 3365.)

Applied in *Powers v. Baker*, 152 N.C. 718, 68 S.E. 203 (1910).

§ 47-85. **Before masters in chancery.**—All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registrations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this State in force at the time and as registrations thereof and certified copies of such registrations. Nothing in this section contained shall have effect to deprive anyone of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered. (1911, c. 10; C. S., s. 3366.)

§ 47-85.1. **Further as to acknowledgments, etc., before masters in chancery.** — All probates, acknowledgments and privy examinations of deeds, mortgages and conveyances of land, which prior to January 1, 1948 have been taken before masters in equity or masters in chancery in any other state, are hereby declared to be valid, and all registrations of such deeds, mortgages or conveyances upon such probates, acknowledgments and private examinations, or any of them are hereby declared to be sufficient and valid. All such deeds and conveyances and registration thereof, and all certified copies of such registrations shall be received in evidence or otherwise used in the same manner and with the same

force and effect as other deeds, mortgages and conveyances with probates, acknowledgments, or private examinations made in accordance with the provisions of statutes and laws of this State in force at the time, and as registrations thereof and certified copies of such registrations. (1953, c. 1136.)

§ 47-86. Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted.—In all cases where, prior to the first day of January, one thousand eight hundred and ninety-one, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this State and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated. (1921, c. 15, ss. 1, 2; C. S., s. 3366(a).)

§ 47-87. Validation of probates by different officers of deeds by wife and husband.—In all cases where, prior to the second day of March, one thousand eight hundred and ninety-five, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C. S., s. 3366(b).)

§ 47-88. Registration without formal order validated.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this State, under the provisions of section twenty of chapter thirty-five of Battle's Revisal, during the time said chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby are, to all intents and purposes validated. (1921, c. 19, ss. 2, 4; C. S., s. 3366(c).)

§ 47-89. Same subject.—In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of §§ 47-87 and 47-88, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 3, 4; C. S., s. 3366(d).)

§ 47-90. Validation of acknowledgments taken by notaries public holding other office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly

probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1921, c. 21; C. S., s. 3366(e).)

§ 47-91. Validation of certain probates of deeds before consular agents of the United States.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time chapter thirty-five of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said chapter thirty-five of Battle's Revisal. (1921, c. 157; C. S., s. 3366(f).)

§ 47-92. Probates before stockholders and directors of banks.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred and twenty-three (1923), shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation. (1923, c. 17; C. S., s. 3366(g).)

Editor's Note.—A provision for a similar purpose is found in § 47-63.

§ 47-93. Acknowledgments taken by stockholder, officer, or director of bank.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation. (Ex. Sess. 1924, c. 68.)

§ 47-94. Acknowledgment and registration by officer or stockholder in building and loan or savings and loan association.—All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any State or federal building and loan or savings and loan association prior to the first day of January, one thousand nine hundred and fifty-five, shall not be, nor held to be, invalid by reason of the fact that the clerk of the superior court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the superior court, or by any deputy or assistant clerk of the superior court, be or held to be invalid by reason of the fact that the clerk of the superior court, or deputy, or assistant clerk of the superior court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any State or federal building and loan or savings and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1; 1959, c. 489.)

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1959, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C. S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321; 1955, c. 696; 1957, c. 1270; 1959, c. 81.)

Editor's Note. — It is suggested in 1 N.C.L. Rev. 302, that this section should be considered as an addition to § 47-62.

§ 47-96. Validation of instruments registered without probate.—In every case where it shall appear from the records in the office of the register of deeds of any county in the State that any instrument of writing required or allowed by law to be registered prior to January first, eighteen hundred and sixty-nine, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this State, if otherwise competent. (1923, c. 215, s. 1; C. S., s. 3366(i).)

Local Modification.—Cherokee, Graham: 1935, c. 92.

Editor's Note. — It is suggested in 1 N.C.L. Rev. 302, that this section probably means that the registration must have

been made prior to 1869, and that this and § 47-98 should be considered as amendments or additional sections to chapter 8, article 2 of the General Statutes.

§ 47-97. Validation of corporate deed with mistake as to officer's name.—In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 47-97.1. Validation of corporate deeds containing error in acknowledgment or probate.—In all cases where the deed of a corporation executed and filed for registration prior to the fifteenth day of June, 1947, is properly executed and properly recorded and there is error in the acknowledgment or probate of said corporation's deed as to the name or names of the officer or officers named therein and error as to the title or titles of the officer or officers named therein, said deed shall be construed to be a deed of the same force and effect as if said probate or acknowledgment were in every way proper. (1951, c. 825.)

§ 47-98. Registration on defective probates beyond State.—In every case where it shall appear from the records in the office of the register of deeds of any county in this State that any instrument required or allowed by law to be registered, bearing date prior to the year one thousand eight hundred and thirty-five, executed by any person or persons residing in any of the United States, other than this State, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken thereto, before any officer or person authorized by any of the laws of this State in force prior to the said year one thousand eight hundred and thirty-five to take such proofs, privy examinations and acknowledgments, and the said instrument has been registered in the proper county without the certificate of the governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the Secretary of State of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as afore-

said, and without an order of registration made by a court or judge in this State having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this State. (1923, c. 215, ss. 2, 3; C. S., s. 3366(j).)

Cross Reference.—See note to § 47-96.

§ 47-99. Certificates of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the superior court of the State prior to March 1, 1945, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248; 1945, c. 798.)

§ 47-100. Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, 1951, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1951, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986.)

§ 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence.—In all cases where deeds appear to have been executed for land prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this State, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this State as if the same had been properly probated and recorded: Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this section shall not apply to creditors or purchasers, but as to them the same shall stand as if this section had not been passed, and shall only apply to deeds executed prior to January first, nineteen hundred. (1929, c. 14, s. 1.)

§ 47-102. Absence of notarial seal.—Any deed executed prior to the first day of January, nineteen hundred and forty-five, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in

which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472; 1945, c. 808, s. 3.)

Cross Reference. — As to absence of notarial seal from acknowledgment, see § 47-53.1.

§ 47-103. Deeds probated and registered with notary's seal not affixed, validated.—Any deed conveying or affecting real estate executed prior to January 1, 1932, and ordered registered and recorded in the county in which the land lies prior to said date, from which deed and the acknowledgment and privy examination thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to be sufficient and valid, and the probate and registration thereof are hereby in all respects validated and confirmed to the same effect as if the seal of said notary was affixed to the acknowledgment or privy examination thereof. (1941, c. 20.)

§ 47-104. Acknowledgments of notary holding another office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1935, c. 133; 1937, c. 284.)

§ 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor.—In all cases where a deed or deeds of mortgages or other conveyances of land dated prior to the first (1st) day of January, one thousand nine hundred and twenty-six (1926), purporting to convey lands have been registered in the office of the register of deeds of the county where the lands conveyed in said deeds are located prior to said first (1st) day of January, one thousand nine hundred and twenty-six (1926), and the acknowledgments or proof of execution of such deed or deeds and the private examination of any married woman who is a grantor in such deed or deeds have been taken as to some of the grantors, and the private examination of any married woman grantor in such deed has been taken by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment, proof of execution and the private examination of such married woman, evidenced by the certificate thereof on such deed and the registration thereof as above described and set forth, shall be and the same are hereby declared to be in all respects valid, and such deed or deeds or other conveyances of land are declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution or taking the private examination of such married woman and certifying thereto upon such deed or deeds had not been named as grantor therein and had not been interested therein in any way whatsoever. (1937, c. 91.)

§ 47-106. Certain instruments in which clerk of superior court was a party, validated.—In all cases where a deed, or other conveyance of land dated prior to the first day of January, one thousand nine hundred and eighteen, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution, privy examination of a married woman, and, or, order of registration had and taken before a deputy clerk of the superior court of said county, and the instrument registered upon the order of said deputy clerk of the superior court in the office of the register of deeds of said county, within two years from the date of said instrument, such instrument and its probate are hereby in all respects validated and confirmed; and such instrument, together with such defective acknowledgment, proof of execution,

privy examination of a married woman, order of registration, and the certificate of such deputy clerk of the superior court, and the registration thereof, are hereby declared in all respects to be valid and binding upon the parties of such instrument and their privies, and such instrument so probated and recorded together with its certificates may be read in evidence as a muniment of title, for all intents and purposes, in any of the courts of this State. (1939, c. 261.)

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.—All deeds, deeds of trust, conveyances or other instruments permitted by law to be registered in this State, which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which a clerk of the superior court has adjudged the certificate of the officer before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, are hereby declared to have been duly proved, probated and recorded and to be valid. (1941, c. 30.)

§ 47-108. Acknowledgments before notaries under age.—All acts of notaries public for the State of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

Cross Reference.—For similar provision, see § 10-10.

§ 47-108.1. Certain corporate deeds, etc., declared validly admitted to record.—Deeds, conveyances and other instruments of writing of corporations entitled to registration, which have been heretofore duly executed in the manner required by law, by the proper officers of the corporation, and which have prior to March 8, 1943, been admitted to registration, on the acknowledgment or proof of the proper executing officer, in the manner required by law, shall be, and the same are hereby declared to be, in all respects validly admitted to record, although such officer at the date of such acknowledgment or proof had ceased to be an officer of such corporation, or such corporation at the date of such acknowledgment or proof had ceased to exist. (1943, c. 598.)

§ 47-108.2. Acknowledgments and examinations before notaries holding some other office.—In every case where deeds or other instruments have been acknowledged, and where privy examination of wives had, before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been otherwise duly probated and recorded, such acknowledgment taken by, and such privy examination had before such notary public is hereby declared to be sufficient and valid. (1945, c. 149.)

§ 47-108.3. Validation of acts of certain notaries public prior to November 26, 1921.—In all cases where prior to November 26th, 1921, instruments by law, or otherwise, required, permitted or authorized to be registered, certified, probated, recorded or filed with certificates of notaries public showing the acknowledgments or proofs of execution thereof as required by the laws of the State of North Carolina have been registered, certified, probated, recorded or filed, such registration, certifications, probates, recordings and filings are hereby validated and made as good and sufficient as though such instruments had been in all respects properly registered, certified, probated, recorded or filed, notwithstanding there are no records in the office of the Governor of the State of North Carolina or in the office of the clerk of the superior court of the county in which

such notaries public were to act that such persons acting as such notaries public had ever been appointed or subscribed written oaths or received any certificates or commissions or were qualified as notaries public at the time of the performance of the acts hereby validated. (1947, c. 102.)

§ 47-108.4. Acknowledgments, etc., of instruments of married women made since February 7, 1945.—All acknowledgments, probates and registrations of instruments wherein any married woman was a grantor, including deeds and mortgages on land, made since February 7th, 1945, are hereby validated, approved and declared of full force and effect. (1947, c. 991, s. 2.)

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.—All deeds to lands in North Carolina, executed prior to January 1, 1959, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797.)

Editor's Note. — For brief comment on this section, see 27 N.C.L. Rev. 475.

§ 47-108.6. Validation of certain conveyances of foreign dissolved corporations.—In all cases when, prior to the first day of January, 1947, any dissolved foreign corporation has, prior to its dissolution, by deed of conveyance purported to convey real property in this State, and said instrument recites a consideration, is signed by the proper officers in the name of said corporation, sealed with the corporate seal and duly registered in the office of the register of deeds of the county where the land described in said instrument is located, but there is error in the attestation clause and acknowledgment in failing to identify the officers signing said deed and to recite that authority was duly given and that the same was the act of said corporation, said deed shall be construed to be a deed of the same force and effect as if said attestation clause and acknowledgment were in every way proper. (1949, c. 1212.)

Editor's Note. — For brief comment on this section, see 27 N.C.L. Rev. 440.

§ 47-108.7. Validation of acknowledgments, etc., by deputy clerks of superior court.—All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probating wills, deeds and other instruments required or permitted by law to be recorded are hereby validated: Provided, nothing in this section shall affect pending litigation. (1949, c. 1072.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.8. Acts of registers of deeds or deputies in recording plats and maps by certain methods validated.—All acts heretofore performed by a register of deeds, or a deputy register of deeds in recording plats and maps by transcribing a correct copy thereof or permanently attaching the original to the records in a book designated "Book of Plats" is hereby validated the same as if said plats had been recorded as required by G.S. § 47-30: Provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 1073.)

Editor's Note.—The act from which this section was codified became effective April 20, 1949.

§ 47-108.9. Validation of probate of instruments pursuant to § 47-12.—The probates of all instruments taken on and after February 7, 1945, in ac-

cordance with the provisions of G.S. § 47-12, as amended by § 11 of chapter 73 of the Session Laws of 1945 and § 1 of chapter 991 of the Session Laws of 1947 and as further amended by §§ 2 and 3 of chapter 815 of the Session Laws of 1949, are hereby in all respects validated; provided, however, that this section shall not apply to pending litigation. (1949, c. 815, s. 3.)

§ 47-108.10. Validation of registration of plats upon probate in accordance with § 47-30.—The registration of all plats which have prior to February 6, 1953, been admitted to registration upon probate thereof, in accordance with the provisions of § 47-30 of the General Statutes, as amended by § 1 of chapter 47 of the Session Laws of 1953, is hereby validated. (1953, c. 47, s. 2.)

§ 47-108.11. Validation of recorded instruments where seals have been omitted.—In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word “seal,” “notarial seal” and that any of said recorded or registered instruments shows or recites that the grantor or grantors “have hereunto fixed or set their hands and seals” and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites “signed, sealed and delivered in the presence of,” and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word “seal” or “notarial seal” had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1959, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022.)

Cited in *Page v. Miller*, 252 N.C. 23, 113 S.E.2d 52 (1960).

§ 47-108.12. Validation of instruments acknowledged before United States commissioners.—All deeds, mortgages, or other instruments permitted or required by law to be registered, which prior to January 1, 1933, have been proved or acknowledged before a United States commissioner, or U.S. commissioner, are hereby in all respects validated as to such proof or acknowledgment, and all registrations of such deeds or conveyances, upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient and validated. (1953, c. 987.)

§ 47-108.13. Validation of certain instruments registered prior to January 1, 1934.—In all cases where prior to January 1, 1934 instruments by law required or authorized to be registered show the signatures and seal of each of the grantors therein and further show that each of such grantors has appeared before or signed such instruments in the presence of a notary public, justice of the peace or other person duly authorized to take acknowledgments, and such instruments have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probate and admit instruments to registration, and actually put on the books in the office of the register of deeds, as if properly acknowledged, all such instruments and their registrations are hereby validated

and made as good and sufficient as though such instruments had been in all respects properly acknowledged: Provided, that this section shall not apply to any privy examination or acknowledgment of a married woman. (1953, c. 1334.)

§ 47-108.14. Conveyances by the United States acting by and through the General Services Administration.—The United States of America, acting by and through the General Services Administration may convey lands and other property in the State of North Carolina which is transferable by deed, quitclaim deed, or other means of conveyances without the Regional Director or other duly authorized agent acting for and on behalf of the United States of America, adopting or placing a “seal,” in any form, after the signature of the grantor’s agent, or elsewhere on said deed, quitclaim deed, or other instrument, and the conveyances of the United States of America acting by and through the General Services Administration, and executed by its Regional Director or other duly authorized agent, although without a “seal” appearing thereon, shall be in all respects valid and binding to the same extent as if the word “seal” or some other type of seal, appeared after the signature of the grantor’s agent, or elsewhere on said conveyances.

All conveyances prior to April 19, 1955, where any deed, quitclaim deed, or other instrument conveying land or other property in the State of North Carolina has been executed by the United States of America, by and through the General Services Administration, and said conveyances are authorized or required to be registered in the office of the register of deeds of any county in this State, and it appears from said instrument, or said instrument as recorded in the office of the register of deeds of any county in this State, that a seal has been omitted from said instruments, that notwithstanding the absence of a seal all such conveyances are hereby declared to be in all respects valid and binding to convey lands and property rights in the State of North Carolina to the grantees named therein, to the same extent as if the word “seal,” or a seal in some other form, had appeared after the signature of the grantor’s agent, or elsewhere on said conveyances, and the registration and recording of such conveyances in the office of the register of deeds in all counties in this State are hereby declared to be valid, proper, legal and binding registrations to the same extent as if such conveyances were executed under seal. (1955, c. 629, s. 1.)

§ 47-108.15. Validation of registration of instruments filed before order of registration.—All deeds, deeds of trust, mortgages, chattel mortgages, contracts and all other instruments required or permitted by law to be registered which have heretofore been accepted for filing and registration by registers of deeds on a date preceding the date of the clerk’s order of registration are hereby validated, approved, confirmed and declared to be valid, proper, legal and binding registrations to the same extent as if such instruments had been accepted for filing and registration on the date of or subsequent to the date of the clerk’s order of registration. (1957, c. 1430.)

§ 47-108.16. Validation of certain deeds executed by nonresident banks.—All deeds and other conveyances of land in this State executed on behalf of banks not incorporated in the State of North Carolina, by a trust officer thereof, and properly recorded on or before December 31, 1963, which deeds are otherwise regular and valid, are hereby validated. (1965, c. 610.)

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and

permanent book, in which shall be recorded official discharges from the army, navy, marine corps and other branches of the armed forces of the United States. Said book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; C. S., s. 3366(k) ; 1945, c. 659, s. 2.)

§ 47-110. **Registration of official discharge or certificate of lost discharge.**—Upon the presentation to the register of deeds of any county of any official discharge, or official certificate of lost discharge, from the army, navy, marine corps, or any other branch of the armed forces of the United States he shall record the same without charge in the book provided for in § 47-109. (1921, c. 198, s. 2; C. S., s. 3366(1) ; 1943, c. 599; 1945, c. 659, s. 1.)

Local Modification.—Alleghany: 1945, c. 877.

§ 47-111. **Inquiry by register of deeds; oath of applicant.**—If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy, or marine corps of the United States, or an official certificate of lost discharge, he shall have power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

“I,, being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the Government of the United States; and that no alterations have been made therein by me, or by any person to my knowledge.
.....
Subscribed and sworn to before me this day of,
19.....
.....”

(1921, c. 198, s. 3; C. S., s. 3366(m).)

§ 47-112. **Forgery or alteration of discharge or certificate; punishment.**—Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1921, c. 198, s. 4; C. S., s. 3366(n).)

§ 47-113. **Certified copy of registration; fee.**—Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents thereof: Provided, that the register of deeds shall furnish such certified copy without charge to any member or former member of the armed forces of the United States who applies therefor. (1921, c. 198, s. 5; C. S., s. 3366(o) ; 1945, c. 659, s. 3.)

§ 47-114. **Payment of expenses incurred.**—The county commissioners of each county are hereby authorized and empowered in their discretion to appropriate from the general fund of the county an amount sufficient to cover any additional expense incurred by the register of deeds of the county in carrying out the purposes of this article. (1945, c. 659, s. 3½.)

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115. Execution in name of either principal or attorney in fact; indexing in names of both.—Any instrument in writing executed by an attorney in fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed and/or acknowledged in the name of the principal by the attorney in fact or by the attorney in fact designating himself as attorney in fact for the principal or acknowledged in the name of the attorney in fact without naming the principal from which it will appear that it was the purpose of the attorney in fact to be acting for and on behalf of the principal mentioned or referred to in the instrument. This section shall not affect any pending litigation or the status of any matter heretofore determined by the courts. This section shall apply to all such instruments heretofore or hereafter executed. Registers of deeds shall be required to index all such instruments filed for registration both in the name of the principal or principals executing the powers of appointment and in the name of the attorney in fact executing the instrument: Provided, that instruments heretofore registered and indexed only in the name of the attorney in fact shall be valid and in all respects binding upon the principal or principals insofar as validity of registration is concerned. (1945, c. 204; 1959, c. 210.)

§ 47-115.1. Appointment of attorney in fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.—(a) Any person twenty-one (21) years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(b) The power of attorney shall be in writing, signed by the principal under seal, acknowledged by the principal before an officer authorized to take the acknowledgment of deeds whose authority is recognized under the law of North Carolina in effect at the time of such acknowledgment, and delivered to the attorney in fact.

(c) The power of attorney shall contain a statement that it is executed pursuant to the provisions of this section, or shall contain such other language as shall clearly indicate the intention that the power of attorney shall continue in effect notwithstanding the incapacity or incompetence of the principal.

(d) No power of attorney executed pursuant to the provisions of this section shall be valid but from the time of registration thereof in the office of the register of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney in fact is uncertain as to the principal's residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys in fact reside. Within thirty (30) days after the registration of the power of attorney as above provided, the attorney in fact shall file with the clerk of the superior court in the county of such registration a copy of the power of attorney, but failure to file with the clerk shall not affect validity of the instrument.

(e) Every power of attorney executed pursuant to the provisions of this section shall be revoked by:

- (1) The death of the principal; or
- (2) The appointment of a guardian or trustee of the property in this State of the principal, and the registration of a certified copy of such ap-

pointment in the office of the register of deeds where the power of attorney has been registered; or

- (3) Registration in the office of the register of deeds where the power of attorney has been registered of an instrument of revocation executed and acknowledged by the principal while he is not incapacitated or mentally incompetent, or by the registration in such office of an instrument of revocation executed by any person or corporation who is given such power of revocation in the power of attorney, with proof of service thereof in either case on the attorney in fact in the manner prescribed for service of summons in civil actions.

(f) Any person dealing in good faith with an attorney in fact acting under a power of attorney executed and then in effect under this section shall be protected to the full extent of the powers conferred upon such attorney in fact, and no person so dealing with such attorney in fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney in fact.

(g) Every attorney in fact acting under a power of attorney in effect under this section shall keep full and accurate records of all transactions in which he acts as agent of the principal and of all property of the principal in his hands and the disposition thereof.

(h) If the power of attorney provides for rendering inventories and accounts, such provisions shall govern. Otherwise, the attorney in fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is registered, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal. The power of the clerk to enforce the filing and his duties in respect to audit and recording of such accounts shall be the same as those in respect to the accounts of administrators, but the fees and charges of the clerk shall be computed or fixed only with relation to property of the principal required to be shown in the accounts and inventories. The fees and charges of the clerk shall be paid by the attorney in fact out of the principal's money or other property and allowed in his accounts. If the powers of an attorney in fact shall terminate for any reason whatever, he, or his executors or administrators, shall have the right to have a judicial settlement of a final account by any procedure available to executors, administrators or guardians.

(i) A power of attorney executed under this section may contain any provisions, not unlawful, relating to the appointment, resignation, removal and substitution of an attorney in fact, and to the rights, powers, duties and responsibilities of the attorney in fact.

(j) If all attorneys in fact named in the instrument or substituted shall die, or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted, such power of attorney shall cease to be effective. Any substitution by a person authorized to make it shall be in writing signed and acknowledged by such person. Notice of every other substitution shall be in writing signed and acknowledged by the person substituted. No substitution or notice shall be effective until it has been recorded in the office of the register of deeds of the county in which the power of attorney has been recorded. (1961, c. 341, s. 1.)

ARTICLE 7.

Private Examination of Married Women Abolished.

§ 47-116: Transferred to § 47-14.1 by Session Laws 1951, c. 893.

ARTICLE 8.

Memoranda of Leases and Options.

§ 47-117. **Forms do not preclude use of others; adaptation of forms.** — (a) The form prescribed in this article does not exclude the use of other forms which are sufficient in law.

(b) The prescribed form may be adapted to fit the various situations in which the grantors or grantees are individuals, firms, associations, corporations, or otherwise, or combinations thereof. (1961, c. 1174.)

§ 47-118. **Forms of registration of lease.** — (a) A lease of land or land and personal property may be registered by registering a memorandum thereof which shall set forth:

- (1) The names of the parties thereto;
- (2) A description of the property leased;
- (3) The term of the lease, including extensions, renewals and options to purchase, if any; and
- (4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

MEMORANDUM OF LEASE

.....
 (Name and address or description of lessor or lessors)
 hereby lease(s) to
 (Name and address or description of lessee or lessees)
 for a term beginning the day of, 19, and con-
 (Month) (Year)
 tinuing for a maximum period of, including extensions and
 renewals, if any, the following property:
 (Here describe the property)

(If applicable: [There exists an option to purchase with respect to this leased property, in favor of the lessee which expires the day of
 (Month)
 19, which is set forth at large in the complete agreement between the parties].)

The provisions set forth in a written lease agreement between the parties dated the day of, 19, are hereby incorporated in this
 (Month) (Year)
 memorandum.

..... [Seal]
 (Lessor)
 [Seal]
 (Lessee)

(Acknowledgment as required by law.)

(b) If the provisions of the lease make it impossible or impractical to state the maximum period of the lease because of conditions, renewals and extensions, or otherwise, then the memorandum of lease shall state in detail all provisions concerning the term of the lease as fully as set forth in the written lease agreement between the parties.

(c) Registration of a memorandum of lease pursuant to subsections (a) and (b) of this section, shall have the same legal effect as if the written lease agreement had been registered in its entirety. (1961, c. 1174.)

§ 47-119. **Form of memorandum for option to purchase real estate.**—An option to purchase real estate may be registered by registering a memorandum thereof which shall set forth:

- (1) The names of the parties thereto;
- (2) A description of the property which is subject to the option;
- (3) The expiration date of the option;
- (4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

NORTH CAROLINA

..... COUNTY

In consideration of, the receipt of which
(Set out consideration)

is hereby acknowledged, does hereby
(Name and address of person selling option)

give and grant to
(Name and address of person buying option)

the right and option to purchase the following property:

(Here describe property)

This option shall expire on the day of, 19

The provisions set forth in a written option agreement between the parties dated the day of, 19...., are hereby incorporated in this memorandum.

Witness our hand(s) and seal(s) this day of,
19.....

..... (Seal)

..... (Seal)

(1961, c. 1174.)

§ 47-120. **Memorandum as notice.**—Such memorandum of an option to purchase real estate, or lease as proposed by G.S. 47-118 or 47-119, when executed, acknowledged, delivered and registered as required by law, shall be as good and sufficient notice, and have the same force and effect as if the written lease or option to purchase real estate had been registered in its entirety. (1961, c. 1174.)

Chapter 47A.

Unit Ownership Act.

Sec.	Sec.
47A-1. Short title.	47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.
47A-2. Declaration creating unit ownership; recordation.	47A-17. Termination of unit ownership; no bar to reestablishment.
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§ 47A-1. **Short title.**—This chapter shall be known as the “Unit Ownership Act.” (1963, c. 685, s. 1.)

§ 47A-2. **Declaration creating unit ownership; recordation.** — Unit ownership may be created by an owner or the co-owners of a building by an express declaration of their intention to submit such property to the provisions of the chapter, which declaration shall be recorded in the office of the register of deeds of the county in which the property is situated. (1963, c. 685, s. 2.)

§ 47A-3. **Definitions.**—Unless it is plainly evident from the context that a different meaning is intended, as used herein :

- (1) “Association of unit owners” means all of the unit owners acting as a group in accordance with the bylaws and declaration.
- (2) “Common areas and facilities,” unless otherwise provided in the declaration or lawful amendments thereto, means and includes :
 - a. The land on which the building stands and such other land and improvements thereon as may be specifically included in the declaration, except any portion thereof included in a unit;
 - b. The foundations, columns, girders, beams, supports, main walls,

- roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building ;
- c. The basements, yards, gardens, parking areas and storage spaces ;
 - d. The premises for the lodging of janitors or persons in charge of property ;
 - e. Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating ;
 - f. The elevators, tanks, pumps, motors, fans, compressors, ducts, and in general, all apparatus and installations existing for common use ;
 - g. Such community and commercial facilities as may be provided for in the declaration ; and
 - h. All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.
- (3) "Common expenses" means and includes :
- a. All sums lawfully assessed against the unit owners by the association of unit owners ;
 - b. Expenses of administration, maintenance, repair or replacement of the common areas and facilities ;
 - c. Expenses agreed upon as common expenses by the association of unit owners ;
 - d. Expenses declared common expenses by the provisions of this chapter, or by the declaration or the bylaws ;
 - e. Hazard insurance premiums, if required.
- (4) "Common profits" means the balance of all income, rents, profits, and revenues from the common areas and facilities remaining after the deductions of the common expenses.
- (5) "Condominium" means the ownership of single units in a multi-unit structure with common areas and facilities.
- (6) "Declaration" means the instrument, duly recorded, by which the property is submitted to the provisions of this chapter, as hereinafter provided, and such declaration as from time to time may be lawfully amended.
- (7) "Limited common areas and facilities" means and includes those common areas and facilities which are agreed upon by all the unit owners to be reserved for the use of a certain number of units to the exclusion of the other units, such as special corridors, stairways and elevators, sanitary services common to the units of a particular floor, and the like.
- (8) "Majority" or "majority of unit owners" means the owners of more than fifty per cent (50%) of the aggregate interest in the common areas and facilities as established by the declaration assembled at a duly called meeting of the unit owners.
- (9) "Person" means individual, corporation, partnership, association, trustee, or other legal entity.
- (10) "Property" means and includes the land, the building, all improvements and structures thereon and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this chapter.
- (11) "Recordation" means to file of record in the office of the county register of deeds in the county where the land is situated, in the manner provided by law for recordation of instruments affecting real estate.
- (12) "Unit" or "condominium unit" means an enclosed space consisting of one or more rooms occupying all or part of a floor in a building of

one or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use and shall include such accessory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.

- (13) "Unit designation" means the number, letter, or combination thereof designating the unit in the declaration.
- (14) "Unit owner" means a person, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns a unit within the building. (1963, c. 685, s. 3.)

§ 47A-4. **Property subject to chapter.**—This chapter shall be applicable only to property, the full owner or all of the owners of which submit the same to the provisions hereof by duly executing and recording a declaration as herein-after provided. (1963, c. 685, s. 4.)

§ 47A-5. **Nature and incidents of unit ownership.**—Unit ownership as created and defined in this chapter shall vest in the holder exclusive ownership and possession with all the incidents of real property. A condominium unit in the building may be individually conveyed, leased and encumbered and may be inherited or devised by will, as if it were solely and entirely independent of the other condominium units in the building of which it forms a part. Such a unit may be held and owned by more than one person either as tenants in common or tenants by the entirety or in any other manner recognized under the laws of this State. (1963, c. 685, s. 5.)

§ 47A-6. **Undivided interests in common areas and facilities; ratio fixed in declaration; conveyance with unit.**—(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the ratio expressed in the declaration. Such ratio shall be in the approximate relation that the fair market value of the unit at the date of the declaration bears to the then aggregate fair market value of all the units having an interest in said common areas and facilities.

(b) The ratio of the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered except with the unanimous consent of all unit owners expressed in an amended declaration duly recorded.

(c) The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. (1963, c. 685, s. 6.)

§ 47A-7. **Common areas and facilities not subject to partition or division.**—The common areas and facilities shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this chapter as provided in §§ 47A-16 and 47A-25. Any covenant to the contrary shall be null and void. This restraint against partition shall not apply to the individual condominium unit. (1963, c. 685, s. 7.)

§ 47A-8. **Use of common areas and facilities.**—Each unit owner may use the common areas and facilities in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other unit owners. (1963, c. 685, s. 8.)

§ 47A-9. **Maintenance, repair and improvements to common areas and facilities; access to units for repairs.**—The necessary work of main-

tenance, repair, and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as provided herein and in the bylaws. The association of unit owners shall have the irrevocable right, to be exercised by the manager or board of directors, or other managing body as provided in the bylaws, to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another unit or units. (1963, c. 685, s. 9.)

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.—Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner. (1963, c. 685, s. 10.)

§ 47A-11. Unit owners not to jeopardize safety of property or impair easements.—No unit owner shall do any work which would jeopardize the soundness or safety of the property or impair any easement or hereditament without in every such case the unanimous consent of all the other unit owners affected being first obtained. (1963, c. 685, s. 11.)

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits.—The unit owners are bound to contribute pro rata, in the percentages computed according to § 47A-6 of this chapter, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. No unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

Provided, however, that the common profits of the property, if any, shall be distributed among the unit owners according to the percentage of the undivided interest in the common areas and facilities. (1963, c. 685, s. 12.)

§ 47A-13. Declaration creating unit ownership; contents; recordation.—The declaration creating and establishing unit ownership as provided in § 47A-3 of this chapter, shall be recorded in the office of the county register of deeds and shall contain the following particulars:

- (1) Description of the land on which the building and improvements are or are to be located.
- (2) Description of the building, stating the number of stories and basements, the number of units, and the principal materials of which it is constructed.
- (3) The unit designation of each unit, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification.
- (4) Description of the general common areas and facilities and the proportionate interest of each unit owner therein.
- (5) Description of the limited common areas and facilities, if any, stating what units shall share the same and in what proportion.
- (6) Statement of the purpose for which the building and each of the units are intended and restricted as to use.

- (7) The name of a person to receive service of process in the cases herein-after provided, together with the residence or the place of business of such person which shall be within the city and county in which the building is located.
- (8) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this chapter.
- (9) The method by which the declaration may be amended, consistent with the provisions of this chapter. (1963, c. 685, s. 13.)

§ 47A-14. Deeds conveying units; recordation; contents. — Deeds conveying a unit ownership shall be recorded in the office of the register of deeds in the county in which the land and building is located and shall contain the following particulars:

- (1) Description of the land as provided in § 47A-13 of this chapter, including the book and page numbers and the date of recording of the declaration.
- (2) The unit designation as contained in the declaration and any other data necessary for its proper identification.
- (3) A clear expression of the use for which the unit is intended and restrictions on its use.
- (4) The percentage of undivided interest appertaining to the unit in the common areas and facilities.
- (5) Any further details which the grantor and grantee may deem desirable to set forth consistent with the declaration and this chapter. (1963, c. 685, s. 14.)

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.—There shall be attached to the declaration, at the time it is filed for record, a full and exact copy of the plans of the building, which copy of plans shall be entered of record along with the declaration. Said plans shall show graphically all particulars of the building, including, but not limited to, the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, stating the name of the building or that it has no name, area and location of the common areas and facilities affording access to each unit, and such plans shall bear the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the municipal or other governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings. If such plans do not include a verified statement by such architect or engineer that such plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built, there shall be recorded prior to the first conveyance of any unit an amendment to the declaration to which shall be attached a verified statement of a registered architect or licensed professional engineer certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully depict the layout, ceiling and floor elevations, unit numbers and dimensions of the units as built. Such plans shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated "Unit Ownership," with the name of the building, if any, and each containing a reference to the book and page numbers and date of the recording of the declaration. (1963, c. 685, s. 15.)

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.—(a) All of the unit owners may remove a property from the provisions of this chapter by an instrument to that effect, duly recorded, provided that the holders of all liens, affecting any of the units consent

thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the unit owner in the property as hereinafter provided.

(b) Upon removal of the property from the provisions of this chapter, the property shall be deemed to be owned as tenants in common by the unit owners. The undivided interest in the property owned as tenants in common which shall appertain to each unit owner shall be the percentage of the undivided interest previously owned by such unit owner in the common areas and facilities. (1963, c. 685, s. 16.)

§ 47A-17. Termination of unit ownership; no bar to reestablishment.—The removal provided for in the preceding section [§ 47A-16] shall in no way bar the subsequent resubmission of the property to the provisions of this chapter. (1963, c. 685, s. 17.)

§ 47A-18. Bylaws; annexed to declaration and first deed to unit; amendments.—The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the declaration and to the first deed of each unit. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded. (1963, c. 685, s. 18.)

§ 47A-19. Bylaws; contents.—The bylaws shall provide for the following:

- (1) Form of administration, indicating whether this shall be in charge of an administrator, manager, or of a board of directors or board of administration, independent corporate body, or otherwise, and specifying the powers, manner of removal, and, where proper, the compensation thereof.
- (2) Method of calling or summoning the unit owners to assemble; what percentage, if other than a majority of unit owners, shall constitute a quorum; who is to preside over the meeting and who will keep the minute book wherein the resolutions shall be recorded.
- (3) Maintenance, repair and replacement of the common areas and facilities and payments therefor, including the method of approving payment vouchers.
- (4) Manner of collecting from the unit owners their share of the common expenses.
- (5) Designation and removal of personnel necessary for the maintenance, repair and replacement of the common areas and facilities.
- (6) Method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the common areas and facilities.
- (7) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common areas and facilities, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common areas and facilities by the several unit owners.
- (8) The percentage of votes required to amend the bylaws, and a provision that such amendment shall not become operative unless set forth in an amended declaration and duly recorded.
- (9) A provision that all unit owners shall be bound to abide by any amendment upon the same being passed and duly set forth in an amended declaration, duly recorded.
- (10) Other provisions as may be deemed necessary for the administration of the property consistent with this chapter. (1963, c. 685, s. 19.)

§ 47A-20. Records of receipts and expenditures; availability for examination; annual audit.—The manager or board of directors, or other form of

administration provided in the bylaws, as the case may be, shall keep detailed, accurate records in chronological order of the receipts and expenditures affecting the common areas and facilities, specifying and identifying the maintenance and repair expenses of the common areas and facilities and any other expense incurred. Both said book and the vouchers accrediting the entries thereupon shall be available for examination by all the unit owners, their duly authorized agents or attorneys, at convenient hours on working days that shall be set and announced for general knowledge. All books and records shall be kept in accordance with good and accepted accounting practices and an outside audit shall be made at least once a year. (1963, c. 685, s. 20.)

§ 47A-21. **Units taxed separately.**—Each condominium unit and its percentage of undivided interest in the common areas and facilities shall be deemed to be a parcel and shall be separately assessed and taxed by each assessing unit and special district for all types of taxes authorized by law including but not limited to special ad valorem levies and special assessments. Each unit holder shall be liable solely for the amount of taxes against his individual unit and shall not be affected by the consequences resulting from the tax delinquency of other unit holders. Neither the building, the property nor any of the common areas and facilities shall be deemed to be a parcel. (1963, c. 685, s. 21.)

§ 47A-22. **Liens for unpaid common expenses; recordation; priorities; foreclosure.**—(a) Any sum assessed by the association of unit owners for the share of the common expenses chargeable to any unit, and remaining unpaid for a period of thirty (30) days or longer, shall constitute a lien on such unit when filed of record in the office of the clerk of superior court of the county in which the property is located in the manner provided therefor by article 8 of chapter 44 of the General Statutes. Upon the same being duly filed, such lien shall be prior to all other liens except the following:

- (1) Assessments, liens and charges for real estate taxes due and unpaid on the unit;
- (2) All sums unpaid on deeds of trust, mortgages and other encumbrances duly of record against the unit prior to the docketing of the aforesaid lien.
- (3) Materialmen's and mechanics' liens.

(b) Provided the same is duly filed in accordance with the provisions contained in subsection (a) of this section, a lien created by nonpayment of a unit owner's pro rata share of the common expenses may be foreclosed by suit by the manager or board of directors, acting on behalf of the unit owners, in like manner as a deed of trust or mortgage of real property. In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid in the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. A suit to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same.

(c) Where the mortgagee of a first mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the first mortgage, such purchaser, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of unit owners chargeable to such unit which became due prior to the acquisition of title to such unit by such purchaser. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners including such purchaser, his successors and assigns. (1963, c. 685, s. 22.)

§ 47A-23. Liability of grantor and grantee of unit for unpaid common expenses.—The grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for his proportionate share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantee shall be entitled to a statement from the manager or board of directors, as the case may be, setting forth the amount of the unpaid assessments against the grantor and such grantee shall not be liable for, nor shall the unit conveyed be subject to a lien for, any unpaid assessments in excess of the amount therein set forth. (1963, c. 685, s. 23.)

§ 47A-24. Insurance on property; right to insure units.—The manager of the board of directors, or other managing body, if required by the declaration, bylaws or by a majority of the unit owners, shall have the authority to, and shall, obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested. Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of unit owners, as trustee for each of the unit owners in the percentages established in the declaration. The trustee so named shall have the authority on behalf of the unit owners to deal with the insurer in the settlement of claims. The premiums for such insurance on the building shall be deemed common expenses. Provision for such insurance shall be without prejudice to the right of each unit owner to insure his own unit for his benefit. (1963, c. 685, s. 24.)

§ 47A-25. Damage to or destruction of property; repair or restoration; partition sale on resolution not to restore.—Except as hereinafter provided, damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors, or other managing body, using the proceeds of insurance on the building for that purpose, and unit owners shall be liable for assessment for any deficiency; provided, however, if the building shall be more than two-thirds ($\frac{2}{3}$ rds) destroyed by fire or other disaster and the owners of three-fourths ($\frac{3}{4}$ ths) of the building duly resolve not to proceed with repair or restoration, then and in that event:

- (1) The property shall be deemed to be owned as tenants in common by the unit owners;
- (2) The undivided interest in the property owned by the unit owners as tenants in common which shall appertain to each unit owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities;
- (3) Any liens affecting any of the units shall be deemed to be transferred in accordance with the existing priorities to the percentage of the undivided interest of the unit owner in the property as provided herein; and
- (4) The property shall be subject to an action for sale for partition at the suit of any unit owner, in which event the net proceeds of sale, together with the net proceeds of insurance policies, if any, shall be considered as one fund and shall be divided among all the unit owners in proportion to their respective undivided ownership of the common areas and facilities, after first paying off, out of the respective shares of unit owners, to the extent sufficient for that purpose, all liens on the unit of each unit owner. (1963, c. 685, s. 25.)

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.—Without limiting the rights of any unit owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the unit owners, as their respective interests may ap-

pear, with respect to any course of action relating to the common areas and facilities or more than one unit. Service of process on two or more unit owners in any action relating to the common areas and facilities or more than one unit may be made on the person designated in the declaration to receive service of process. Any individual, corporation, partnership, association, trustee, or other legal entity claiming damages for injuries without any participation by a unit owner shall first exhaust all available remedies against the association of unit owners prior to proceeding against any unit owner individually. (1963, c. 685, s. 26.)

§ 47A-27. Zoning regulations governing condominium projects.—Whenever they deem it proper, the planning and zoning commission of any county or municipality may adopt supplemental rules and regulations governing a condominium project established under this chapter in order to implement this program. (1963, c. 685, s. 27.)

§ 47A-28. Persons subject to chapter, declaration and bylaws; effect of decisions of association of unit owners.—(a) All unit owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use the property or any part thereof submitted to the provisions of this chapter, shall be subject to this chapter and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of this chapter.

(b) All agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established in the chapter, declaration or bylaws, shall be deemed to be binding on all unit owners. (1963, c. 685, s. 28.)

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Chapter 48.

Adoption of Minors.

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§ 48-1. Legislative intent; construction of chapter.—The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—

- (1) The primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure.
- (2) The secondary purpose of this chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.
- (3) When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed. (1949, c. 300.)

Editor's Note.—Session Laws 1949, c. 300 rewrote this chapter of the General Statutes as amended by Session Laws 1945, cc. 155, 787 and 788, and inserted the present thirty-five sections in lieu of the former fifteen sections. For discussion of the 1949 act, see 27 N.C.L. Rev. 418. The original chapter relating to the

adoption of minors was codified from Public Laws 1935, c. 243, as amended by Public Laws 1937, c. 422; 1939, cc. 32, 132; 1941, c. 281; 1943, c. 735.

Cases construing the former law have been placed, where appropriate, under the corresponding sections of this chapter as rewritten.

For critical analysis and appraisal of the former chapter, see 13 N.C.L. Rev. 355. For article entitled "Thwarting Adoptions," see 19 N.C.L. Rev. 127. For case law survey on adoption, see 41 N.C.L. Rev. 458 (1963).

Chapter Exclusive.—The only procedure for the adoption of minors is that prescribed by this chapter. In re Custody of Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

1947 Act Rewriting Chapter Inoperative.—Chapter 885 of the Session Laws of 1947, purporting to rewrite this chapter, was held inoperative and void by reason of the fact that the enacting clause prescribed by Art. II, § 21, of the Constitution of North Carolina was omitted. In re Advisory Opinion, 227 N.C. 708, 43 S.E.2d 73 (1947). For discussion of the invalid act, see 25 N.C.L. Rev. 392, 408.

Construction of Former Chapter.—Under this chapter as it formerly stood, it was held that since the laws of inheri-

tance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

Construction Should Be Fair and Reasonable.—The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statute should not be narrow or technical, but rather fair and reasonable, where all material provisions of the statute have been complied with. Locke v. Merrick, 223 N.C. 798, 28 S.E.2d 523 (1944).

Juvenile Court Act Not an Amendment.—The Juvenile Court Act was not an amendment to the former adoption law, and did not affect the procedure therein prescribed for the adoption of minors. Ward v. Howard, 217 N.C. 201, 7 S.E.2d 625 (1940).

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, was not an adoption of a minor under the former chapter. Chambers v. Byers, 214 N.C. 373, 199 S.E. 398 (1938).

Quoted in Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

§ 48-2. Definitions.—In this chapter, unless the context or subject matter otherwise requires—

- (1) "Adult person" means any person who has attained the age of twenty-one years.
- (2) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the State Board of Public Welfare, or in the event that such agency is in another state or territory or in the District of Columbia, operating under a license to place children for adoption issued by a governmental authority of such state, territory, or the District of Columbia, empowered by law to issue such licenses.
- (3) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child.
- (3a) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. A child may be willfully abandoned by his or her legal or natural father, within the meaning of this section, if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of such birth; but in any event said child must be over the age of three months and under the age of eighteen years at the time of institution of the action or proceeding to declare the child to be an abandoned child.

- (3b) In addition to the definition of abandonment in (3a) above, an abandoned child, for purposes of this chapter, shall be a child under eighteen years of age who has been placed in the care of a child caring institution or foster home, and whose parent, parents, or guardian of the person has failed substantially and continuously for a period of more than one year to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child, although physically and financially able to do so. In order to find an abandonment under this subdivision, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child placing agency to encourage the parent, parents, or guardian of the person of the child to strengthen the parental or custodial relationship to the child.
- (4) "Readoption" means an adoption by any person of a child who has been previously legally adopted.
- (5) "Stepchild" means the child of one spouse by a former union, whether or not such child was born in wedlock. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241.)

"Abandonment" Defined. — "Abandonment" imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

"Abandonment" has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Abandonment Must Be Willful.—Willfulness is as much an element of abandonment within the meaning of this section as it is of the crime of abandonment described in G.S. 14-322 and 14-326. In re *Adoption of Hoose*, 243 N.C. 589, 91 S.E.2d 553 (1956).

Abandonment requires a willful intent to escape parental responsibility and conduct in effectuation of such intent. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Willful intent is a question of fact to be determined from the evidence. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Mere Failure to Contribute to Support of Child Does Not Constitute Abandonment.—A mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment, since explanations could be made which would be inconsistent with a willful intent to abandon. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

But Continued Willful Failure to Support Is Evidence of Abandonment. — A continued willful failure to perform the parental duty to support and maintain a

child would be evidence that a parent had relinquished his claim to the child. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

It Is Not Necessary That Parent Absent Himself from Child Continuously. — To constitute an abandonment within the meaning of this section it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

If His Conduct Shows Intent to Forego All Obligations and Relinquish All Claims. —If the parent's conduct over the six months period evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been abandonment within the meaning of this section. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Conduct Amounting to Abandonment.—If a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Sufficient Allegation of Abandonment.—See *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Instruction.—An instruction to the jury explaining that "willful means that the abandonment would be without just cause or excuse, unjustifiable and wrong; that the respondent had a purpose to do it without authority, careless of whether he had a right or not," was sufficient. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Quoted in *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

Cited in *In re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-3. Who may be adopted.—Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in accordance with the provisions of this chapter. (1949, c. 300; 1957, c. 778, s. 2.)

Editor's Note.—For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

Stated in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

§ 48-4. Who may adopt children.—(a) Any person over twenty-one years of age may petition in a special proceeding in the superior court to adopt a minor child and may also petition for a change of the name of such child. If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.

(b) Provided, however, that if the spouse of the petitioner is a natural parent of the child to be adopted, such spouse need not join in the petition but need only to give consent as provided in G.S. § 48-7 (d).

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for one year next preceding the filing of the petition unless the petition is for the adoption of a stepchild as provided in subsection (b). In cases where the petition is for the adoption of a stepchild, the petitioner must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. (1949, c. 300; 1963, c. 699.)

Editor's Note.—The 1963 amendment added that part of subsection (c) relating to the adoption of a stepchild.

adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

Stated in *Wilson v. Anderson*, 232 N.C.

For article on interstate and foreign 212, 59 S.E.2d 836 (1950).

§ 48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.—(a) In all cases where a court of competent jurisdiction, including a juvenile court or a domestic relations court, has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this chapter nor shall their consent be required.

(b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than ten days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place; provided, that if the child is under the jurisdiction and control of a juvenile court or a domestic relations court, such determination of abandonment shall be made only by that court having jurisdiction, after due notice to the parent, parents or guardian of the person of the child and to any person or agency having the custody or supervision of the child under the order of such court.

(c) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. § 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk.

(d) A copy of the order of the court declaring a child abandoned must be filed in the proceeding with the petition in which case consent must be given or withheld in accordance with G.S. § 48-9, subsection (a) (2). (1949, c. 300; 1957, c. 90; c. 778, s. 3.)

Editor's Note.—Many of the cases in the following note were decided under former

§ 48-10, to which this section corresponds, or under earlier provisions of the law.

Consent of Parent Guilty of Abandonment Need Not Be Obtained.—If it is determined that a child or children have been abandoned, the consent of the parent, or guardian guilty of the abandonment of such child or children need not be obtained. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

And If Child Has Been Abandoned for Six Months Parent Is Not Necessary Party.—If it is found that a child has been abandoned for at least six months immediately preceding the institution of an action or proceeding to declare the child an abandoned child, then such parents, surviving parent, or guardian of the person, declared guilty of the abandonment, shall not be necessary parties to any proceeding brought under this chapter. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

The time of the abandonment is not determinative of jurisdiction, but is determinative of the question whether or not the parents, surviving parent, or guardian of the person, must be a party to the adoption proceeding. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

Where a court of competent jurisdiction has declared a child to be an abandoned child, the court is not ousted of its jurisdiction although it may be found that abandonment occurred less than six months prior to the institution of the proceeding to determine whether the child had been abandoned. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

Abandonment Judicially Determined.—Under the former law, the existence of abandonment as ground for an adoption without parental consent must be judicially determined. *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295 (1926).

Abandonment Must Be Willful.—Where there was evidence in behalf of the defendant father tending to show that the plaintiff took possession of his children against his will and prevented him from performing his parental duty, as well as

evidence to the contrary, it was held that when the jury found for the defendant, the case did not fall within the meaning of the former section. *Howell v. Solmon*, 167 N.C. 588, 83 S.E. 609 (1914).

Purpose to Forego Parental Duties.—To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego the parental duties. *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295 (1926).

The act of adoptive parents of child in entering into contract consenting to its adoption by another couple does not constitute constructive abandonment of the child so as to obviate the necessity of their consent to its adoption by such other couple. Therefore, when such consent is withdrawn within six months, the proceedings for adoption by such other couple should be dismissed upon motion. In re *Adoption of Hoose*, 243 N.C. 589, 91 S.E.2d 555 (1956).

No abandonment was shown of an illegitimate child. In re *Jones*, 153 N.C. 312, 69 S.E. 217 (1910).

Parents Declared Unfit. — Former § 48-10, to which this section corresponds, provided that parents or guardians who had been declared by a juvenile court to be unfit to have the custody of the child were not necessary parties to adoption proceedings. It was held that this provision was intended to apply only to final, absolute and unconditional determination of unfitness, and not to a judgment of unfitness retained "for further orders as the continued welfare of said child and changing conditions may require." In re *Morris*, 224 N.C. 487, 31 S.E.2d 539 (1944).

Death by Wrongful Act.—The former section did not deprive the parent of the right to recover for the wrongful death of the child. *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721 (1926).

Applied in *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

§ 48-6. When consent of father not necessary.—(a) In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding.

(b) In all cases where a court of competent jurisdiction has rendered a judgment of divorce on the grounds of separation between the natural mother of a child and her husband, the consent of the husband shall not be required for the adoption of a child of the wife, begotten during the period of separation determined by the court in the divorce action as the basis of its judgment, and the

husband need not be made a party to the adoption proceeding. (1949, c. 300; 1957, c. 778, s. 4.)

Cross Reference. — See note under § 48-7.

Father's Consent Unnecessary to Adoption of Illegitimate by Mother and Her Husband.—Should the mother of an il-

legitimate child and her husband desire to adopt the child, the father's consent would be unnecessary. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

§ 48-6.1. When consent of mother of illegitimate child not necessary.—Whenever it has been judicially determined in a proceeding instituted pursuant to the provisions of North Carolina G.S. 110-25.1 that a child born out of wedlock is living under such conditions that the health or general welfare of such child is endangered by its living conditions and environment, then, the consent of the mother to the adoption of such child shall not be necessary as a prerequisite to the validity of the adoption of said child. (1963, c. 1258.)

§ 48-7. When consent of parents or guardian necessary.—(a) Except as provided in G.S. § 48-5, and G.S. § 48-6, and if they are living and have not released all rights to the child and consented generally to adoption as provided in G.S. § 48-9, the parents or surviving parent or guardian of the person of the child must be a party or parties of record to the proceeding and must give written consent to adoption, which must be filed with the petition.

(b) In any case where the parents or surviving parent or guardian of the person of the child whose adoption is sought are necessary parties and their address is known, or can by due and diligent search be ascertained, that fact must be made known to the court by proper allegation in the petition or by affidavit and service of process must be made upon such person as provided by law for service of process on residents of the State or by service of process on nonresidents as provided in G.S. 1-104; provided, however, that service of process upon such person shall not be necessary if he or she has given written consent, duly acknowledged, to the adoption sought in the proceeding.

(c) If the address of such person cannot be ascertained for the purpose of service of process or service of process cannot be made as hereinbefore provided, that fact must be made known to the court by proper allegation in the petition or by affidavit to the effect that after due and diligent search such person cannot be found for the purpose of service of process. Service of process upon such person may then be made by publication of summons as provided by G.S. § 1-98 et seq., and as provided by law.

(d) When a stepparent petitions to adopt a stepchild, consent to the adoption must be given by the spouse of the petitioner, and this adoption shall not affect the relationship of parent and child between such spouse and the child. (1949, c. 300; 1957, c. 778, s. 5.)

Editor's Note. — As to revocability of consent in adoption proceedings, see 26 N.C.L. Rev. 293.

Some of the cases in this note were decided under former § 48-4, to which this section corresponds, or under earlier provisions of the law.

Noncompliance Deprives Clerk of Jurisdiction.—In *Truelove v. Parker*, 191 N.C. 430, 132 S.E. 295 (1926), decided under similar provisions of a former law, it is said: "Upon the record in this case it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person, [consequently] he had no

jurisdiction of the subject matter." See note of this case in 5 N.C.L. Rev. 67.

Mother of illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption, or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. In *re Holder*, 218 N.C. 136, 10 S.E.2d 620 (1940).

Parent's consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child. In *re Holder*, 218 N.C. 136, 10 S.E.2d 620 (1940).

Under this section, except as provided in § 48-5 and § 48-6, before a child can

be adopted, the written consent of the parents, or surviving parent or guardian of the person of the child must be obtained. In re Adoption of Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956). See also § 48-6.1.

In the absence of the consent of the adoptive parents, the court was without jurisdiction to order the adoption of a child unless her adoptive parents had abandoned such child within the meaning of our statutes. In re Adoption of Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Where proceeding for the adoption of a child born out of wedlock was instituted in conformity with § 48-6 upon the written consent of its mother but its mother and reputed father married prior to an order of reference directing the superintendent [now director] of public welfare of the

county to make a full investigation to determine if the child was a proper child for adoption and the natural parents intervened and moved to vacate and dismiss the proceeding, it was held that at the time of the reference and at the time the court came to determine whether the child was the proper subject for adoption the status of the child had changed from illegitimate to legitimate, and the motion of interveners to vacate the proceeding and for the custody of their child should have been allowed, it being required in a proceeding for the adoption of a legitimate child that its natural parents be parties or their consent to the adoption be made to appear unless they had abandoned the child. In re Adoption of Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

§ 48-8. Capacity of parents to consent.—A parent who has not reached the age of twenty-one years shall have legal capacity to give consent to adoption and to release such parent's rights in a child, and shall be as fully bound thereby as if said parents had attained twenty-one years of age. (1949, c. 300.)

§ 48-9. When consent may be given by persons other than parents.—(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person.

- (1) When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a director of public welfare of a county or to a licensed child placing agency and at the same time in writing has consented generally to adoption of the child, the director of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of public welfare may accept the surrender of a child who was born in the county or whose parent or parents have established residence in the county.
- (2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(b) The surrender of the child and consent for the child to be adopted given by the parent or guardian of the person to the director of public welfare or to the licensed child placing agency shall be filed with the petition along with the consent of the director of public welfare or of the executive head of the agency to the adoption prayed for in the petition.

(c) Where the child has been surrendered to an agency operating under the laws of another state, and authorized by such state to place children for adoption, the written consent of such agency shall be sufficient for the purposes of this chapter.

(d) If the court finds as a fact that one or both of the parents of a child are unable to give a valid consent to an adoption for the reason that one or both of said parents have been adjudged mentally incompetent, the court may appoint

some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as the next friend of the child to give or withhold such consent. It shall be the duty of the person so appointed as next friend of the child to make a full investigation as to whether or not the parent or parents of the child is, or are, incurably insane and make a full report thereof to the court. The appointment of any next friend or the county director as herein provided shall be made immediately or at such time fixed by the court upon the making of such determination and the court may make such further orders as may be proper. Upon a finding that one or both of the parents of a child have been adjudged mentally incompetent, the director of public welfare or licensed agency shall cause notice of such fact to be given to the adopting parents. (1949, c. 300; 1953, c. 906; 1961, c. 186.)

§ 48-10. When child's consent necessary.—In any proceeding under this chapter, a child who is twelve years of age or over or who becomes twelve years of age before the granting of the final order must also consent to the proposed adoption. (1949, c. 300.)

§ 48-11. Consent not revocable.—No consent described in G.S. 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree or a final order of adoption when entering of an interlocutory decree has been waived in accordance with the provisions of G.S. 48-21: Provided, no consent shall be revocable after six months from the date of the giving of the consent; provided further, that when the consent has been given generally to a director of public welfare or to a duly licensed child placing agency, it shall not be revocable after thirty days from the date of the giving of the consent. When the consent of any person or agency is required under the provisions of this chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding; and no service of any process need be made upon such person or agency. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186.)

Revocation within Six Months.—Ordinarily the consent of parents to the adoption of their child may be withdrawn or revoked within six months from the date it is given. In re Adoption of Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Instrument held sufficient revocation of consent to adoption. In re Adoption of Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

§ 48-12. Nature of proceeding; venue.—Adoption shall be by a special proceeding before the clerk of the superior court. The petition may be filed in the county:

- (1) Where the petitioners reside; or
- (2) Where the child resides; or
- (3) Where the child resided when it became a public charge; or
- (4) In which is located any licensed child placing agency or institution operating under the laws of this State and having custody of the child or to which the child shall have been surrendered as provided in G.S. § 48-9. (1949, c. 300.)

Editor's Note.—For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

Child Committed to Children's Home Society. — In a case arising under this chapter before the 1949 revision, the evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that

the court committed it to the custody of a children's home society having its home office in another county of the State, but that the child was immediately taken by the persons seeking to adopt it to their residence in another state. It was held that the child never resided in the county in which was located the home office of the children's home society, its mere commitment to the children's home not having

the effect of making the child's constructive residence there, and adoption proceedings in that county were void since the child was never within its jurisdiction.

In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

Quoted in In re Custody of Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-13. **Reference to parental status.**—No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the natural parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.

In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G.S. § 48-6 is necessary shall be filed with and become a part of the report provided for in G.S. § 48-16. (1949, c. 300.)

§ 48-14. **Use of original name of child unnecessary; name used in proceedings for adoption.**—(a) Only in the report required by G.S. § 48-16 on the investigation of the conditions and antecedents of the child sought to be adopted shall the original name of the child given by the natural parent or parents be necessary.

(b) In the petition, interlocutory decree, and final order of adoption and in all other papers related to the case the name selected by the petitioner or petitioners as the name for the child may be used as the true and legal name and the original name shall not be necessary. (1949, c. 300.)

§ 48-15. **Petition for adoption.**—(a) The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE SUPERIOR COURT
..... COUNTY
BEFORE THE CLERK

..... (Full name of adopting father) and (Full name of adopting mother) FOR THE ADOPTION OF (Full name of child as used in proceeding)	}	PETITION FOR ADOPTION
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(b) The petition may be prepared on a standard form to be supplied by the State Board of Public Welfare, or may be typewritten, giving all the information hereinafter required.

(c) Such petition must state:

- (1) The full names of the petitioners;
- (2) The information necessary to show that the court to which the petition is addressed has jurisdiction;
- (3) When the petitioners acquired custody of the child, and from what person or agency;
- (4) The birth date and state or county of birth of the child, if known;
- (5) The name used for the child in the proceeding;
- (6) That it is the desire of the petitioners that the relationship of parent and child be established between them and said child;
- (7) Their desire, if they have such, that the name of the child be changed together with the new name desired;
- (8) The desire of the petitioners that the said child shall, upon adoption, inherit real and personal property in accordance with the statutes of descent and distribution;

- (9) The value of the personal property and of the real estate owned by the child as far as can be ascertained;
- (10) That the petitioners are fit persons to have the care and custody of the child;
- (11) That they are financially able to provide for him; and
- (12) That there has been full compliance with the law in regard to consent to adoption.

(d) The petition must be signed and verified by the petitioners and must be filed in triplicate. The original of the petition shall be held in the office of the clerk of the superior court, a copy sent to the State Board of Public Welfare, and a copy sent to the director of public welfare or to the licensed child placing agency concerned with the order of reference.

(e) The names of the adopting parents must be indexed on the plaintiffs' or petitioners' side of the cross index of special proceedings. The child's name as used in the proceeding must be indexed on the defendants' or respondents' side of such index. (1949, c. 300; 1961, c. 186.)

Applied in *Pratt v. Bishop*, 257 N.C. 486,
126 S.E.2d 597 (1962).

Quoted in *Wilson v. Anderson*, 232 N.C.
212, 59 S.E.2d 836 (1950).

§ 48-16. Investigation of conditions and antecedents of child and of suitability of foster home.—(a) Upon the filing of a petition for adoption the court shall order the county director of public welfare, or a licensed child placing agency through its authorized representative, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child, and to investigate any other circumstances or conditions which may have a bearing on the adoption and of which the court should have knowledge.

(b) The court may order the director of public welfare of one county to make an investigation of the condition and antecedents of the child and the director of public welfare of another county or counties to make any other part of the necessary investigation.

(c) The county director or directors of public welfare of the authorized representative of such agency described hereinbefore must make a written report within sixty days of his or their findings, on a standard form or following an outline supplied by the State Board of Public Welfare, for examination by the court of adoption. Such report shall be filed with the clerk as a part of the official papers in the adoption proceeding but shall not be retained permanently in the office of the clerk. The clerk shall in no wise be responsible for the permanent custody of the report and said report shall not be open to public inspection except upon order of the court as provided in G.S. 48-26. (1949, c. 300; 1961, c. 186.)

Cited in *In re Adoption of Doe*, 231 N.C.
1, 56 S.E.2d 8 (1949).

§ 48-17. Interlocutory decree of adoption.—(a) Upon examination of the written report, required in G.S. § 48-16, the court may issue in triplicate an interlocutory decree of adoption giving the care and custody of the child to the petitioners. Such interlocutory decree must be issued within six months of the filing of the petition unless a final order is entered as provided in G.S. § 48-21 (c). It may be issued on a standard form supplied by the State Board of Public Welfare or may be typewritten, giving all the information hereinafter required.

(b) The interlocutory decree must state:

- (1) That all necessary parties are properly before the court and that the time for answering has expired;
- (2) The name of the child used in the petition;
- (3) The full names of the petitioners and their county of residence;
- (4) The fact and date of filing of the petition;

- (5) When the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;
- (6) That the petitioners are fit persons to have the care and custody of the child;
- (7) That the petitioners are financially able to provide for him;
- (8) That the child is a suitable child for adoption; and
- (9) That the adoption is for the best interests of the child. (1949, c. 300.)

Jurisdiction of Domestic Relations Court Not Ousted.—The provision in the adoption statute that the court (the clerk), if it be satisfied that the adoption be for the best interests of the child, may tentatively approve the adoption and issue an order giving the care and custody

of the child to the petitioner during the testing period, so to speak, is provisional, and is not intended to oust the jurisdiction of the domestic relations court in a case involving question of custody of such child. *In re Blalock*, 233 N.C. 493, 64 S.E.2d 848, 25 A.L.R.2d 818 (1951).

§ 48-18. Effect of interlocutory decree.—(a) Upon issuance of the interlocutory decree the child shall remain or be placed in the care and custody of the petitioners pending further orders of the court. Such decree shall be provisional only and may be rescinded or modified at any time prior to the final order. Until the final order is made, the child shall be a ward of the court having jurisdiction.

(b) When a husband and wife have petitioned jointly to adopt and an interlocutory decree has been entered, and the death of one spouse occurs before the time for the entering of the final order, the petition of the living petitioner shall not be invalidated by the fact of the death of the other petitioner, and the court may proceed to grant the adoption to the surviving petitioner. (1949, c. 300.)

§ 48-19. Report on placement after interlocutory decree.—When the court enters an interlocutory decree of adoption, it must order the county director of public welfare or a licensed child placing agency through its duly authorized representative to supervise the child in its adoptive home and report to the court on the placement on a standard form or following an outline supplied by the State Board of Public Welfare, such report being for examination by the court before entering any final order. (1949, c. 300; 1961, c. 186.)

§ 48-20. Dismissal of proceeding.—(a) If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adoption to the petitioners, the court may dismiss the proceeding.

(b) The court before entering an order to dismiss the proceeding must give notice of not less than five days of the motion to dismiss to the petitioners, to the county director of public welfare or licensed child placing agency having made the investigation provided for in G.S. 48-16, and to the State Board of Public Welfare, and they shall be entitled to a hearing to admit or refute the facts upon which the impending action of the court is based.

(c) Upon dismissal of an adoption proceeding, the custody of the child shall revert to the county director of public welfare or licensed child placing agency having custody immediately before the filing of the petition. If the placement of the child was made by its natural parents directly with the adoptive parents, the director of public welfare of the county in which the petition was filed shall be notified by the court of such dismissal and said director of public welfare shall be responsible for taking appropriate action for the protection of the child. (1949, c. 300; 1961, c. 186.)

§ 48-21. Final order of adoption; termination of proceeding within three years.—(a) If no appeal has been taken from any order of the court, the court must complete or dismiss the proceeding by entering a final order within three years of the filing of the petition. A final order of adoption must not be entered earlier than one year from the date of the interlocutory decree except as

hereinafter provided. Provided, however, that no adoption proceedings completed prior to April 1, 1959 shall be invalid because of the entry of the final order earlier than one year from the date of the interlocutory decree.

(b) If an appeal is taken from any order of the court, the proceeding must be completed by the court by entering a final order of adoption or a final order dismissing the proceeding within two years from the final judgment upon the appeal.

(c) Upon examination of the written report required under G.S. 48-16, the court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when the child is by blood a grandchild, great grandchild, nephew or niece, grandnephew or grandniece of one of the petitioners or is the stepchild of the petitioner, or where the child is at least sixteen years of age and has resided in the home of the petitioners for five years prior to the filing of the petition and consents to the adoption as provided in G.S. 48-10.

(d) Upon examination of the written report required under G.S. 48-16, the court may, in its discretion, shorten the probationary period between the granting of the interlocutory decree and the final order of adoption by the length of time the child has resided in the home of the petitioners prior to the granting of the interlocutory decree; provided, that the child was placed in the home of the petitioners by a director of public welfare or by a licensed child placing agency and such fact has been certified to the court by the director of public welfare or the executive head of the child placing agency, but no final order shall be entered until the child shall have resided in the home of the petitioners for a period of one year. (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384.)

A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. In re Custody of Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-22. Contents of final order.—(a) The final order of adoption must be entered in triplicate and may be made on a standard form furnished by the State Board of Public Welfare or may be typewritten, giving all the information hereinafter required.

(b) The final order of adoption must state:

- (1) That all necessary parties are properly before the court and that the time for answering has expired;
- (2) The name of the child used in the proceeding;
- (3) The full names of the petitioners and their county of residence;
- (4) The date when the petitioners acquired custody of the child and from what person or agency and that proper consent has been given;
- (5) The fact and date of the filing of the petition;
- (6) The fact and date of the interlocutory decree if such decree has been entered;
- (7) That the petitioners are fit persons to have the care and custody of the child;
- (8) That the petitioners are financially able to provide for him;
- (9) That the child is a suitable child for adoption; and
- (10) That the adoption is for the best interests of the child.

(c) The order shall thereupon decree the adoption of the child by the petitioners and may order that the name of the child be changed to that requested in the petition. (1949, c. 300.)

§ 48-23. Legal effect of final order.—The following legal effects shall result from the entry of every final order of adoption:

- (1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents

in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.

- (2) The natural parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person.
- (3) From and after the entry of the final order of adoption, the words "child," "grandchild," "heir," "issue," "descendant," or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section.
- (4) Where an adoption proceeding has been instituted and interlocutory decree has been entered and one of the petitioners who seeks to adopt the child dies before the final order of adoption has been entered, and the wife or husband of such deceased petitioner shall thereafter obtain a final order of adoption, then said child shall have the status defined in subdivisions (1) and (3) of this section and shall be entitled to inherit real and personal property by, through, and from the deceased petitioner in accordance with the statutes relating to intestate succession, and shall be held to be the "child," "grandchild," "heir," "issue," "descendant," or an equivalent of such deceased petitioner or of his or her ancestor, as the case may be, and any such word or word of like import appearing in any deed, grant, will or other written instrument shall be held to include, whenever appropriate, said child unless the contrary plainly appears by the terms thereof. (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967.)

Cross References.—As to succession by, through and from adopted children, see § 29-17. As to rights under Workmen's Compensation Act, see § 97-2, subdivisions (12), (13), (16).

Editor's Note. — The 1963 amendment rewrote this section.

For brief comment on the 1953 amendment to this section, see 31 N.C.L. Rev. 388 (1953). For comment on the 1955 amendment to this section, see 33 N.C.L. Rev. 521 (1955). For article on inheritance right consequent to adoption, see 29 N.C.L. Rev. 227. As to right of adopted children to take under a will as "grandchildren," see 39 N.C.L. Rev. 203 (1961).

Many of the cases in the following note were decided under former § 48-6, to which this section corresponds, or under earlier provisions of the law.

History of Former § 48-6.—For a brief history of former § 48-6, and the effect of the 1941 amendment thereto, see Phillips v. Phillips, 227 N.C. 438, 42 S.E.2d 604 (1947).

For comment on the 1945 amendment to former § 48-6, see 23 N.C.L. Rev. 346.

Construction. — As statutes such as former § 48-6 are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. *Edwards v. Yearby*, 168 N.C. 663, 85 S.E. 19 (1915); *Grimes v. Grimes*, 207 N.C. 778, 178 S.E. 573 (1935). But see § 48-1.

Conclusiveness of Proceedings. — Under former § 48-6, it was held that adoption proceedings are conclusive as to persons who were parties thereto, and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding on him, but who does not complain of his nonjoinder. *Locke v. Merrick*, 223 N.C. 798, 28 S.E.2d 523 (1944). See § 48-28.

Adopted Child Acquires Only Rights Declared by Statute.—The rights which a child acquires by adoption are those and only those declared by legislative act. *Wachovia Bank & Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E.2d 182 (1965).

Right of Adopted Child to Inherit.—

The legislature has provided that an adopted child from the date of its adoption shall have the same property rights as a natural born child from the date of its birth. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961).

An adopted child shall be entitled to inherit property by, through and from his adoptive parents as if he were born the legitimate child of the adoptive parents. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child, was swept away by the repealing clause in Session Laws 1955, c. 813. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961).

Under the provisions of Session Laws 1955, c. 813, s. 6, an adopted child is entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute, the legislature having the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act. *Bennett v. Cain*, 248 N.C. 428, 103 S.E.2d 510 (1958).

See also § 29-17.

Same—Former Law. — Under former § 48-6, as it stood prior to the 1941 amendment, the effect of the adoption was simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child might inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. *Phillips v. Phillips*, 227 N.C. 438, 42 S.E.2d 604 (1947). See *Grimes v. Grimes*, 207 N.C. 778, 178 S.E. (1935).

Under former § 48-6, as it stood prior to the 1941 amendment, the adopted child could not inherit through the adoptive parent, or from any source other than the "estate of the petitioner." The right to inherit was limited to the property of the adoptive parent, and the adopted child could not inherit from his father's ancestors or other kindred, or be a representative of them. *Grimes v. Grimes*, 207 N.C. 778, 178 S.E. 573 (1935); *Phillips v. Phillips*, 227 N.C. 438, 42 S.E.2d 604 (1947).

See also *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

Inheritance from Adopted Child.—As to former law, see *Edwards v. Yearby*, 168

N.C. 663, 85 S.E. 19 (1915). See now § 29-17.

Former Provisions Applicable Only to Intestacy.—It was held that former provisions, corresponding to this section, had reference to cases of the intestacy of persons standing in loco parentis, and did not apply where the property was disposed of by will. *King v. Davis*, 91 N.C. 142 (1884); *Sorrell v. Sorrell*, 193 N.C. 439, 137 S.E. 306 (1927).

An adopted or legitimated child did not come within the terms of a devise to "heirs lawfully begotten." *Love v. Love*, 179 N.C. 115, 101 S.E. 562 (1919).

A deed to the grantor's daughter conveyed lands to be held, with remainder over as designated thereafter, with habendum to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, "should any child or children born unto her predecease her the other such children should take in fee," with an ultimate and further contingent limitation over. It was held that a child adopted by the grantee after the death of the grantor, no other child having been born, was excluded as against the ultimate takers of the blood of the grantor provided by the deed. *Tankersley v. Davis*, 195 N.C. 542, 142 S.E. 765 (1928).

The statutes relating to the right of adopted children to take as distributees and heirs have no bearing upon whether an adopted child takes under a will except insofar as they establish and define the parent and child relationship between the adoptive parents and the adopted child. *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953).

Right of Adopted Child to Take under Will. — The courts in most jurisdictions still make a distinction between devises and inheritances with respect to the right of an adopted child, even though all distinctions between natural born and adopted children have been abolished by statute. *Thomas v. Thomas*, 258 N.C. 590, 129 S.E.2d 239 (1963), decided under this section as it stood before the 1963 amendment.

It seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he had so desired, such adopted child will be included in the word "children" when used to designate a

class which is to take under the will. *Thomas v. Thomas*, 258 N.C. 590, 129 S.E.2d 239 (1963), decided under this section as it stood before the 1963 amendment.

Where a testator, in 1926, devised real property to a son for life and then to the children of said son living at the time of his death, a child adopted by the son after the death of the testator did not take as though he had been a natural born child of the son. *Thomas v. Thomas*, 258 N.C. 590, 129 S.E.2d 239 (1963), decided under this section as it stood before the 1963 amendment.

Where a trust provides benefits for named blood relatives of testator with provision that this number can be increased only in the event great nieces and great nephews were born within 21 years after testator's death, the will clearly indicates testator's intent to exclude children adopted by his nieces and nephews from the benefits, and therefore this section, by its express language, does not apply, and the children adopted by testator's nieces and nephews do not take under the will.

Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

Subdivision (1) Inapplicable to Existing Deed.—The second sentence of subdivision (1) of this section has no application to a deed executed prior to its enactment. *Allen v. Allen*, 260 N.C. 431, 132 S.E.2d 909 (1963), decided under this section as it stood before the 1963 amendment.

Antilapse Statute Applies to Adopted Child of Legatee.—Where a parent by adoption is named a legatee in the will of her mother, but dies prior to the death of her mother, the adopted child takes the personalty bequeathed his mother by adoption under former § 31-42.1, even though the adoption was subsequent to the execution of the will, since under the provisions of this section the adopted child has the same standing as though he had been born to his adopted parent at the time of the adoption. *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961). See now § 31-42.

Quoted in *In re Gibbons*, 247 N.C. 273, 101 S.E.2d 16 (1957).

Cited in *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E.2d 113 (1962).

§ 48-24. Recordation of adoption proceedings.—(a) Only the final order of adoption or the final order dismissing the proceeding, and no other papers relating to the proceeding, shall be recorded in the office of the clerk of the superior court in the county in which the adoption takes place.

(b) A copy of the petition, the consent, the report on the condition and antecedents of the child and the suitability of the foster home, a copy of the interlocutory decree, the report on the placement, and a copy of the final order must be sent by the clerk of the superior court to the State Board of Public Welfare in the following order:

- (1) Within ten days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition, and the consent must be filed by the clerk with the State Board of Public Welfare.
 - (2) Within ten days after an interlocutory decree is entered, a copy of the interlocutory decree giving the date of the issuance of the decree and the report to the court on the condition and antecedents of the child and the suitability of the foster home must be filed by the clerk with the State Board of Public Welfare. When the interlocutory decree is waived, as provided in G.S. § 48-21 the said report and the recommendation to waive the interlocutory decree shall be so filed by the clerk.
 - (3) Within ten days after the final order of adoption is made the clerk must file with the State Board of Public Welfare the report on the supervision of the placement during the interlocutory period, and a copy of the final order.
- (c) The said Board must cause all papers and reports related to the proceeding to be permanently indexed and filed. (1949, c. 300.)

§ 48-25. Record and information not to be made public; violation a misdemeanor.—(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the State Board of Public Welfare shall be open for general public inspection.

(b) With the exception of the information contained in the final order, it shall be a misdemeanor for any person having charge of the file or the record to disclose, except as provided in G.S. 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of public welfare or any employee of a public welfare department nor a duly licensed child placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its natural, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of public welfare or child placing agency; provided, however, that every director of public welfare and child placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186.)

§ 48-26. Procedure for opening record for necessary information.—

(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction who may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.

(b) The original order to open the record must be filed with the proceedings in the office of the clerk of the superior court. If the clerk shall refuse to issue such order, the party requesting such order may appeal to the judge who may order that the record be opened, if, in his opinion, it be to the best interest of the child or of the public. (1949, c. 300.)

§ 48-27. Procedure when appeal is taken.—In the event of an appeal from ruling of the clerk in an adoption proceeding, the clerk must impound all papers and reports not open to the public pending final determination of the appeal. Within ten days after final determination of the appeal, the clerk must forward all papers and reports as specified in G.S. 48-24. (1949, c. 300; 1957, c. 778, s. 8.)

A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. In re Custody of

Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-28. Questioning validity of adoption proceeding.—(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a natural parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county director of public welfare, or the executive head of a licensed child placing agency to perform any of the duties or acts within the time required by the provisions of this section shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300; 1961, c. 186.)

Only Parent or Guardian Who Was Not Attack. — The provision in this section Party to Adoption Proceeding May which permits a direct or collateral attack

on an adoption proceeding by a natural parent or guardian of the person of the child, is limited to such natural parent or guardian of the person of the child who was not a party to the adoption proceed-

ing. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

Quoted in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made. — (a) For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition. When the name of any child is so changed, the court shall forthwith report such change to the Office of Vital Statistics of the State Board of Health. Upon receipt of the report, the State Registrar of the Office of Vital Statistics shall prepare a new birth certificate for the child named in the report which shall contain the following information: Full adoptive name of child, sex, date of birth, race of adoptive parents, full name of adoptive father, full maiden name of adoptive mother, and such other pertinent information not inconsistent herewith as may be determined by the State Registrar. The city and county of residence of the adoptive parents at the time the petition is filed shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted: Provided, that when the adoptive parents reside in another state at the time the petition is filed the city and county of birth of the child shall be the same on the new birth certificate as on the original certificate. No reference shall be made on the new certificate to the adoption of the child, nor shall the adopting parents be referred to as foster parents.

(b) The State Registrar shall place the original certificate of birth and all papers in his hand pertaining to the adoption under seal which shall not be broken except in the manner provided in G.S. 48-26 for the opening of the record of adoption. Thereafter when a certified copy of the certificate of birth of such person is issued it shall be in the form of a birth registration card containing only the full name, birth date, city and county of birth as shown on the new certificate, race, sex, date of filing, and birth certificate number, except when an order of a court shall direct the issuance of a copy of the original certificate of birth in the manner hereinbefore provided. When one of the adoptive parents of the child, or the child, shall so request, a full copy of the new certificate prepared in accordance with subsection (a) may be issued.

(c) The State Registrar shall not issue to registers of deeds copies of birth certificates for adopted children. Certified copies of such record shall be issued by the State Board of Health only, and such copies shall be prepared in accordance with subsection (b). This section shall not be construed to prohibit issuance of copies of certificates now on file in the office of the register of deeds. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1.)

§ 48-30. Guardian appointed when custody granted of child with estate.—When the court grants the petitioners custody of a child, if the child is an orphan and without guardian and possesses any estate to be administered, the court must appoint a guardian as provided by law. (1949, c. 300.)

§ 48-31. Rights of adoptive parents.—When a child is adopted pursuant to the provisions of this chapter, the adoptive parents shall not thereafter be deprived of any rights in the child, at the instance of the natural parents or otherwise, except in the same manner and for the same causes as are applicable in proceedings to deprive natural parents of the children. (1949, c. 300.)

§ 48-32. Readoption of child previously adopted.—Any minor child may be readopted in accordance with the provisions of this chapter. All provisions relating to the natural parent or parents shall apply to the adoptive parent or parents, except that in no case of readoption shall a natural parent be made a party to the proceedings nor shall the consent of a natural parent be necessary. For the

purposes of service of process, necessary parties, and consent, the adoptive parent shall be substituted for the natural parent. (1949, c. 300.)

§ 48-33. Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by G.S. § 48-5 and who shall, otherwise than by legal process, procure the possession and custody of such child with respect to whom his rights and privileges have been forfeited shall be guilty of a crime, and shall be punished as for abduction. (1949, c. 300.)

§ 48-34. Past adoption proceedings validated.—All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law; provided that this section shall not apply to litigation pending on March 11, 1949, in which the validity of a prior adoption proceeding is involved. (1949, c. 300.)

Presumption That Evidence Was Sufficient to Sustain Finding of Abandonment.—Where, in an adoption proceeding in 1923, the court found that the parents of a minor child had abandoned such child and the evidence on which the finding was

made does not appear in the record, there is a presumption that it was sufficient to sustain the finding. *Locke v. Merrick*, 223 N.C. 798, 28 S.E.2d 523 (1944).

Quoted in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

§ 48-35. Prior proceedings not affected.—Adoption proceedings pending on March 11, 1949, shall not be affected, except that the provisions of G.S. § 48-34 shall apply thereto, and such proceedings shall be completed in accordance with provisions of the statutes in effect at the time such proceedings were instituted; provided that the petitioners in proceedings pending on date of ratification may discontinue such proceedings by taking voluntary nonsuits and, upon paying the costs accrued in such discontinued proceedings, may institute new proceedings under the provisions of this chapter, in which cases all of the provisions of this chapter shall apply. (1949, c. 300.)

Quoted in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

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ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. **Title.**—This article shall be referred to as “An act concerning the support of children of parents not married to each other.” (1933, c. 228, s. 11.)

Cross Reference.—As to special county attorneys and their duties with respect to proceedings authorized by this chapter, see §§ 108-14.01 to 108-14.03.

Editor's Note. — For comment on this article, see 28 N.C.L. Rev. 119.

Meaning of Word “Parents”.—The word “parents” in this section and in § 50-13 and

the word “parent” in § 49-2 all relate to the rights and duties of parents in respect to their children, and are in *pari materia*. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

Stated in *State v. Dill*, 224 N.C. 57, 29 S.E.2d 145 (1944); *State v. Sharpe*, 234 N.C. 154, 66 S.E.2d 655 (1951).

§ 49-2. **Nonsupport of illegitimate child by parents made misdemeanor.**—Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than eighteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1.)

Cross References.—See § 49-7 and note. As to when offense of failure to support illegitimate child deemed committed in State, see § 14-325.1.

Editor's Note.—As to extradition of defendant in bastardy proceedings, see 11 N.C.L. Rev. 191. As to application of article to both father and mother, see 11 N.C.L. Rev. 205. For note concerning this chapter, see 22 N.C.L. Rev. 250. For discussion of problems arising under this article, see 26 N.C.L. Rev. 305.

A number of the cases treated in this note were decided under the bastardy law as it stood prior to its revision by Public

Laws 1933, c. 228. They are made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

History of Section.—For a history of this section, see *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Constitutionality.—This section does not violate due process of law or impose imprisonment but by the law of the land. *State v. Spillman*, 210 N.C. 271, 186 S.E. 322 (1936).

Purpose.—The object of the Bastardy Act was to shift the burden of maintain-

ing the child from the innocent many to the guilty one. *State v. Roberts*, 32 N.C. 350 (1849).

The sole aim of the proceeding is to ascertain the paternity of the child and impose upon the father the burden of its support, such as he would incur if it were his lawful instead of his illegitimate offspring, and to save the county the expense of its maintenance. *State v. Collins*, 85 N.C. 511 (1881). See also *State v. Robeson*, 24 N.C. 46 (1841); *State v. Brown*, 46 N.C. 129 (1853); *Ward v. Bell*, 52 N.C. 79 (1859); *State ex rel. Clements v. Durham*, 52 N.C. 100 (1859).

This article is not primarily to benefit illegitimate children, but to prevent them from becoming public charges. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Section Renders Moral Obligation Legal and Enforceable.—At common law the father of a bastard child is under no legal obligation to support it. However, the father of a bastard is under a natural and moral duty to support his bastard. This section makes this moral obligation of the father legal and enforceable, and our courts should enforce it where the father is subject to their jurisdiction. *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953).

Duty of Support Not Primarily for Benefit of Child.—The duty of a putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental. Such rights as it may have must be enforced under this section and in accord with the procedure therein prescribed. *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E.2d 18 (1949).

This is a criminal statute. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

As to whether bastardy proceedings under the former law were criminal or civil in their nature, see *State v. Roberts*, 32 N.C. 350 (1849); *State v. Edwards*, 110 N.C. 511, 14 S.E. 741 (1892); *State v. Ostwalt*, 118 N.C. 1208, 24 S.E. 660 (1896); *State v. Liles*, 134 N.C. 735, 47 S.E. 750 (1904); *State v. Addington*, 143 N.C. 683, 57 S.E. 398 (1907); *State v. McDonald*, 152 N.C. 802, 67 S.E. 762 (1910); *State v. Currie*, 161 N.C. 275, 76 S.E. 694 (1912); *Sanders v. Sanders*, 167 N.C. 319, 83 S.E. 490 (1914); *Payne v. Thomas*, 176 N.C. 401, 97 S.E. 212 (1918); *State v. Carnegie*, 193 N.C. 467, 137 S.E. 308 (1927). As to criminal nature of proceedings under present act, see 11 N.C.L. Rev. 191, 206.

Remedy Is Exclusive.—This chapter and

§ 7-103 provide an exclusive remedy to compel a father to provide for the support of his illegitimate child, and these statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E.2d 18 (1949).

As stated in *Burton v. Belvin*, 142 N.C. 151, 55 S.E. 71 (1906), the natural obligation of the father to support will be enforced under the statute recognizing the obligation and imposing the duty. *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E.2d 18 (1949).

The old Bastardy Act is repealed in toto by Public Laws 1933, c. 228, the provisions of s. 2 that the act should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of s. 9, and in a prosecution under the act of 1933 a demurrer on the grounds that proceedings under the old Bastardy Act were then pending should be overruled. See *State v. Morris*, 208 N.C. 44, 179 S.E. 19 (1935), holding that the act of 1933 was intended to cover the entire subject dealing with bastardy.

Proceeding under Former Law Will Not Bar Proceeding under Present Statute.—Bastardy proceedings against defendant under C.S., § 265, et seq., repealed by s. 9, c. 228, Public Laws 1933, being civil, will not support a plea of former jeopardy in a prosecution under this and the following sections for willful failure to support an illegitimate child. *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934).

Offense Punishable after Effective Date of Section Although Child Born Before.—A parent may be prosecuted under this section for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute. *State v. Parker*, 209 N.C. 32, 182 S.E. 723 (1935).

Time Child Was Begotten Is Immaterial.—A defendant may be prosecuted under this statute, for willful failure to support his illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is ex post facto cannot be sustained, since the offense is the willful failure to support the child, and the time it was begotten is immaterial. *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934), followed

in *State v. Morris*, 208 N.C. 44, 179 S.E. 19 (1935).

Violation of Statute Is Continuing Offense. — Defendant was convicted and served the sentence imposed for willfully failing and refusing to support his illegitimate child under this and the following sections. After completion of his term, defendant still willfully failed and refused to support the child, and this prosecution was instituted for breach of this and the following sections subsequent to his release. Defendant entered a plea of former jeopardy. It was held that the violation of the statute constitutes a continuing offense, and the prior prosecution is not a bar to a prosecution for breach of the statute for the period subsequent to defendant's release from the imprisonment imposed in the first prosecution. *State v. Johnson*, 212 N.C. 566, 194 S.E. 319 (1937).

This section creates a continuing offense. *State v. Robinson*, 236 N.C. 408, 72 S.E.2d 857 (1952); *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953); *State v. Perry*, 241 N.C. 119, 84 S.E.2d 329 (1954); *State v. Coppedge*, 244 N.C. 590, 94 S.E.2d 569 (1956); *State v. Smith*, 246 N.C. 118, 97 S.E.2d 442 (1957); *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Liability of Nonresident Who Begot Child in Another State. — Where defendant, a resident of another state, begot a bastard child in such other state, and the mother moved to this State before the child was born, and the mother and child continued to reside in this State from the time of the birth, the offense of willful failure and refusal to support the child was committed in this State, and defendant was constructively in this State when the offense was committed, since he had voluntarily set in motion the chain of circumstances resulting in the commission of the offense here, and therefore the courts of this State had jurisdiction of the offense. *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953), commented on in 32 N.C.L. Rev. 435 (1954).

Meaning of Word "Parents." — The word "parent" in this section and the word "parents" in §§ 49-1 and 50-13 all relate to the rights and duties of parents in respect to their children, and are in *pari materia*. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

This section clearly recognizes that the putative father of an illegitimate child is now deemed to be the father thereof within the eyes of the law. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the putative father of an unborn, illegitimate child is insufficient to support a prosecution under this statute, nor is such insufficiency cured by an amendment allowing the word "willful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. *State v. Tyson*, 208 N.C. 231, 180 S.E. 85 (1935). See *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. Robinson*, 236 N.C. 408, 72 S.E.2d 857 (1952); *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953).

The only "prosecution" contemplated by this legislation is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child, the mere begetting of the child not being denominated a crime. *State v. Dill*, 224 N.C. 57, 29 S.E.2d 145 (1944); *State v. Stiles*, 228 N.C. 137, 44 S.E.2d 728 (1947); *State v. Coppedge*, 244 N.C. 590, 94 S.E.2d 569 (1956); *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956); *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Nor is the failure of the father to pay the expenses of the mother incident to the birth of his illegitimate child a criminal offense. *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. Ferguson*, 243 N.C. 766, 92 S.E.2d 197 (1956); *State v. Coppedge*, 244 N.C. 590, 94 S.E.2d 569 (1956).

Prosecution Is Grounded on Willful Neglect or Refusal to Support Child. — The only prosecution contemplated under this section is that grounded on the willful neglect or refusal of a parent to support his or her illegitimate child. *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

The question of paternity is incidental to the prosecution for nonsupport. *State v. Bowser*, 230 N.C. 330, 53 S.E.2d 282 (1949); *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. Robinson*, 236 N.C. 408, 72 S.E.2d 857 (1952); *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953); *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

"To support and maintain his or her illegitimate child," within the purview of this section, is not restricted merely to providing food. It includes the supplying of food, clothing and other necessities, "together with medical assistance reasonably required for the preservation of health" of the child. And this obligation to the child applies even in the case of the

newly born baby. *State v. Love*, 238 N.C. 283, 77 S.E.2d 501 (1953).

Unborn Child.—A man cannot be held criminally liable for the willful failure to support an unborn illegitimate child. *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Married Woman.—It was held in *State v. Pettaway*, 10 N.C. 623 (1825), and in *State v. Wilson*, 32 N.C. 131 (1849), cited with approval in *State v. Allison*, 61 N.C. 346 (1867), that, though the statute in force at that time specified "any single woman big with child or delivered of the child," the subsequent language in the statute, that the object was to protect the public against the charge of maintaining bastard children, included married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. See *Wilkie v. West*, 5 N.C. 319 (1809); *State v. Liles*, 134 N.C. 735, 47 S.E. 750 (1904).

Willfulness Is Essential Element of Offense.—The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was willful, that is, without just cause, excuse or justification. The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of willfulness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a willful neglect, but it does not raise a presumption of willfulness. *State v. Cook*, 207 N.C. 261, 176 S.E. 757 (1934); *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Willfulness is an essential element in the crime of failure and refusal to support an illegitimate child. *State v. McDay*, 232 N.C. 388, 61 S.E.2d 86 (1950).

And Must Be Charged in Warrant or Indictment.—Under this section, the neglect or refusal to support an illegitimate child must be willful and it must be so charged in the warrant or bill of indictment, and the omission of such allegation is fatal. *State v. Vanderlip*, 225 N.C. 610, 35 S.E.2d 885 (1945); *State v. Morgan*, 226 N.C. 414, 38 S.E.2d 166 (1946); *State v. Moore*, 238 N.C. 743, 78 S.E.2d 914 (1953).

The warrant in a prosecution under this and the following sections must allege that the failure or refusal of defendant to

support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed. *State v. McLamb*, 214 N.C. 322, 199 S.E. 81 (1938). See *State v. Tarleton*, 208 N.C. 734, 182 S.E. 481 (1935); *State v. Clarke*, 220 N.C. 392, 17 S.E.2d 468 (1941); *State v. Sturdivant*, 220 N.C. 535, 17 S.E.2d 661 (1941); *State v. Coppedge*, 244 N.C. 590, 94 S.E.2d 569 (1956); *State v. Smith*, 246 N.C. 118, 97 S.E.2d 442 (1957).

And proved beyond reasonable doubt.—The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proved beyond a reasonable doubt. *State v. Spillman*, 210 N.C. 271, 186 S.E. 322 (1936); *State v. Moore*, 238 N.C. 743, 78 S.E.2d 914 (1953).

"Willful" Defined.—The word "willful," when used in this section, creating an offense, means that the act is done purposely and deliberately in violation of the law; it means an act done without any lawful justification, reason or excuse. *State v. Stiles*, 228 N.C. 137, 44 S.E.2d 728 (1947).

The word "willfully" as used in the statute is used with the same import as in the act relating to willful abandonment of wife by husband (§ 14-322). *State v. Cook*, 207 N.C. 261, 176 S.E. 757 (1934).

A defendant's willful failure and refusal to support his illegitimate child means an intentional neglect or refusal. *State v. McDay*, 232 N.C. 388, 61 S.E.2d 86 (1950).

In prosecution under this section an instruction defining willfully as "wrongfully and unjustifiably, without valid and good excuse" instead of an intentional neglect or refusal, must be held for reversible error. *State v. McDay*, 232 N.C. 388, 61 S.E.2d 86 (1950).

Willfulness Not Presumed from Failure to Support.—Construing the word "willful" in the light of the decided cases, it is clear that one cannot be brought within the meaning of the statute without proving the criminal intent, and that it is error for the court to charge the jury that if the defendant failed to support his illegitimate child "the presumption is he willfully did so." *State v. Cook*, 207 N.C. 261, 176 S.E. 757 (1934).

Warrant Must Charge a Crime.—Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record. Thus the failure of the warrant to charge defendant with willful failure to support his

illegitimate child is not cured by the charge or verdict, where the warrant fails to charge any criminal offense. *State v. Tyson*, 208 N.C. 231, 180 S.E. 85 (1935).

The charge must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and time of trial—at least when the trial is had upon the original warrant. *State v. Sharpe*, 234 N.C. 154, 66 S.E.2d 655 (1951); *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953).

Demand for Support Must Have Been Made before Warrant Was Drawn. — Where, in a prosecution for willful neglect and refusal to support an illegitimate child, the evidence discloses that no demand for support of the child was made upon defendant until after the warrant was drawn, nonsuit must be entered, since the warrant must be supported by the facts as they existed at the time it was formally laid, and cannot be supported by evidence of willful failure thereafter. *State v. Perry*, 241 N.C. 119, 84 S.E.2d 329 (1954).

Amendment of Warrant. — The trial court has authority to permit the solicitor to amend a warrant charging defendant with willful failure to support his illegitimate child by inserting the word "maintain," so as to charge his willful failure to support and maintain his illegitimate child. *State v. Bowser*, 230 N.C. 330, 53 S.E.2d 282 (1949).

Sufficiency of Indictment.—In a prosecution for willful failure and refusal to support an illegitimate child, under this and the following sections, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. *State v. Oliver*, 213 N.C. 386, 196 S.E. 325 (1938).

Presumption of Innocence. — Since the statute raises no presumption against a person accused, the failure to support being evidence of willfulness, but raising no presumption thereof, but to the contrary, the statute requires the State to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. *State v. Spillman*, 210 N.C. 271, 186 S.E. 322 (1936).

State Must Prove Paternity of Child and Willful Neglect.—It is not necessary that defendant's paternity of the child

should be first judicially determined, but the State must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child. *State v. Spillman*, 210 N.C. 271, 186 S.E. 322 (1936).

In order to convict defendant under this section the burden is on the State to show not only that he is the father of the child, and that he had refused or neglected to support and maintain it, but further that his refusal or neglect is willful, that is intentionally done, "without just cause, excuse or justification," after notice and request for support. *State v. Hayden*, 224 N.C. 779, 32 S.E.2d 333 (1944); *State v. Stiles*, 228 N.C. 137, 44 S.E.2d 728 (1947); *State v. Ellison*, 230 N.C. 59, 52 S.E.2d 9 (1949); *State v. Thompson*, 233 N.C. 345, 64 S.E.2d 157 (1951); *State v. Sharpe*, 234 N.C. 154, 66 S.E.2d 655 (1951); *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953); *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

To impose responsibility on one for the support of an illegitimate child, it must first be established that he is the father of the child. The Act of 1741 created a conclusive presumption from the oath of the mother. This was modified in 1814 to make a prima facie case by the affidavit or oath of the woman. There is now no presumption from the affidavit or testimony of the mother. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

It is as much the duty of the State to establish willful failure to support by evidence showing that fact beyond reasonable doubt as it is to so establish paternity. *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

And That Willful Neglect Followed Demand for Support.—In order to support a finding of willful nonsupport of an illegitimate child by the father, the State must prove beyond a reasonable doubt that the mother of the child or, under certain circumstances, the director of public welfare has, after the child was born and before the prosecution was commenced, made demand upon the father for support, and after such demand and before prosecution, the father willfully neglected and refused to provide adequate support according to his means and condition and the necessities of the child. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

But Paternity Need Not Be Relitigated on Subsequent Prosecution.—Upon a prosecution for a subsequent willful neglect or refusal to support, the accused is not

entitled to have the question of paternity relitigated. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964), denying new trial on issue of paternity.

A judgment as of nonsuit in a prosecution under this section does not constitute an adjudication on the issue of paternity and will not support a plea of former acquittal in a subsequent prosecution under the statute, the offense being a continuing one. *State v. Robinson*, 236 N.C. 408, 72 S.E.2d 857 (1952). See also *State v. Perry*, 241 N.C. 119, 84 S.E.2d 329 (1954); *State v. Ferguson*, 243 N.C. 766, 92 S.E.2d 197 (1956).

Testimony of Prosecutrix That She Wrote Defendant Demanding Support for Child.—In a prosecution under this section, testimony of prosecutrix that she wrote defendant after the baby was born demanding support for it is sufficient upon that question without the introduction of the letter in evidence, since the testimony is sufficient to support the inference that the letter was written before the bill of indictment was laid. *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953).

Admissibility of Testimony of Prosecutrix as to Nonaccess of Husband.—In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the admission of testimony by the prosecutrix as to the nonaccess of her husband at the time of conception is error entitling defendant to a new trial. *State v. Bowman*, 230 N.C. 203, 52 S.E.2d 345 (1949).

Cross-Examination as to Failure to Make Blood Test.—It was held competent upon the trial of a prosecution under this section for the solicitor to ask defendant upon cross-examination if the reason the blood test was not made was because defendant knew the baby was his, the matter being within the bounds of a fair cross-examination. The legal principles relating to the purpose and value of a blood test are not relevant upon objection to the cross-examination. *State v. Chambers*, 238 N.C. 373, 78 S.E.2d 209 (1953).

Sufficiency of Evidence.—Evidence in prosecution of defendant for willful neglect or refusal to support his illegitimate child held sufficient to overrule motions to nonsuit. *State v. Bowser*, 230 N.C. 330, 53 S.E.2d 282 (1949).

In a prosecution under this section the evidence was held sufficient to carry the case to the jury. *State v. Humphrey*, 236 N.C. 608, 73 S.E.2d 479 (1952).

Evidence held sufficient to show failure

to support at time warrant issued. *State v. Sharpe*, 234 N.C. 154, 66 S.E.2d 655 (1951).

Instruction as to Willfulness.—Willfulness of the refusal to support one's illegitimate child is an essential ingredient of the offense denounced by this section, and must be proven beyond a reasonable doubt; and instructions, which fail to so charge, deprive defendant of his right to have the jury consider his willfulness as an issuable fact. *State v. Hayden*, 224 N.C. 779, 32 S.E.2d 333 (1944).

Failure to Charge as to Necessity of Notice and Demand for Support.—The failure of the court to charge that there was no obligation upon defendant to support the child in question until he had been given notice that he was the father and demand made upon him for support, cannot be held prejudicial when there is evidence of notice and demand prior to the issuance of the warrant and the court categorically charges that the jury must be satisfied beyond reasonable doubt that defendant was the father of the child, and further that he knowingly, intentionally and with stubborn and willful purpose refused to support the child before they could return a verdict of guilty. *State v. Humphrey*, 236 N.C. 608, 73 S.E.2d 479 (1952).

Submission of Issues Is Virtually Necessary.—The submission of issues in prosecutions under this section is, as a practical matter, almost a necessity. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Because of the nature and effect of the elements involved in this section, it would be difficult to properly try a case pursuant to this statute without submitting to the jury either oral interrogatories or written issues. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Unless Paternity Has Been Previously Determined.—If the question of paternity has been previously determined adversely to the accused, the case could well be tried solely upon the general issue of guilt. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Verdict upon Proper Issues Is Sufficient without General Verdict of Guilty.—A verdict upon the issues of paternity and nonsupport if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of N.C. Const., Art. I, §§ 11 and 13, requiring trial and verdict by jury in criminal cases. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

holding findings in special verdict deficient and granting new trial.

Verdict Must Find Willful Nonsupport.—Willfulness is an essential element of the offense denounced by this section, and a verdict “guilty of failure to support and maintain his bastard child” is insufficient to support a judgment. *State v. Allen*, 224 N.C. 530, 31 S.E.2d 530 (1944).

If a jury find that the accused is parent of the child but has not willfully failed or refused to support the child, there can be no conviction, for no crime has been committed. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Verdict Held Insufficient.—A verdict of “guilty of willful nonsupport of illegitimate child” is insufficient in that it fails to fix the paternity of the child. *State v. Ellison*, 230 N.C. 59, 52 S.E.2d 9 (1949).

A verdict of “guilty of the charge of bastardy” will not support a judgment in a prosecution under this section. *State v.*

Dixon, 257 N.C. 653, 127 S.E.2d 246 (1962).

Where the nonsupport issue submitted was, “Has the defendant . . . willfully neglected and refused to support and maintain said illegitimate child?”, an affirmative answer did not supply the information as to whether demand was made, or, if made, whether it was before or after the prosecution was commenced. Because of the deficiency of the findings in the special verdict there had to be a new trial. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Applied in *State v. Moore*, 209 N.C. 44, 182 S.E. 692 (1935); *State v. Bradshaw*, 214 N.C. 5, 197 S.E. 564 (1938); *State v. Moore*, 222 N.C. 356, 23 S.E.2d 31 (1942); *State v. Wortham*, 240 N.C. 132, 81 S.E.2d 254 (1954); *State v. Robinson*, 248 N.C. 282, 103 S.E.2d 376 (1958); *State v. Little*, 263 N.C. 130, 139 S.E.2d 8 (1964).

Cited in *State v. Stone*, 231 N.C. 324, 56 S.E.2d 675 (1949); *State v. Aldridge*, 254 N.C. 297, 118 S.E.2d 766 (1961).

§ 49-3. Place of birth of child no consideration.—The provisions of this article shall apply whether such child shall have been begotten or shall have been born within or without the State of North Carolina: Provided, that the child to be supported is a bona fide resident of this State at the time of the institution of any proceedings under this article. (1933, c. 228, s. 2.)

Applied in *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953).

§ 49-4. When prosecution may be commenced.—The prosecution of the reputed father of an illegitimate child may be instituted under this chapter within any of the following periods, and not thereafter:

- (1) Three years next after the birth of the child; or
- (2) Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of eighteen years; or
- (3) Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of eighteen years.

The prosecution of the mother of an illegitimate child may be instituted under this chapter at any time before the child attains the age of eighteen years. (1933, c. 228, s. 3; 1939, c. 217, s. 3; 1945, c. 1053; 1951, c. 154, s. 2.)

Editor's Note.—A number of the cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

As to effect of the 1945 amendment to this section, see 23 N.C.L. Rev. 331.

In General.—A proceeding to establish the paternity of an illegitimate child and

to prosecute the father, who willfully neglects or refuses to support and maintain the same, may be instituted at any time within three years next after the birth of the child. *State v. Moore*, 222 N.C. 356, 23 S.E.2d 31 (1942).

General Limitation on Criminal Prosecutions Not Controlling.—The former statute provided the limitation on bastardy proceedings, and such proceedings were not controlled by the statute limiting

criminal prosecutions for misdemeanors to two years. *State v. Hedgepeth*, 122 N.C. 1039, 30 S.E. 140 (1898); *State v. Perry*, 122 N.C. 1043, 30 S.E. 139 (1898).

This section cannot be limited to proceedings to establish paternity. Its language is clear, positive and unbending. It seems to have been taken from C.S., § 274, of the old law, which was held to supersede the general statute of limitations on the subject. *State v. Bradshaw*, 214 N.C. 5, 197 S.E. 564 (1938).

Maximum Time for Prosecution Was Formerly Six Years from Birth. — See *State v. Killian*, 217 N.C. 339, 7 S.E.2d 702 (1940).

Where Paternity Established in Proceeding under Old Law.—Under this section as it stood before the 1945 amendment, a prosecution of the father of an illegitimate child for the willful neglect and refusal to support such child, whose paternity had been established under the old law, C.S., §§ 265-279, and which prosecution originated more than 13 years after the birth of the child, was held barred under the terms of this section, since the prosecution was a new and independent proceeding, rather than a motion in the original proceeding to enforce the order of support as contemplated by the 1933 act. *State v. Dill*, 224 N.C. 57, 29 S.E.2d

145 (1944). See subdivision (2) of this section.

The failure to support an illegitimate child is a continuing offense, and the date such child was born is immaterial provided the action is instituted within the time prescribed by this section, and that demand for the support of such child was made a reasonable time before the action was instituted. *State v. Womack*, 251 N.C. 342, 111 S.E.2d 332 (1959).

Where the question of paternity is judicially determined within three years after the birth of the illegitimate child, the defendant may thereafter be prosecuted for his willful neglect and refusal to support the child. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Acknowledgment Made More than Three Years from Birth Does Not Prevent Running of Limitation.—Where acknowledgment has been made of the paternity of the child by payments for its support within three years from the date of the birth, prosecution for nonsupport may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. *State v. Hodges*, 217 N.C. 625, 9 S.E.2d 24 (1940).

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood. — Proceedings under this article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the director of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Indictments under this article may be returned in the county where the mother resides or is found, or in the county where putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in nowise affect any proceedings under this article. Preliminary proceedings under this article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4; 1961, c. 186.)

Cross Reference.—See note to § 49-2.

Editor's Note. — A number of the cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

Institution of Proceedings.—The provi-

sion that proceedings under this section can only be instituted by the mother or her personal representative or the superintendent of public welfare is applicable both to preliminary proceedings to determine paternity and to proceedings involving the completed crime. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

The affidavit initiating the prosecution

may be made by the mother or the director of public welfare. *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

The mother may decide whether to call upon the father for assistance. In the event she elects not to make the demand, her election will be respected unless the child is likely to become a public charge, then the director of public welfare may proceed. *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

Continuance.—By express statutory language preliminary proceedings to determine the paternity of the child may be initiated and determined before the birth of the child. A continuance of the proceeding until after the birth of the child rests in the sound discretion of the trial court. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Rights of Surety.—The surety on the appearance bond of the defendant, who, in bastardy proceedings under the former law, appealed from a justice of the peace to the county court, which remanded the cause for want of jurisdiction, may insist

upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability have been discharged. *State v. Carnegie*, 193 N.C. 467, 137 S.E. 308 (1927).

Death of Child.—What kind of order should be entered where the child dies pending the trial at the next term of court, is in the discretion of the judge. The former statute seemed to require an order in every case. *State v. Beatty*, 66 N.C. 648 (1872).

Consideration for Promise of Father to Support Child.—Where the mother of a bastard child had refrained from enforcing maintenance thereof under the former statute, this was held to constitute consideration to support an action on a promise of the father to support and educate it. *Thyer v. Thyer*, 189 N.C. 502, 127 S.E. 553 (1925).

§ 49-6. Mother not excused on ground of self-incrimination; not subject to penalty.—No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying, in obedience to a subpoena of any court, in any suit or proceeding based upon or growing out of the provisions of this article, but no such mother shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify. (1933, c. 228, s. 5; 1939, c. 217, s. 5.)

§ 49-7. Jurisdiction of inferior courts; issues and orders.—Proceedings under this article shall be instituted only in the superior court of any county of this State, or in any court inferior to the superior court of this State, except courts of justices of the peace and courts whose criminal jurisdiction does not exceed that of justices of the peace. Justices of the peace may issue warrants for violations of this article made returnable to any court having jurisdiction of such violations under the terms of this article.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this article or the order or orders of the court requiring additional acts to be

performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court in its discretion may require the person requesting a blood grouping test to pay the cost thereof; that the results of a blood grouping test shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person; provided, that from a finding of the issue of paternity against the defendant, the defendant shall have the same right to an appeal as though he had been found guilty of the crime of willful failure to support a bastard child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1945, c. 40; 1947, c. 1014.)

Cross reference.—See note to § 49-2.

Editor's Note. — For comment on the 1937 amendment to this section, see 15 N.C.L. Rev. 347. For comment on the 1939 amendment, see 17 N.C.L. Rev. 351. For comment on the 1945 amendment, see 23 N.C.L. Rev. 343. For comment on the 1947 amendment, see 25 N.C.L. Rev. 412.

As to effect of § 8-501 on the provision of this section as to blood grouping tests, see 27 N.C.L. Rev. 456.

Justice of Peace Has No Jurisdiction.—A prosecution of a defendant for willful failure to support his illegitimate child may not be instituted and heard in a court of a justice of the peace. *State v. Dixon*, 257 N.C. 653, 127 S.E.2d 246 (1962).

Jurisdiction Determined by Age of Defendant at Time He Is Charged.—Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the superior court and not the juvenile court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. *State v. Bowser*, 230 N.C. 330, 53 S.E.2d 282 (1949).

This section seems to contemplate the submission of issues. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Issue of Paternity Must Be Determined First. — In a prosecution of a father for willful neglect or refusal to support his illegitimate child, the issue of paternity must first be determined before and separate from the determination of the issue of guilt or innocence of the offense charged. *State v. Robinson*, 236 N.C. 408, 72 S.E.2d 857 (1952).

The court is expressly commanded by this section to first determine the paternity of the child. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

The domestic relations court was entitled to determine paternity of child, though when the affidavit was filed and the warrant was issued the defendant had not committed the offense of willfully ne-

glecting his illegitimate child, and even though the court exceeded its power in ordering the defendant to make payments, its determination of the facts as to paternity was in effect a jury verdict, and constituted a judicial declaration of the paternity of the child. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

And Established beyond a Reasonable Doubt.—The paternity of the child cannot be established by mere preponderance of the evidence but must be established beyond a reasonable doubt. *State v. Robinson*, 245 N.C. 10, 95 S.E.2d 126 (1956).

Appeal on Issue of Parentage Where Defendant Acquitted on Charge of Nonsupport.—Under the provisions of this section a defendant in a prosecution for nonsupport of his illegitimate child may appeal from a verdict establishing his paternity of the child notwithstanding that the verdict finds him not guilty of nonsupport. *State v. Clement*, 230 N.C. 614, 54 S.E.2d 919 (1949).

Before the 1947 amendment, which added the proviso at the end of this section, it was held that where the jury found the defendant to be the father of the bastard child, but not guilty of nonsupport, this was an acquittal. The defendant therefore was not entitled to an appeal under § 15-180. *State v. Hiatt*, 211 N.C. 116, 189 S.E. 124 (1937).

Modification of Orders. — Where defendant pleaded guilty and orders were made for the support of the child, the court had no authority to strike out a plea of guilty or a judgment at a former term; but, under this section, the court may modify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support. *State v. Duncan*, 222 N.C. 11, 21 S.E.2d 822 (1942).

This section and § 49-8 contemplate initial findings and an order of support, subject to modification or increase from time to time, and to be enforced by such prescribed supplemental orders as the ex-

agencies of the case may require. *State v. S.E.2d 313 (1939); State v. Robinson, 248 Dill, 224 N.C. 57, 29 S.E.2d 145 (1944). N.C. 282, 103 S.E.2d 376 (1958).*

Cited in *State v. Black, 216 N.C. 448, 5*

§ 49-8. Power of court to modify orders; suspend sentence, etc.—

Upon the determination of the issues set out in the foregoing section [§ 49-7] and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives:

- (1) Commit the defendant to prison for a term not to exceed six months;
- (2) Suspend sentence and continue the case from term to term;
- (3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;
- (4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;
- (5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this article. (1933, c. 228, s. 7; 1939, c. 217, s. 6.)

Cross Reference.—See note to § 49-7.

Editor's Note.—The cases treated under this section were decided under the former law. They are made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

Constitutionality. — Proceedings in bastardy under the former law, C.S., § 273, for an allowance to be made to the woman were civil and not criminal, for the enforcement of police regulations, and that section was held not to be contrary to the provisions of the Constitution, Art. IV, § 27. *Richardson v. Egerton, 186 N.C. 291, 119 S. E. 487 (1923)*. See note to § 49-2.

A judgment for an allowance for the mother of the bastard is not a debt arising out of contract, to which the protection afforded by the inhibition of the Constitution, Art. I, § 16, extend, but is rendered as a means of enforcing a legal obligation and duty imposed by the legislature under the police power of the State upon one who is responsible for bringing into existence a bastard child that may become a burden to society. *State v. Manuel, 20 N.C. 144 (1838); State v. Cannady, 78 N.C. 539 (1878); State v. Parsons, 115 N.C. 730, 20 S.E. 511 (1894); State v. Wynne, 116 N.C. 981, 21 S.E. 35 (1895); State v. Nelson, 119 N.C. 797, 25 S.E. 863 (1896)*.

Imprisonment of the putative father for failure to obey an order of maintenance, or give the bond, is a matter of

legislative discretion, and is not imprisonment for debt. *State v. Green, 71 N.C. 172 (1874); State v. Wynne, 116 N.C. 981, 21 S.E. 35 (1895); State v. Morgan, 141 N.C. 726, 53 S.E. 142 (1906)*.

Mother as Creditor of Father. — A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. *State v. Parsons, 115 N.C. 730, 20 S.E. 511 (1894)*.

Father Not Entitled to Claim Exemption. —The father was not entitled to the constitutional exemption of \$500 as against the mother's claim for an allowance made to her in bastardy proceedings. *State v. Parsons, 115 N.C. 730, 20 S.E. 511 (1894)*.

Effect of Death of Child. — Under the former law, C.S. § 273, the intention was to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born did not affect the right of the mother to "support;" among other things, she was entitled to payment for medical attention and medicine for herself, and the burial expenses of the child, consequent upon the defendant's unlawful act. *State v. Adington, 143 N.C. 683, 57 S.E. 398 (1907)*.

Six months is the maximum sentence permitted by this section. *State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964)*.

Suspension of Execution of Sentence.— Upon defendant's conviction of wilful failure to support his illegitimate child the

trial court has plenary power to suspend execution of sentence on condition that defendant pay specified sums of money into court for support of his child. *State v. Bowser*, 232 N.C. 414, 61 S.E.2d 98 (1950).

A domestic relations court has authority, upon conviction of a defendant for willful refusal to support her illegitimate child, to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of the child. *State v. Robinson*, 248 N.C. 282, 103 S.E.2d 376 (1958).

Work on Roads. — Under the former law, when there was no house of correction

in the county, the court could only commit the putative father to jail until the performance of the order of support. He could not be put to work on roads. *State v. Addington*, 143 N.C. 683, 57 S.E. 398 (1907), overruling *Myers v. Stafford*, 114 N.C. 234, 19 S.E. 764 (1894).

Sentence Held Excessive. — See *State v. Nelson*, 119 N.C. 797, 25 S.E. 868 (1896).

Effect of Discharge. — After the defendant, who had served a twenty-day sentence for failure to pay under the former law, had been discharged, he could not be resented to the house of correction at a subsequent term. *State v. Burton*, 113 N.C. 655, 18 S.E. 657 (1893).

§ 49-9. Bond for future appearance of defendant.—At the preliminary hearing of any case arising under this article it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars, conditioned upon the reappearance of the accused at the further hearing under this article. This bond and all other bonds provided for in this article shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.—The putative father of any child born out of wedlock may apply by a verified written petition filed in a special proceeding in the superior court of the county in which he resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross index. (Code, s. 39; Rev., s. 263; C. S., s. 277; 1947, c. 663, s. 1.)

Cross Reference. — As to constitutional provision regarding private laws to legitimate persons, see the North Carolina Constitution, Art. II, § 11.

Editor's Note.—For a brief account of the 1947 amendments to this article, see 25 N.C.L. Rev. 414.

Petition Addressed Directly to Judge.

—A decree of legitimation was not void upon the ground that the petition should have been originally addressed to the clerk of the court, instead of directly to the judge. *Dunn v. Dunn*, 199 N.C. 535, 155 S.E. 165 (1930).

Cited in *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940).

§ 49-11. Effects of legitimation.—The effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the

Intestate Succession Act as if he had been born in lawful wedlock. (Code, s. 40; Rev., s. 264; C. S., s. 278; 1955, c. 540, s. 2; 1959, c. 879, s. 10; 1963, c. 1131.)

Editor's Note.—The 1963 amendment rewrote the first sentence so as to give parents of a child legitimated under the law all legal privileges and parental rights as if such child had been born in lawful wedlock.

The plain intent and language of this section is that a child adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as

if it had been born in lawful wedlock." *Love v. Love*, 179 N.C. 115, 101 S.E. 562 (1919).

Child May Inherit by, through and from Parents.—A legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

§ 49-12. Legitimation by subsequent marriage.—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock. (1917, c. 219, s. 1; C. S., s. 279; 1947, c. 663, s. 2; 1955, c. 540, s. 3; 1959, c. 879, s. 11.)

Editor's Note.—Prior to the passage of this section in 1917, marriage of the parents did not legitimate the previous offspring. *Ashe v. Camp Mfg. Co.*, 154 N.C. 241, 70 S.E. 295 (1911). But where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attached at the time of the marriage, he being a minor, and follows him wherever he goes. *Fowler v. Fowler*, 131 N.C. 169, 42 S.E. 563 (1902).

Contesting Constitutionality of Section.—In *Bowman v. Howard*, 182 N.C. 662, 110 S.E. 98 (1921), it was held that, upon the evidence in the case, and the theory of the defense, the defendant could not invoke the doctrine of vested rights so as to contest the constitutionality of this section.

Strict Construction.—This section is strictly construed as being in derogation of the common law. In re *Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929).

Section Retroactive.—This section is, by its express terms, retroactive as well as prospective in effect. *Stewart v. Stewart*, 195 N.C. 476, 142 S.E. 577 (1928).

The provisions of this section are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. In re *Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929).

By its express language, this section is retroactive as well as prospective. *Greenlee*

v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

This section and § 50-13 must be construed in pari materia, and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock, and such child is a minor child of the marriage within the purview of § 50-13, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce. *Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).

"Reputed Father".—In *Bowman v. Howard*, 182 N.C. 662, 110 S.E. 98 (1921), the court said: "No contention as to the statute was made by the defendant except as the construction of the words 'reputed father,' which the defendant contended should be construed to mean 'actual father.'" The exception is not meritorious. The word 'reputed' means considered, or generally supposed, or accepted by general or public opinion."

The use of the word "reputed" rather than "putative" in this section was intended merely to dispense with the absolute proof of paternity, so that, if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate. *Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).

Evidence of Paternity.—Where a marriage between slaves was validated by §

51-5, declarations as to paternity of a child born subsequent to the marriage, made ante litem motam by the alleged father and mother, were admissible in evidence without regard to this section. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. *Bowman v. Howard*, 182 N.C. 662, 110 S.E. 98 (1921).

The legislature has given a new or additional meaning to the word "legitimate" as used in this section. Although this meaning is not strictly within its ordinary definition, the courts will adopt the meaning impressed upon the word by legislative enactment. *Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).

Irregularity in divorce proceedings is not ground for declaring children who would otherwise be legitimated by a subsequent marriage illegitimate. *Reed v. Blair*, 202 N.C. 745, 164 S.E. 118 (1932).

Rights and Duties as to Custody and Support.—In declaring in this section that "the child shall in all respects after such intermarriage be deemed and held to be legit-

imate," the General Assembly clearly intended that the child should be treated as a child born in lawful wedlock in determining the rights and duties of parent and child as to custody and support. In *re Adoption of Doe*, 231 N.C. 1, 56 S.E.2d 8 (1949).

Child Has Same Right to Inherit as if Born in Lawful Wedlock.—A legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961).

Including Right to Inherit from Collaterals.—The legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had had it been born in lawful wedlock. *Greenlee v. Quinn*, 255 N.C. 601, 122 S.E.2d 409 (1961). As to inheritance from collaterals under former law, see *In re Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929).

Cited in *Williamson v. Cox*, 218 N.C. 177, 10 S.E.2d 662 (1940).

§ 49-13. New birth certificate on legitimation.—A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father. (1947, c. 663, s. 3; 1955, c. 951, s. 2.)

Cross Reference. — For further provisions as to change of birth certificates by State Registrar of Vital Statistics on proof

of marriage of unwed parents, see § 130-64.1.

Chapter 50.

Divorce and Alimony.

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§ 50-1. **Jurisdiction.**—The superior court and such other courts as are now or may hereafter be so vested by statute shall have concurrent jurisdiction of actions for divorce and alimony, or either. (1868-9, c. 93, s. 45; Code, s. 1282; Rev., s. 1557; C. S., s. 1655; 1949, c. 264, s. 1.)

Cross Reference.—As to power of the General Assembly to pass laws regulating divorce and alimony, see the North Carolina Constitution, art. II, § 10.

Editor's Note.—On the general question of jurisdiction in divorce, see 1 N.C.L. Rev. 95. For case law survey on domestic relations, see 41 N.C.L. Rev. 456 (1963). For note on early statutory and common law of divorce in North Carolina, see 41 N.C.L. Rev. 604 (1963).

§ 50-2. **Bond for costs unnecessary.**—It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. (1871-2, c. 193, s. 41; Code, s. 1294; Rev., s. 1558; C. S., s. 1656.)

Cross References. — As to prosecution bonds generally, see § 1-109 et seq. As to costs generally, see § 6-21.

Husband Liable for Own Costs.—In actions for divorce the husband, whether suc-

Jurisdiction of Superior Court. — Prior to the 1949 amendment to this section the legislature had conferred the sole original jurisdiction in all applications for divorce upon the superior courts. *Williamson v. Williamson*, 56 N.C. 446 (1857); *Barringer v. Barringer*, 69 N.C. 179 (1873).

Applied in *Pulley v. Pulley*, 255 N.C. 423, 121 S.E.2d 876 (1961).

cessful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases left to the discretion of the court. *Broom v. Broom*, 130 N.C. 562, 41 S.E. 673 (1902).

§ 50-3. **Venue.**—In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides. (1871-2, c. 193, s. 40; Code, s. 1289; Rev., s. 1559; 1915, c. 229, s. 1; C. S., s. 1657.)

Change in Common-Law Rule. — The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by Laws 1915, c. 229, making the summons returnable to the county in which either the plaintiff or de-

fendant resides. *Wood v. Wood*, 181 N.C. 227, 106 S.E. 753 (1921).

Section Not Jurisdictional—Waiver.—The provision of this section, that summons shall be returnable to the court of the county in which either plaintiff or defendant resides, is not jurisdictional, but re-

lates to venue, and may be waived, and if an action for divorce be instituted in any other county, it may be tried there, unless defendant before the time of answering expires demands in writing that trial be had in the proper county. *Smith v. Smith*, 226 N.C. 506, 39 S.E.2d 391 (1946); *Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961).

The provisions of this section, that in divorce proceedings the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, are not jurisdictional; they relate only to venue. *Stokes v. Stokes*, 260 N.C. 203, 132 S.E.2d 315 (1963).

The provisions of this section are not jurisdictional, but relate to venue and may be waived. *Nelms v. Nelms*, 250 N.C. 237, 108 S.E.2d 529 (1959).

Any Superior Court Has Jurisdiction If Either Party is Domiciled in State.—In the absence of fraud the superior court of any county in the State has jurisdiction for divorce if either of the parties is domiciled in this State. *Stokes v. Stokes*, 260 N.C. 203, 132 S.E.2d 315 (1963).

But if Plaintiff Conceals Action and Whereabouts of Defendant, Jurisdiction Is Lacking.—If a plaintiff should fraudulently conceal his action for a divorce from the defendant and the whereabouts of the defendant from the court, jurisdiction would be lacking and a divorce obtained upon service of summons by publication would be a nullity. *Stokes v. Stokes*, 260 N.C. 203, 132 S.E.2d 315 (1963).

§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the second proviso contained in § 51-3. (1871-2, c. 193, s. 33; Code, s. 1283; Rev., s. 1560; C. S., s. 1658; 1945, c. 635.)

Cross References.—As to marriage generally, see § 51-1 et seq. As to void and voidable marriages, see § 51-3 and note.

Marriage Not Void until So Declared by Court.—The court has jurisdiction to declare a marriage in proper cases void ab initio, but the marriage of a lunatic is not so ipso facto, and must be so declared by a decree of the court, for only in the instances set out in the second proviso to § 51-3 can a marriage be treated as void in a collateral proceeding. *Watters v. Watters*, 168 N.C. 411, 84 S.E. 703 (1915). See *State ex rel. Setzer v. Setzer*, 97 N.C. 252, 1 S.E. 558 (1887).

But Marriage So Declared Is Void ab Initio.—A former marriage, which has been

How Noncompliance with Section Taken Advantage of.—The provision of this section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270 (1920).

Any action brought in the wrong county may be removed instead of dismissing it, and a failure to make the motion for removal is a waiver of the objection to the county in which it is brought. *Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961).

Where Wife Resides.—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his residence, is bad. *Wood v. Wood*, 181 N.C. 227, 106 S.E. 753 (1921).

Suits for alimony without divorce are within the analogy of divorce laws, and where a wife has been forced by her husband's conduct to leave his residence and live elsewhere, she may bring such a suit in the county in which she resides, notwithstanding the provision of § 50-16 that "the wife may institute an action in the superior court of the county in which the cause of action arose." *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923).

Stated in Batts v. United States, 120 F. Supp. 26 (E.D.N.C. 1954).

decreed to be void because induced by duress, was void ab initio, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

What Marriages Absolutely Void.—Under § 51-3, the only marriages which are absolutely void are those between a white person and one of negro blood (or descent to the third generation, inclusive,) and bigamous marriages. The others need to be "declared void." *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890).

Formal Decree When Marriage Originally Void.—Though a marriage is abso-

lutely void, without being so declared, yet the court will formally decree its nullity, as well for the sake of the good order of society as for the quiet and relief of the party seeking the relief. *Johnson v. Kincade*, 37 N.C. 470 (1843); *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889).

Marriage of Person Incapable of Contracting for Want of Understanding.—Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void ipso facto; but, if and when declared void in a legally constituted action, such marriage is void ab initio. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

An action to declare void a marriage of a person incapable of contracting for want of understanding may be instituted in the lifetime of the parties thereto by a guardian for the alleged mentally incompetent or by such mentally incompetent if and when he (she) becomes mentally competent to do so; and unless such marriage is followed by cohabitation and the birth of issue, such action may be instituted after the death of such mentally incompetent by a person or persons whose legal rights depend upon whether such marriage is valid or void. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

A marriage of a person incapable of contracting for want of understanding, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

Subsequent Insanity Not Ground for Annulment.—Insanity afterwards afflicting a party to a contract of marriage is not a ground for annulment. *Watters v. Watters*, 168 N.C. 411, 84 S.E. 703 (1915).

How Action for Nullity on Ground of Insanity Brought. — A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian, though the former is, for some reasons, the preferable course. *Crump v. Morgan*, 38 N.C. 91, 40 Am. Dec. 447 (1843).

Incestuous Marriage.—In *Baity v. Cranfill*, 91 N.C. 293 (1884), it was held that the authority conferred upon the court by this section was so limited by the second proviso of § 51-3 as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins," after the husband's death, when their marriage was followed by cohabita-

tion and the birth of issue. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

License Issued upon Fraudulent Representations as to Age — Suit by Parent or Register of Deeds. — Where a register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female between the ages of fourteen and sixteen without conforming with § 51-2 as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void; the register of deeds may at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929). [This case was decided prior to the 1939 amendment to § 51-2, which amendment makes the parents of the female proper parties plaintiff to an action to annul the marriage.]

Effect of Twenty Years' Ratification. — Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of twenty years, the parties acknowledging each other and being recognized as husband and wife, though such marriage in its inception is invalid, by reason of such ratification by the parties it will not be declared void. *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890).

Suit by Nonresident.—Under this section the courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929).

Procedure Similar to Divorce Action.—An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889); *Johnson v. Johnson*, 141 N.C. 91, 53 S.E. 623 (1906).

In *Johnson v. Kincade*, 37 N.C. 470 (1843), the marriage of the parties was declared a nullity because of the mental incapacity of one of the parties at the time of the marriage. In that decision the court declared that the "plaintiff ought to be, and is divorced from the defendant." See *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889); *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

Alimony Pendente Lite. — While not technically actions for divorce, actions for annulment come under that heading, in a general way, in that alimony pendente lite may be allowed. *Taylor v. White*, 160 N.C.

38, 75 S.E. 941 (1912). See *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889).

Affidavit Not Necessary. — Action for annulment under this section would not be dismissed because of failure to make the affidavit formerly prescribed in § 50-8 for actions for divorce or alimony. *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

Effect of Decree.—A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage. *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

Same — Children Legitimate. — The children of a marriage which is subsequently

annulled are made legitimate by § 50-11. *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

Motion to Set Aside Judgment. — If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. *Johnson v. Johnson*, 141 N.C. 91, 53 S.E. 623 (1906).

Same Counsel Cannot Represent Both Parties.—A proceeding to set aside a judgment in an action of annulment will be dismissed where the same counsel jointly make the motion representing both parties to the action. *Johnson v. Johnson*, 141 N.C. 91, 53 S.E. 623 (1906).

Applied in *Dees v. McKenna*, 261 N.C. 373, 134 S.E.2d 644 (1964).

§ 50-5. Grounds for absolute divorce.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Cross References.—As to necessary allegations, see § 50-8 and note thereto. As to effect of absolute divorce on right to administer, see §§ 31A-1, 52-19.

Editor's Note.—For note on domicile of military personnel for purpose of divorce, see 31 N.C.L. Rev. 304 (1953). For note discussing cases decided under this section, see 40 N.C.L. Rev. 808 (1962).

Divorce Is Entirely Statutory.—It has always been the policy of this State to regard marriage as indissoluble except for the causes named in the statute. *Long v. Long*, 77 N.C. 304 (1877). See also *Alexander v. Alexander*, 165 N.C. 45, 80 S.E. 890 (1914).

Legislative Control.—Subject to the constitutional restriction that "it may not grant a divorce nor secure alimony in any individual case," the question of divorce is a matter exclusively of legislative cognizance. *Cooke v. Cooke*, 164 N.C. 272, 80 S.E. 178 (1913).

Facts Must Be Pleaded and Proved.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. *McQueen*

v. McQueen, 82 N.C. 471 (1880); *Steel v. Steel*, 104 N.C. 631, 10 S.E. 707 (1889).

Decree a Mensa Not a Bar.—A decree of divorce a mensa does not bar subsequent action for absolute divorce under this section. *Cooke v. Cooke*, 164 N.C. 272, 80 S.E. 178 (1913).

Recrimination. — The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce. *House v. House*, 131 N.C. 140, 42 S.E. 546 (1902).

Applied in *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964).

Cited in *Hyder v. Hyder*, 210 N.C. 486, 187 S.E. 798 (1936); *Burrowes v. Burrowes*, 210 N.C. 788, 188 S.E. 648 (1936); *Smith v. Smith*, 226 N.C. 544, 39 S.E.2d 458 (1946); *Norman v. Norman*, 230 N.C. 61, 51 S.E.2d 927 (1949); *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956); as to subdivision (1), in *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E.2d 375 (1951); as to subdivision (4), in *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951).

(1) If the husband or wife commits adultery.

Adultery Even after Abandonment Sufficient Cause.—Adultery by the wife committed after her husband had wrongfully abandoned her is ground for divorce. *Ellett v. Ellett*, 157 N.C. 161, 72 S.E. 861 (1911). This case overrules *Tew v. Tew*, 80 N.C. 316 (1879).

Where both parties are found guilty of adultery and no condonation is proven, the petition will be dismissed. *Horne v. Horne*, 72 N.C. 530 (1875).

Plaintiff Need Not Set Up His Innocence. — A party seeking divorce is not bound to set forth or prove that he has

not himself been guilty of adultery or is not in fault. *Edwards v. Edwards*, 61 N.C. 534 (1868); *Toms v. Fite*, 93 N.C. 274 (1885); *Steel v. Steel*, 104 N.C. 631, 10 S.E. 707 (1889).

Sufficiency of Allegations.—Allegations that husband cohabited and committed adultery with another woman, and that illicit relations continued over a period of time notwithstanding the protestations and pleas of the wife, state a cause of action for absolute divorce. *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

- (2) If either party at the time of the marriage was and still is naturally impotent.

Editor's Note.—Since the passage of § 51-3 impotency of either of the contracting parties renders the marriage void, and prior to the passage of that section it was a ground for annulment of the marriage. *Smith v. Morehead*, 59 N.C. 360 (1863).

- (3) If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

Illicit Intercourse Not Resulting in Pregnancy.—Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under this section unless pregnancy resulted. *Steel v. Steel*, 104 N.C. 631, 10 S.E. 707 (1889).

Knowledge of Husband.—Where a man

- (4) If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceeding, and they have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in this State for six months.

Editor's Note.—The 1965 amendment substituted "one year" for "two successive years" in subdivision (4).

For comment on the 1943 amendment to this section, see 21 N.C.L. Rev. 347. For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N.C.L. Rev. 453.

Provisions Jurisdictional.—Under this section a divorce upon the ground of desertion cannot be granted unless there be a continuous separation of the parties for time required preceding the beginning of the case and unless the plaintiff has been a resident of the State for the requisite period of time. These provisions are jurisdictional, and, when they are not complied with, the State court is without authority to grant a divorce. *Sears v. Sears*, 92 F.2d 530 (D.C. Cir. 1937).

Necessary Residence Must Be Estab-

Effect of Plaintiff's Death Pending Trial.

—Where the plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all issues are found by the jury in favor of the plaintiff, judgment of divorce will be entered as of the first day of the term, while the plaintiff was still alive. *Webber v. Webber*, 83 N.C. 280 (1880).

Husband Competent Witness.—The husband is a competent witness to prove the impotency of his wife. *Barringer v. Barringer*, 69 N.C. 179 (1873).

is induced to marry a woman by her false representation that she is pregnant by him, he cannot secure a divorce under this section. *Bryant v. Bryant*, 171 N.C. 746, 88 S.E. 147 (1916).

Cited in *State v. Williams*, 220 N.C. 445, 17 S.E.2d 769 (1941).

lished.—For the granting of a divorce for the separation of husband and wife under the provisions of this section, there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing a lesser period of residence in this State by the plaintiff is insufficient, and a judgment signed thereon is improvidently rendered. *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925).

Who May Bring Suit.—In *Cooke v. Cooke*, 164 N.C. 272, 80 S.E. 178 (1913), the court held that this subdivision, which was first added to the grounds for divorce in 1907, was a new and independent cause and should not be construed in connection with the main part of the section, which provides that the suit can only be brought by the injured party. But in *Sanderson v.*

Sanderson, 178 N.C. 339, 100 S.E. 590 (1919), the court construed this subdivision to mean that one who has caused the separation by his own misconduct cannot later use that separation to obtain a divorce. And the construction in the Cooke case was again refuted in *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352 (1921). See also § 50-6 and note.

An action can be maintained under this section only by the party injured. *Reeves v. Reeves*, 203 N.C. 792, 167 S.E. 129 (1933).

Separation Defined.—The word “separation” as used in this section means a voluntary separation by mutual agreement with the intent on the part of at least one of the parties to discontinue all the marital privileges and responsibilities, or a separation under judicial decree, or a separation caused by the abandonment or wrongful act of the party sued. *Woodruff v. Woodruff*, 215 N.C. 685, 3 S.E.2d 5 (1939).

The word “separation” as used in matrimonial law is a cessation of cohabitation of husband and wife by mutual agreement, or, in the case of a judicial separation, under decree of court. This statute contemplates the addition of “separation” caused by desertion or abandonment, or other wrongful act of the party sued. It certainly does not intend to give an action to one spouse for driving the other from home or to one who has voluntarily deserted the home for the specified period. *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352 (1921).

Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945).

For the purpose of obtaining a divorce under this section or § 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such a character as to induce others, who observed them, to regard them as living together in the ordinary acceptance of that descriptive phrase. *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945).

Separation Must Have Been Voluntary in Its Inception.—Where plaintiff's cause of action is couched in the language of this section, he must prove his case by showing that the separation was voluntary in its inception. *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945).

Assent to Separation Obtained by Fraud.

—If the assent of wife is obtained by fraud or deceit, the separation is not voluntary within the meaning of this section. *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945).

Separation without Fault.—It certainly was not intended that this statute should apply to cases where the separation was without fault on either side. While it is in the power of the legislature to make the misfortune of either party a ground for divorce it has not done so, and the court cannot by judicial construction extend the grounds of divorce beyond the statute. The misconduct of the parties, and not their misfortunes, is the cause which will justify a divorce. *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352 (1921).

Separation Caused by Commitment for Insanity.—A physical separation caused by the commitment of one of the parties for insanity is not a “separation” constituting ground for divorce, nor may the party committed consent to a separation during the continuance of the mental incapacity. *Woodruff v. Woodruff*, 215 N.C. 685, 3 S.E.2d 5 (1939). See subdivision (6).

Period of Separation.—In *Smithdeal v. Smithdeal*, 206 N.C. 397, 174 S.E. 118 (1934), it was held that two (now one) years' separation as a ground for divorce need not have existed six months prior to the commencement of the action under either this subdivision or under § 50-6. See 11 N.C.L. Rev. 223. See also the next to the last paragraph of this section, added by the 1933 amendment.

Allegation of Separation Works Estoppel.—If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband she is estopped by this averment, and a verdict that her husband separated himself from her will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence, justifying such separation, be found by a jury. *Wood v. Wood*, 27 N.C. 674 (1845).

Abandonment as Defense Must Be Set Up in Answer.—In an action for divorce a vinculo brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife. *Kinney v. Kinney*, 149 N.C. 321, 63 S.E. 97 (1908).

Abandonment Not Put at Issue.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was com-

mitted without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. *Kinney v. Kinney*, 149 N.C. 321, 63 S.E. 97 (1908).

Sufficiency of Evidence of Residence.—Plaintiff's testimony that he had been continuously a resident of North Carolina up to the time he went to another state for temporary work, and that he returned here once or twice a month and did not intend to make his home in such other state, but intended to remain a citizen of North Carolina, is held sufficient to be submitted to the jury on the question of his residence in this State for the period prescribed by this section and § 50-6. *Welch v. Welch*, 226 N.C. 541, 39 S.E.2d 457 (1946).

The fact that plaintiff went to another state to engage temporarily in work there, and, upon mistaken advice, instituted an action for divorce in such other state upon allegations of residence therein, is evidence against him on the issue of his residence in this State for the statutory period but is not conclusive and does not constitute an estoppel. *Welch v. Welch*, 226 N.C. 541, 39 S.E.2d 457 (1946).

Evidence Held Insufficient.—Evidence of separation by mutual agreement and living separate and apart as contemplated by this section and § 50-6 held insufficient. *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945).

Appeal and Error.—Where a husband appeals from a judgment under this section in favor of his wife and assigns error only in the court's refusing his motion to nonsuit upon the evidence, on the ground that he was insane for a part of the time, it is necessary that the evidence should appear in the record and not in the assignment merely. *Brown v. Brown*, 182 N.C. 42, 108 S.E. 380 (1921).

Where a judgment has been entered granting a divorce under this section, in the absence of finding of the necessary issue as to the plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only. *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925).

Cited in *Nelson v. Nelson*, 197 N.C. 463, 149 S.E. 585 (1929); *Keys v. Tuten*, 199 N.C. 368, 154 S.E. 631 (1930).

- (5) If any person shall commit the abominable and detestable crime against nature, with mankind, or beast.
- (6) In all cases where a husband and wife have lived separate and apart for five consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the same spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined.

In lieu of proof of incurable insanity and confinement for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane

more than five (5) years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In all decrees granted under this subdivision in actions in which the husband is the plaintiff the court shall require him to provide for the care and maintenance of the insane defendant as long as she may live, compatible with his financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring the plaintiff to furnish the necessary funds for such care and maintenance. In the event of feme defendant's continued confinement in an institution for the mentally disordered, it shall be deemed sufficient support and maintenance if the plaintiff continue to pay and discharge the monthly payments required of him by the institution, such payments to be in amounts equal to those required of patients similarly situated. In all such actions wherein the wife is the plaintiff and the insane defendant has insufficient income and property to provide for his care and maintenance, then in the discretion of the court, the court may require her to provide for the care and maintenance of the insane defendant as long as he may live, compatible with her financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.

Editor's Note.—The 1963 amendment inserted the present second paragraph of this subdivision.

For comment on the 1945 amendment to this subdivision, see 23 N.C.L. Rev. 340. For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N.C.L. Rev. 453.

The purpose of subdivision (6), as amended, is to require that a person alleged to be incurably insane shall not have his or her marital status altered until such

person has been committed to an institution for the care and treatment of the mentally disordered for a period of five successive years in order that it may be ascertained whether or not the inmate's insanity is incurable. Mere confinement for a period of five successive years in such an institution would fulfill the literal meaning of the statute but it would not be in compliance with its spirit or purpose. *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955).

The remedy provided in subdivision (6) is exclusive. *Lawson v. Bennett*, 240 N.C. 52, 81 S.E.2d 162 (1954).

Release on Probation.—In a proceeding by wife for a divorce on the ground of husband's insanity where doctors testified that the husband was incurably insane, the fact that the husband during the five-year period of confinement had been released on probation to his relatives on separate occasions, once for ten days and once for six months, did not bar divorce of wife on the ground of insanity, since release on probation did not constitute such acts on the part of the hospital authorities as to terminate the period of confinement within the meaning of subdivision (6). *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955).

By the use of the word "confined" in the statute, the legislature did not contemplate such confinement as would require an inmate to be at all times under lock and key. *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955).

Proof of Separation. — In a suit for di-

It shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subdivision (4) of this section that the grounds for divorce have existed at least six months prior to the filing of the complaint, nor to allege or prove such fact.

In any action for absolute divorce upon any of the grounds set forth in this section, allegation and proof that the plaintiff or defendant has resided in North Carolina for at least six months next preceding the filing of the complaint shall constitute compliance with the residence requirements for prosecuting any such action for divorce. (1871-2, c. 193, s. 35; 1879, c. 132; Code, s. 1285; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; Rev., s. 1561; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57; C. S., s. 1659; 1921, c. 63; 1929, c. 6; 1931, c. 397; 1933, c. 71, ss. 1, 2; 1943, c. 448, s. 2; 1945, c. 755; 1949, c. 264, ss. 2, 5; c. 417; 1953, c. 1087; 1955, c. 887, s. 15; 1963, c. 1173; 1965, c. 636, s. 1.)

Editor's Note.—For summary of the 1949 amendments to this section and §§ 50-6 and 50-8, see 27 N.C.L. Rev. 453.

§ 50-6. Divorce after separation of one year on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2.)

Cross References.—See notes to § 50-5, subdivisions (4) and (6). As to effect of absolute divorce on right to administer, see §§ 31A-1, 52-19. As to effect of husband's suit under this section on wife's action for alimony without divorce under § 50-16, see note to § 50-16.

orce on the statutory ground of insanity, the insanity must be the reason for the separation of the parties, but no greater proof of separation and its continuance during the five-year period is required than in a proceeding for divorce based on two-year (now one-year) separation period in subdivision (4). *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955).

Separation Occasioned by Insanity Other Than Incurable. — Separation occasioned by insanity is cause for divorce in North Carolina only in cases of incurable insanity. And in these cases the requirements of this section must be met. In all other instances of separation arising by reason of mental incompetency, such separation is not a ground for divorce. But to bar an action for divorce based on two (now one) years' separation under § 50-6, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. *Moody v. Moody*, 253 N.C. 752, 117 S.E.2d 724 (1961).

Editor's Note. — The 1965 amendment substituted "one year" for "two years" in the first sentence.

As to effect of this section on § 50-5, see 9 N.C.L. Rev. 368. For note on "living apart" where both parties live in the same house, see 18 N.C.L. Rev. 247. For com-

ment on the 1943 amendment to this section, see 21 N.C.L. Rev. 347. For note discussing cases decided under this section, see 40 N.C.L. Rev. 808 (1962).

This section creates an independent cause of divorce. *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962).

Jurisdictional Requirements. — Under this section in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year); and (2) the plaintiff, husband or wife, shall have resided in this State for a period of one year (now six months). These two requirements are jurisdictional and if either one or the other of these elements does not exist the court would not have jurisdiction to try the action and any decree rendered would be void. *Henderson v. Henderson*, 232 N.C. 1, 59 S.E.2d 227 (1950).

Under this section, in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year); and (2) the plaintiff, husband or wife, shall have resided in the State of North Carolina for a period of six months. *Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961).

The jurisdictional requirement as to residence under this section is met by allegation and proof of residence within the State of North Carolina for a period of six months next preceding the commencement of the action. *Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961).

The separation contemplated by this section is apparently unrestricted. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E. 2d 492 (1945).

The expression used in *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942), "that the bare fact of living separate and apart for the period of two years (now one year); standing alone, will not constitute a cause of action for divorce," should be viewed in the light of its setting, and construed accordingly. It was not intended as a delimitation of the statute. *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943).

Necessity for Mutual Agreement. — Before the 1937 amendment, which struck out of this section the phrase "either under deed of separation or otherwise," it was held that, while the applicant need not be the injured party, the statute did not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. *Parker v. Parker*, 210 N.C. 264, 186 S.E. 346 (1936), citing *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352

(1921); *Hyder v. Hyder*, 210 N.C. 486, 187 S.E. 798 (1936); *Reynolds v. Reynolds*, 210 N.C. 554, 187 S.E. 768 (1936).

A charge by the court to the jury that the living separate and apart means living separate and apart under mutual agreement only, was erroneous, entitling plaintiff to a new trial. *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942), distinguishing *Parker v. Parker*, 210 N.C. 264, 186 S.E. 346 (1936), as decided under prior wording of section. See 15 N.C.L. Rev. 348.

Separation Must Be Voluntary in Inception. — In an action for divorce, based upon two years' (now one year's) separation by mutual consent, plaintiff must not only show that he and defendant have lived separate and apart for the statutory period, but also that the separation was voluntary in its inception. *Williams v. Williams*, 224 N.C. 91, 29 S.E.2d 39 (1944).

"Separation" would not include an involuntary living apart, where there had been no previous separation, such as might arise from the incarceration or insanity of one of the parties. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

Section Inapplicable Where Separation Is Due to Insanity of Defendant.—Divorce on the grounds of two years' (now one year's) separation under this section cannot be maintained when the separation is due to the insanity or mental incapacity of defendant spouse, the sole remedy in such instance being under subdivision (6) of § 50-5. *Lawson v. Bennett*, 240 N.C. 52, 81 S.E.2d 162 (1954); *Moody v. Moody*, 253 N.C. 752, 117 S.E.2d 724 (1961).

But to bar an action for divorce based on two years' (now one year's) separation, the mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. *Moody v. Moody*, 253 N.C. 752, 117 S.E.2d 724 (1961).

"Judicial Separation" Included.—A legal separation for the requisite period of two years (now one year) is ground for divorce under this section. The separation here contemplated includes a "judicial separation" as well as one brought about by the act of the parties, or one of them. *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E.2d 444 (1943).

A separation by act of the parties, or one of them, or under order of court a mensa et thoro, suffices to meet the terms of this section. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

The effect of a divorce a mensa is to

legalize the separation. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

The effect of a judgment granting a divorce a mensa et thoro is to legalize the separation of the parties which theretofore had been caused by the husband's actions, and after two years (now one year) from the date of such judgment, the husband can proceed to an absolute divorce. *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964).

The effect of a divorce a mensa et thoro, obtained by the wife on the ground her husband abandoned her, is to legalize their separation from the date of such judgment; and in such case the husband, after two years (now one year) from the date of such judgment, may proceed to an absolute divorce. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

A judgment in an action instituted under § 50-16 decreeing that the husband has willfully abandoned the wife and awarding her support and maintenance constitutes a judicial separation which, two years (now one year) thereafter, will permit the husband to obtain an absolute divorce. *Rouse v. Rouse*, 258 N.C. 520, 128 S.E.2d 865 (1963); *Wilson v. Wilson*, 260 N.C. 347, 132 S.E.2d 695 (1963).

Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties. *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945); *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945).

Physical Separation Must Be Accompanied by Intention to Cease Cohabitation. — A husband and wife live separate and apart for the prescribed period within the meaning of this section when, and only when, these two conditions concur: (1) They live separate and apart physically for an uninterrupted period of two years (now one year); and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation. *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951); *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

The bare fact of living separate and apart for the period of two years (now one year), standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the

separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that the husband shall absent himself from the wife for long periods—a situation which was not contemplated by the law as a cause of divorce in fixing the period of separation. *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942).

The discontinuance of sexual relations is not in itself a living "separate and apart" within the meaning of the statute, and a divorce will be denied where it appears that, during the period relied upon, the parties had lived in the same house. *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945).

This section does not contemplate, as essential, a repudiation of all marital obligations, and that the husband has supported the wife will not defeat his action. *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942).

If a plaintiff, in a divorce action on grounds of separation, contributes to the support of his wife, solely in an attempt to fulfill the obligation imposed by statute, his conduct is not inconsistent with a legal separation; but, if he makes such payments in recognition of his marital status and in discharge of his marital obligations, there is no living separate and apart within the meaning of the statute. *Williams v. Williams*, 224 N.C. 91, 29 S.E.2d 39 (1944).

Either party may secure an absolute divorce under this section even though the applicant is the party who commits the wrong, as granting divorces is exclusively statutory and this is an independent act of the General Assembly. *Long v. Long*, 206 N.C. 706, 175 S.E.85 (1934); *Byers v. Byers*, 222 N.C. 298, 22 S.E.2d 902 (1942).

Either party may bring an action for absolute divorce under this section and the jury's finding that defendant did not abandon plaintiff without cause does not preclude judgment in plaintiff's favor. *Campbell v. Campbell*, 207 N.C. 859, 176 S.E. 250 (1934).

Plaintiff Need Not Establish That He Is Injured Party.—Where the husband sues the wife for an absolute divorce upon the ground of two years' (now one year's) separation under this section, he is not required to establish as a constituent element of his cause of action that he is the injured party. *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962).

But Spouse May Not Obtain Divorce Solely on Own Dereliction.—It is not to

be supposed the General Assembly intended in enacting this section to authorize one spouse willfully or wrongfully to abandon the other for a period of two years (now one year) and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years (now one year), without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by complainant's own dereliction. *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943); *Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943); *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

A husband may not ground an action for divorce under this section on his own criminal conduct towards his wife. *Reynolds v. Reynolds*, 208 N.C. 428, 181 S.E. 338 (1935), distinguishing *Long v. Long*, 206 N.C. 706, 175 S.E. 85 (1934) and *Campbell v. Campbell*, 207 N.C. 859, 176 S.E. 250 (1934). See *Hyder v. Hyder*, 210 N.C. 486, 187 S.E. 798 (1936); *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943).

The party in the wrong in the face of a plea in bar based on such wrong cannot obtain a divorce under the provisions of this section. *Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943), following *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943).

Willful Abandonment by Plaintiff Is Defense. — Where the husband sues the wife for an absolute divorce upon the ground of two years' (now one year's) separation under this section, he is not required to establish as a constituent element of his cause of action that he is the injured party. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under this section by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in willfully abandoning her. *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952); *Johnson v. Johnson*, 237 N.C. 383, 75 S.E.2d 109 (1953).

Where the husband sues the wife under this section for an absolute divorce on the ground of two years' (now one year's) separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's willful abandonment of his wife. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

For note on abandonment as a defense to divorce on the ground of separation, see 36 N.C.L. Rev. 495 (1958).

If the husband alleges and establishes that he and his wife have lived separate and apart continuously for two years (now one year) or more next preceding the commencement of the action within the meaning of this section, the only defense recognized by the decisions is that the separation was caused by the act of the husband in willfully abandoning her. *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962).

Burden of Establishing Willful Abandonment. — The plaintiff having based his ground for divorce upon two years' (now one year's) separation, and defendant having averred by way of defense and bar to the action that whatever estrangement between the parties was occasioned by the plaintiff's own wrongful conduct and willful abandonment, the burden rests upon the defendant to establish the defense or defenses set up in the answer and relied upon by defendant. *McLean v. McLean*, 237 N.C. 122, 74 S.E.2d 320 (1953).

Where the husband sues the wife under this section for an absolute divorce on the ground of two years' (now one year's) separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's willful abandonment of his wife, and in such case, the burden of proof is on the defendant (wife) to establish her affirmative defense. *Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962).

Where the wife alleges as an affirmative defense to the husband's action that the separation was caused by the husband's willful abandonment of the wife, the burden of proof is on the wife to establish her alleged affirmative defense. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

To defeat the husband's case, the wife must allege and establish willful abandonment as an affirmative defense. *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962).

Evidence of Conjugal Relations within Statutory Period before Action.—Evidence that within the statutory period before the institution of divorce action defendant visited plaintiff at army camp and plaintiff visited defendant on furloughs, and that at such times they cohabited as man and wife, was sufficient to negative conclusion that conjugal relations has ceased for the period prescribed by this section, and supported verdict in defendant's favor and judgment denying plaintiff's suit for di-

orce on the grounds of two years' (now one year's) separation. *Mason v. Mason*, 226 N.C. 740, 40 S.E.2d 204 (1946).

Question of Resumption of the Conjugal Relation after Separation Is for Jury.—See *Reynolds v. Reynolds*, 210 N.C. 554, 187 S.E. 768 (1936).

Plaintiff's admitted conviction in a criminal prosecution for willful abandonment relating to the same separation on which the divorce action is based bars his right to maintain an action under this section. *Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962).

Valid Separation Agreement Executed after Willful Abandonment.—Where an original separation is caused by the husband's abandonment of his wife, and subsequently the husband and wife enter into and execute a valid separation agreement, their separation agreement would seem to legalize their separation from and after the date thereof. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

Antenuptial Agreement to Separate Immediately after Marriage.—Where the husband seeks to justify his separation from his wife on the ground of an antenuptial agreement that they would separate immediately after the marriage and obtain a divorce, the court of its own motion should take judicial notice that such agreement is contrary to public policy, and exceptions to the court's charge stating the husband's contentions in this respect will be sustained notwithstanding the absence of objection in the record to his allegations and evidence in support thereof. Plaintiff may not, on the grounds of such an agreement, exculpate himself from fault in leaving his wife after the marriage. *McLean v. McLean*, 237 N.C. 122, 74 S.E.2d 320 (1953).

Prior Action by Wife under § 50-7 (1) Abates Action by Husband under This Section.—See note to § 50-7 (1).

Recrimination.—Where defendant, in an action for divorce under this section, set up plaintiff's wrongful conduct and willful abandonment of defendant and also recrimination, either defense, if established, would defeat plaintiff. The burden, however, rests upon defendant to establish these defenses, which are affirmative. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

This section does not authorize the granting of a divorce to one spouse where the other pleads and establishes recrimination. *Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943).

Effect of Plaintiff's Misconduct before Separation.—Where husband and wife have

lived together until their separation and then separated by mutual consent, defendant in the divorce action cannot attack the legality of their separation from and after the day of separation, on account of alleged misconduct while they were living together. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

Husband's Failure to Support Children Does Not Bar Action.—Under this section and § 50-5 plaintiff's admission that he had been convicted for failing to support the children of his marriage is not alone sufficient to defeat his action for divorce on the ground of separation for the statutory period. *Welch v. Welch*, 226 N.C. 541, 39 S.E.2d 457 (1946).

Where all the evidence tends to show both plaintiff and defendant when they separated intended to cease their matrimonial cohabitation and thereafter live separate and apart and that they did so, this fact cannot be removed nor is its legal significance impaired by plaintiff's partial failure to pay the amounts he had agreed to pay, by a separation agreement, for the support of his children. *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

Allegations and Proof Sufficient to Entitle Plaintiff to Divorce.—Where the complaint alleges, and there is evidence tending to show, that husband and wife, "have lived separate and apart for two years (now one year)" next immediately preceding the institution of the action, and that plaintiff "has resided in the State for a period of six months," nothing else appearing, the establishment of these allegations by proof would entitle plaintiff to a divorce. This section so provides. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

It is unnecessary to set out in the complaint the cause for the separation, or to allege that it was without fault on the part of plaintiff, or to aver that it was by mutual agreement of the parties. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties have lived separate and apart for two years (now one year), and that plaintiff has been a resident of the State for one year (now six months). *Oliver v. Oliver*, 219 N.C. 299, 13 S.E.2d 549 (1941).

Where, in an action under this section, the testimony adduced by plaintiff is sufficient to establish that each of these things existed at the commencement of the action: That the plaintiff and defendant were husband and wife; that both of them had re-

sided in the State for a period of six months; and that they had lived separate and apart within the meaning of the statute for an uninterrupted period of two years (now one year); the trial judge rightly refused to nonsuit the action. *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951).

Cause of Action Need Not Have Existed for Six Months Prior to Filing of Complaint.—In an action for divorce on the ground of two years' (now one year's) separation, brought by either party under this section, as amended, it was not required that the jurisdictional affidavit, required by § 50-8, contain the averment that the facts set forth in the complaint, as grounds for divorce, had existed to the knowledge of plaintiff at least six months prior to the filing of the complaint, the legislative intent to this effect being apparent from the proviso in § 50-8, dispensing with the necessity that the cause of action should have existed for six months when the grounds for divorce is separation. *Smithdeal v. Smithdeal*, 206 N.C. 397, 174 S.E. 118 (1934). For present requirements as to contents and verification of complaint, see § 50-8.

Plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc., in which event, if material to the cause of action, the burden would rest with plaintiff to prove the case *secundum allegata*. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

Statement in Answer.—In an action under this section it was held that the mere statement in the answer that the allegation in the complaint "that plaintiff and defendant have not lived together as man and wife since April 1, 1942, is not denied," was not an admission of a "separation." *Moody v. Moody*, 225 N.C. 89, 33 S.E.2d 491 (1945).

Where Issues to Be Passed on by Jury.—In an action under this section, where the complaint alleges sufficient facts and defendant in her answer sets up a divorce a mensa with alimony granted her on the grounds of abandonment, to which plaintiff replied without admission of wrongful or unlawful conduct on his part, a judgment for defendant on the pleadings is erroneous, as there are issues of fact raised to be tried by a jury. *Lockhart v. Lockhart*, 223 N.C. 123, 25 S.E.2d 465 (1943).

To establish a domicile, there must be a residence, and the intention to make it a home or to live there indefinitely. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

Plaintiff must be physically present in this State and have the intention of making his residence here a permanent abiding place in order to be domiciled here within the meaning of this section, making residence in this State for six months a jurisdictional prerequisite to the institution of an action for divorce on the grounds of two years' (now one year's) separation. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

The fact that a person obtains automobile license and ration cards in another state, giving such state as his residence, while competent on the question of domicile, is not conclusive. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

Finding of Court as to Residence.—The finding of the court, supported by evidence, that plaintiff was physically present in this State for more than six months prior to instituting action for divorce and that he regarded his residence here as a permanent home, is sufficient to support judgment denying defendant's motion in the cause to set aside the divorce decree on the ground of want of the jurisdictional requirement of domicile. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

How Decree Attacked on Ground of Nonresidence.—The proper procedure to attack a divorce decree on the ground that plaintiff had not been a resident of the State for six months preceding the institution of the action is by motion in the cause. *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

Modification of Custody Order in Action under This Section.—An order awarding the custody of minor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered pursuant to § 50-16, awarding the custody of the children to the wife, did not preclude another judge of the superior court from awarding custody of children to the husband in the wife's later action for absolute divorce under this section. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Applied in *Hyder v. Hyder*, 215 N.C. 239, 1 S.E.2d 540 (1939); *Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948); *Deaton v. Deaton*, 237 N.C. 487, 75 S.E.2d 398 (1953); *O'Briant v. O'Briant*, 239 N.C. 101, 79 S.E.2d 252 (1953); *Whitener v. Whitener*, 255 N.C. 731, 122 S.E.2d 705 (1961); *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E.2d 532 (1964);

Jones v. Jones, 261 N.C. 612, 135 S.E.2d 554 (1964).

Cited in Teasley v. Teasley, 205 N.C. 604, 172 S.E. 197 (1934); State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934); Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Brown v. Brown, 213 N.C. 347, 196 S.E. 333 (1938); State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941); Carter v. Carter, 232 N.C. 614, 61 S.E.2d 711

(1950); McLean v. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951); Livingston v. Livingston, 235 N.C. 515, 70 S.E.2d 480 (1952); Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956); Shaver v. Shaver, 244 N.C. 309, 93 S.E.2d 614 (1956); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); Sears v. Sears, 253 N.C. 415, 117 S.E.2d 7 (1960).

§ 50-7. **Grounds for divorce from bed and board.**—The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

Cross References.—As to necessary allegations, see § 50-8 and note. As to effect of divorce a mensa et thoro on right to administer, see § 31A-1. As to effect on wife's right to administer and interest in property, see § 52-20. As to effect on husband's right to administer and interest in property, see § 52-21.

Editor's Note.—For case law survey on alimony without divorce, see 41 N.C.L. Rev. 459 (1963).

A divorce from bed and board is nothing more than a judicial separation, that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond. This is precisely the effect of an action under § 50-16, except that the remedy under § 50-16 is only available to the wife. Schlager v. Schlager, 253 N.C. 787, 117 S.E.2d 790 (1961).

Plaintiff Must Petition for Divorce a Mensa.—A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. Morris v. Morris, 75 N.C. 168 (1876).

Section 50-10 applies to a divorce from bed and board under this section. Schlager v. Schlager, 253 N.C. 787, 117 S.E.2d 790 (1961).

Allegations in a cross action for divorce a mensa et thoro, set up by defendant wife in the husband's action for divorce, held sufficient. Ragan v. Ragan, 214 N.C. 36, 197 S.E. 554 (1938).

It is not necessary for the plaintiff to establish all of the grounds for divorce a mensa et thoro alleged in her complaint in order to sustain her action. It is sufficient if she establishes the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in this section. Deaton v. Deaton, 234 N.C. 538, 67 S.E.2d 626 (1951); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Grounds Available to Husband as Well as Wife.—The grounds for divorce a men-

sa given by this section are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party." Brewer v. Brewer, 198 N.C. 669, 153 S.E. 163 (1930); Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

Only the party injured is entitled to a divorce under this section. Vaughan v. Vaughan, 211 N.C. 354, 190 S.E. 492 (1937). See Carnes v. Carnes, 204 N.C. 636, 169 S.E. 222 (1933); Lawrence v. Lawrence, 226 N.C. 624, 39 S.E.2d 807 (1946).

When the misconduct of the complaining party is calculated to and does reasonably induce the conduct of defendant relied upon in an action for divorce a mensa et thoro, he or she, as the case may be, will not be permitted to take advantage of his or her own wrong, and the decree of divorcement will be denied. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943), citing Page v. Page, 161 N.C. 170, 76 S.E. 619 (1912); Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964).

Effect of Delay in Bringing Action.—An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. Whittington v. Whittington, 19 N.C. 64 (1836).

But a delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for divorce, the petitioner was a nonresident of the State, and is now a pauper. Schonwald v. Schonwald, 62 N.C. 215 (1867).

Evidence of Acts Occurring "More than Ten Years Ago."—Where a wife sues her husband for divorce a mensa et thoro, under this section, it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to within six months of the beginning of the action.

Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914).

Condonation.—Evidence merely of forgiveness by the plaintiff, in her action for divorce a mensa et thoro against her husband, is insufficient to establish condonation. Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914); Jones v. Jones, 173 N.C. 279, 91 S.E. 960 (1917).

Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offenses afterwards. If the condition is violated, the original offense is revived. Lassiter v. Lassiter, 92 N.C. 130 (1885).

Repetition of the offense nullifies the previous condonation. Collier v. Collier, 16 N.C. 352 (1829); Gordon v. Gordon, 88 N.C. 45 (1883); Page v. Page, 167 N.C. 346, 83 S.E. 625 (1914).

Condonation, of course, is forgiveness upon condition; and, if the condition is violated, the original offense is revived. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Nothing else appearing, the resumption of marital relations after a separation imports a condonation of previous offenses. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Condonation is an affirmative defense to be alleged and proved by the party relying upon it. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Less may be sufficient to destroy condonation than to found an original suit. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Breach of Forgiveness Must Be Particularized if Complaint Shows Condonation.—Where the complaint alleges cohabitation subsequent to the indignities relied upon, it must, in order to survive a demurrer, allege, as well, with the same particularity required in the first instance, the acts constituting and surrounding the breach of forgiveness. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

A complaint, touching upon plaintiff's

(1) If either party abandons his or her family.

Acts Which Constitute Abandonment.—Where a husband drives his wife from his house, or obtains her removal by stratagem or withholds from her support while there, he is deemed to have abandoned her. Setzer v. Setzer, 128 N.C. 170, 38 S.E. 731 (1901).

A husband who permitted and encouraged certain of his grown children to remain constantly at home in a drunken condition, and allowed them to curse,

claim for alimony, was held demurrable for condonation appearing upon its face, revival of the original cause not also sufficiently there appearing. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Alimony.—Where in the husband's action for divorce a vinculo, the wife sets up a cross action for divorce a mensa, the court has the power to make an order for the payment of alimony upon the jury's determination of the issues in favor of the wife. Norman v. Norman, 230 N.C. 61, 51 S.E.2d 927 (1949).

In an action for divorce, a verified answer and cross action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. Nall v. Nall, 229 N.C. 598, 50 S.E.2d 737 (1948).

Resumption of Marital Relations.—A resumption of marital relations would invalidate a divorce a mensa et thoro. Rouse v. Rouse, 258 N.C. 520, 128 S.E.2d 865 (1963).

Applied in Albritton v. Albritton, 210 N.C. 111, 185 S.E. 762 (1936); Sumner v. Sumner, 227 N.C. 610, 44 S.E.2d 40 (1947); Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964).

Quoted in Bateman v. Bateman, 232 N.C. 659, 61 S.E.2d 909 (1950); Bateman v. Bateman, 233 N.C. 357, 64 S.E.2d 156 (1951) (subdivision (4)); Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953).

Cited in Brown v. Brown, 205 N.C. 64, 169 S.E. 818 (1933); Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Livingston v. Livingston, 235 N.C. 515, 70 S.E.2d 480 (1952); Feldman v. Feldman, 236 N.C. 731, 73 S.E.2d 865 (1952); Morgan v. Brooks, 241 N.C. 527, 85 S.E.2d 869 (1955); McDowell v. McDowell, 243 N.C. 286, 90 S.E.2d 544 (1955); Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960); Pickens v. Pickens, 258 N.C. 84, 127 S.E.2d 889 (1962).

abuse, and harass his wife at all hours of the day and night, and who told his wife to get her things out of his house, was guilty of such cruel treatment toward his wife as to constitute an abandonment of his wife. Bailey v. Bailey, 243 N.C. 412, 90 S.E.2d 696 (1956).

Abandonment under This Subdivision Not Synonymous with Offense Defined in § 14-322.—See Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957).

It is not necessary that the husband should leave the State. *Witty v. Barham*, 147 N.C. 479, 61 S.E. 372 (1908).

It is not necessary for the husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him, which would constitute abandonment by the husband. *Blanchard v. Blanchard*, 226 N.C. 152, 36 S.E.2d 919 (1946), holding evidence insufficient to show abandonment by husband.

Plaintiff Must Prove That Abandonment Was Willful.—Where the wife sues the husband for a divorce from bed and board upon the ground of abandonment under this section, she must prove as an essential part of her case that her husband has willfully abandoned her. *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952).

Abandonment imports willfulness and maliciously turning the spouse out of doors. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

When Abandonment Justified.—The Supreme Court, in applying the provisions of subdivision (1) of this section, has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect, and constitute ground in itself for divorce at least from bed and board. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1952).

Defendant May Not Defeat Action by Making Voluntary Support Payments.—A defendant may not abandon his wife and

defeat an action under this section by making voluntary payments which he may abandon at will. *Thurston v. Thurston*, 256 N.C. 663, 124 S.E.2d 852 (1962).

Fact That Husband Does or Does Not Support Wife as Evidence.—The husband's willful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

The lapse of seven years from the time of the separation does not bar a cross action for divorce a mensa on the ground of constructive abandonment, or application for alimony pendente lite, either by laches or any statute of limitation. *Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948).

Instructions as to Burden of Proof Held Erroneous.—In an action for alimony without divorce on the ground of abandonment, an instruction that the wife had the burden of showing that the husband's separation from her was free of fault on her part and that she was blameless, is erroneous. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1952).

In an action for alimony without divorce on the ground of abandonment, an instruction that plaintiff had the burden of proving that the defendant's separation was wrongful, without charging upon what phase or phases of the evidence defendant's separation would be wrongful, and without defining wrongful except in abstract terms, is insufficient. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1952).

Prior Action under This Section Abates Action under § 50-6.—The pendency of a prior action by the wife for a divorce from bed and board upon the ground of abandonment under this section abates a subsequent action by the husband for an absolute divorce upon the ground of two years' (now one year's) separation under § 50-6. *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952).

(2) Maliciously turns the other out of doors.

This Subdivision an Instance of Abandonment in Subdivision (1).—The ground for divorce a mensa given the wife under this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment provided by subdivision (1). *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918).

Adverse Ruling in Previous Action.—A

denial of alimony in an independent action under § 50-16 brought by the wife, on the ground that her husband maliciously turned her out of doors, will conclude her upon her crossbill setting up the same matter in an action thereafter brought by her husband against her for divorce a vinculo. *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918).

(3) By cruel or barbarous treatment endangers the life of the other.

Necessary Allegations under Subdivisions (3) and (4).—A wife, in alleging a cause of action for divorce from bed and board under subdivisions (3) and (4), must set out with particularity the wrongful acts of the husband upon which she relies and also that such acts were without adequate provocation on her part. *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955); *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

Allegation of actual physical violence is not required under this section. *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

Whipping wife held cause for divorce in *Taylor v. Taylor*, 76 N.C. 433 (1877). For further examples, see *Griffith v. Griffith*, 89 N.C. 113 (1883); *Jackson v. Jackson*, 105 N.C. 433, 11 S.E. 173 (1890).

Communication of Disease.—The communication of an infectious disease by the husband to the wife is not sufficient ground under this subdivision. *Long v. Long*, 9 N.C. 189 (1822).

Cruelty and indignities, like other matrimonial offenses, may be condoned. *Cush-*

ing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Revival of Cause after Condonation.—Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. *Lassiter v. Lassiter*, 92 N.C. 130 (1885).

Acts Committed More than Ten Years before.—A divorce will not be granted for cruel and barbarous treatment where it appears the acts complained of were committed more than ten years before the commencement of the action, and in the meanwhile the parties had continued to reside together. *O'Connor v. O'Connor*, 109 N.C. 140, 13 S.E. 887 (1891).

Causes within Six Months.—Nor will a divorce be granted under this section for causes arising within six months before the commencement of the action. *O'Connor v. O'Connor*, 109 N.C. 140, 13 S.E. 887 (1891); *Green v. Green*, 131 N.C. 533, 42 S.E. 954 (1902). See § 50-8.

(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

Cross Reference.—See note to subdivision (3) of this section.

This Subdivision Remedial.—It would seem that the legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute. *Taylor v. Taylor*, 76 N.C. 433 (1877); *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911).

Nature of Indignities.—To entitle a wife to a divorce from bed and board under this section, the indignity offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temper, and must be repeated, or continued, so that it may appear to have been done willfully and intentionally or at least consciously by the husband to the annoyance of the wife. *Miller v. Miller*, 78 N.C. 102 (1878).

Facts in Each Case Determine.—The acts of the husband which will render the wife's condition intolerable and her life burdensome so as to entitle her to a divorce a mensa are largely dependent on the facts in each particular case, such as the station in life, temperament, state of

health, habits and feelings of the plaintiff. *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911).

Conduct of Defendant Must Be Set Out with Particularity.—When a wife bases her action for alimony without divorce upon the grounds that her husband has been guilty of cruel treatment of her and of offering indignities to her person within the meaning of the statute pertaining to divorce from bed and board, she "must meet the requisite" of this section and not only set out with particularity the acts on the part of her husband upon which she relies, but she is also required to allege, and consequently to prove, that such acts were without adequate provocation on her part. *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947).

Under this subdivision plaintiff must set out with particularity the language and conduct on the part of defendant relied upon, and must allege and prove that such acts were without adequate provocation on her part. *Lawrence v. Lawrence*, 226 N.C. 624, 39 S.E.2d 807 (1946). See *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945).

Plaintiff is required not only to set out with particularity those of her husband's acts which she contends constituted such indignities as to render her condition intolerable and her life burdensome but also

to show that those acts were without adequate provocation on her part. *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964).

Plaintiff's Innocence Must Be Shown.—The complaint must aver, and facts must be found upon which it can be seen, that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. *White v. White*, 84 N.C. 340 (1881); *Garsed v. Garsed*, 170 N.C. 672, 87 S.E. 45 (1915).

In a cross action under this section, the omission of an allegation that plaintiff's conduct was without provocation on defendant's part is fatal. *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945).

Same—General Allegation Insufficient.—It is essential that the plaintiff shall specifically set forth in her complaint the circumstances under which the violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is insufficient. *Everton v. Everton*, 50 N.C. 202 (1857); *O'Connor v. O'Connor*, 109 N.C. 140, 13 S.E. 887 (1891); *Martin v. Martin*, 130 N.C. 27, 40 S.E. 822 (1902).

Failure to Allege and Prove That Husband's Accusations of Infidelity Were False.—In an action for divorce a mensa et thoro and for subsistence, plaintiff alleged that defendant had repeatedly accused her of having sexual relations with her foster father and other men, and her evidence tended to show that all of the specific acts of abuse and misconduct complained of occurred in connection with this accusation. Plaintiff further alleged that she had been faithful and dutiful, and that defendant's acts of abuse and misconduct were without provocation or justification, but did not specifically allege or testify that the accusation was false. It was held that defendant's motion for judgment as of nonsuit should have been allowed, since even if the allegation denying provocation or justification be taken as denial of the charge of infidelity, plaintiff offered no testimony in support of such denial. *Lawrence v. Lawrence*, 226 N.C. 624, 39 S.E.2d 807 (1946).

Examples of Sufficient Cause.—Where a drunken husband cursed his wife and

drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child, and seek safety and protection at a distance of several miles, this is sufficient cause for divorce under this section. *Scoggins v. Scoggins*, 85 N.C. 348 (1881).

Allegations that the husband had been living in adultery, had repeatedly avowed his loss of affection for and his desire to be rid of his wife, had ejected her from his bed, and finally ordered her from his home, saying that he never intended to live with her again, state a cause of action. *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

A persistent charge of adultery against a virtuous woman, accompanied by a contemptuous declaration that she was no longer his wife, and by an abandonment of her bed, is such an indignity to her person as would entitle her to a partial divorce and to alimony. *Everton v. Everton*, 50 N.C. 202 (1857).

When in an action by a wife for divorce a mensa there is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the words of this section, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome." *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911).

Where a petitioner alleged that her husband had become jealous of her without cause, had shaken his fist in her face and threatened her, and declared to her face and published to the neighborhood that the child with which she was pregnant was not his; that her condition had from such treatment become intolerable and her life burdensome, and that she had been compelled to quit his house and seek the protection of her father, it was held that she had set out enough to entitle her to alimony pendente lite. *Erwin v. Erwin*, 57 N.C. 82 (1858).

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, and refused to bed with her and denied that she was his wife. *Green v. Green*, 131 N.C. 533, 42 S.E. 954 (1902).

(5) Becomes an habitual drunkard. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C. S., s. 1660.)

Allegations of Habitual Drunkenness.—Allegations in complaint that defendant had been an habitual drunkard during the prior three years are sufficient to state a

cause of action for divorce from bed and board under this section. *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947).

§ 50-8. **Contents of complaint; verification.**—In all actions for divorce the complaint shall be verified in accordance with the provisions of G.S. 1-145 and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceeding the filing of the complaint, and that the facts set forth therein as grounds for divorce have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by G.S. 1-145, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of G.S. 1-145 and 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variations in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1.)

Editor's Note.—Chapter 636, s. 3, Session Laws 1965, as amended by c. 751, s. 1, Session Laws 1965, substituted "one year" for "two years" twice in the first proviso of the second sentence.

Section 3, c. 751, Session Laws 1965, provides: "This act shall be in full force and effect retroactively to May 20, 1965."

For brief comment on the 1947 amendment, see 25 N.C.L. Rev. 412.

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 375.

Many of the cases in the following note were decided prior to the 1951 amendment, when this section required a separate affidavit to be filed with the complaint.

Purpose of Section. — The affidavit formerly required by this section was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application, and, if it is wanting, there is no jurisdiction in the courts. *Holloman v. Holloman*, 127 N.C. 15, 37 S.E. 68 (1900); *State v. Williams*, 220 N.C. 445, 17 S.E.2d 769 (1941).

Requirements Mandatory.—All the requisites mentioned in the affidavit formerly required by this section were mandatory, and a failure to set out these averments in the affidavit prevented the superior court from having jurisdiction. *Nichols v. Nichols*, 128 N.C. 108, 38 S.E. 296 (1901); *Johnson v. Johnson*, 141 N.C. 91, 53 S.E. 623 (1906).

Jurisdiction in divorce actions is conferred by statute. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

And Is Founded on Domicile.—Judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

The domicile of one spouse within a state gives power to that state to dissolve a marriage wheresoever contracted. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

Domicile Defined.—That place is properly the domicile of a person where he has his true permanent home and principal establishment, and to which he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

To establish a domicile there must be a residence, and the intention to make it a home or to live there permanently or indefinitely. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

Thus Residence Requirement Is Jurisdictional. — The requirement that one of the parties to a divorce action shall have resided in the State for a specified period of time next preceding the commencement of the action is jurisdictional. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

The residence means actual residence, and prior to the 1949 amendment, which allows suit to be brought where defendant has been a resident of the State for six months, a nonresident wife in suing for divorce could not avail herself of the maxim that "her domicile was that of her husband" where she had not actually satisfied the residence requirement. *Schonwald v. Schonwald*, 55 N.C. 367 (1856).

Where husband and wife establish a

residence in the State, the wife, by leaving the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship. *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902).

The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

Plaintiff Must Allege Material Facts Required by This Section. — To allege a cause of action for divorce, a plaintiff, in addition to one or more of the grounds for divorce specified in § 50-5 or § 50-7, must allege the additional material facts now required by this section. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

And Such Allegations Are Indispensable Constituent Elements of Cause of Action. — The legal effect of the 1951 amendment is that the allegations required to be set forth in the complaint are now indispensable constituent elements of plaintiff's cause of action, and the facts so alleged must be established by the verdict of a jury. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

And Proof Must Correspond to Allegations.—As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise the court cannot decree a divorce. *Foy v. Foy*, 35 N.C. 90 (1851); *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945).

General Terms Permitted.—The matters in the jurisdictional affidavit in an action for divorce a mensa brought by the wife may be stated in general terms following the language of the statute. *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911); *Jones v. Jones*, 173 N.C. 279, 91 S.E. 960 (1917).

Verification Must Be According to Statute.—In an application for alimony pendente lite the affidavit and petition must be verified as required by this section. *Clark v. Clark*, 133 N.C. 28, 45 S.E. 342 (1903). See *Hopkins v. Hopkins*, 132 N.C. 22, 43 S.E. 508 (1903). And verification of a pleading that it was "sworn and subscribed to" is not sufficient. *Martin v. Martin*, 130 N.C. 27, 40 S.E. 822 (1902).

Verification in substantial compliance with § 1-145 held sufficient. *Bolin v. Bolin*, 242 N.C. 642, 89 S.E.2d 303 (1955).

Verification of Answer Setting Up Cross Action.—In the husband's action for divorce a vinculo, the wife's answer setting up a cross action must be verified under this section, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous. *Silver v. Silver*, 220 N.C. 191, 16 S.E.2d 834 (1941).

Waiver of Verification of Subsequent Pleadings. — The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified also, is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading, as in an action for divorce in which a special form of affidavit is required. *Calaway v. Harris*, 229 N.C. 117, 47 S.E.2d 796 (1948).

Affidavit Not Required in Action to Annul Marriage.—The affidavit formerly required under this section was not necessary in an action to annul a marriage upon statutory grounds. *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929).

Verification of Complaint under § 50-16.—See note to § 50-16.

Supplementary Affidavits. — No order should be made to deprive the defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits. *Sanders v. Sanders*, 157 N.C. 229, 72 S.E. 876 (1911).

Amendment to Affidavit. — It is discretionary with the trial judge to allow an amendment to the affidavit in an action for divorce. *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902). When allowed the facts shown in the amendment must be verified. *Foy v. Foy*, 35 N.C. 90 (1851).

False Affidavit. — In an action for divorce the affidavit, formerly required by this section in connection with the complaint, was jurisdictional, and a complaint accompanied by a false statutory affidavit would be regarded as insufficient to empower the court to grant a decree of divorce; and the correct procedure for relief against the decree would be by motion in the cause. *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945), wherein the plaintiff was held to have practiced imposition upon the court.

Six Months' Prior Knowledge. — By

Laws 1925, c. 93, this section was amended so that in cases where the cause for divorce is five years' (now one year's) separation, then the six months' prior knowledge need not be alleged in the affidavit, it being the purpose of § 50-5, subdivision (4), to permit a divorce after a separation of five years (now one year) without waiting an additional six months for filing the complaint. *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925); *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956). See *Smithdeal v. Smithdeal*, 206 N.C. 397, 174 S.E. 118 (1934). See also § 50-6 and note.

In all other cases the affidavit must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts stated therein. *Clark v. Clark*, 133 N.C. 28, 45 S.E. 342 (1903). And unless it is so stated the divorce will not be granted. *O'Connor v. O'Connor*, 109 N.C. 140, 13 S.E. 887 (1891); *Green v. Green*, 131 N.C. 533, 42 S.E. 954 (1902). But this was formerly not required to be alleged in the complaint. *Kinney v. Kinney*, 149 N.C. 321, 63 S.E. 97 (1908).

While, in an action for divorce a mensa, it is advisable that the pleading allege that the facts set forth therein as ground for divorce had existed to complainant's knowledge for at least six months prior to the filing of the pleading in accordance with the language of the statute, where the wife's pleading in her cross action for divorce a mensa alleges gross mistreatment of her by the husband, culminating in his locking her out of her home and ordering her away on a specified date more than six months prior to the filing of the pleading, with verification that the facts alleged therein are true to her own knowledge, her pleading will be held sufficient on this aspect. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

Effect of False Swearing on Decree.—If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, the decree is voidable but not void, and is immune from attack by either party to the divorce. *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956).

In an action for annulment of a marriage entered into between plaintiff husband and defendant wife following a decree of divorce in favor of defendant against her former husband, plaintiff, who had been married to defendant for six years, could not attack the divorce decree

by alleging false swearing of defendant in regard to the ground or cause for divorce. *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956).

Applied in *Scoggins v. Scoggins*, 85 N.C. 348 (1881); *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920); *Williams v. Williams*, 180 N.C. 273, 104 S.E. 561 (1920).

Quoted in *Martin v. Martin*, 253 N.C. 704, 118 S.E.2d 29 (1961).

Cited in *Keys v. Tuten*, 199 N.C. 368, 154 S.E. 631 (1930); *Hodges v. Hodges*, 226 N.C. 570, 39 S.E.2d 596 (1946); *Rowland v. Rowland*, 253 N.C. 328, 116 S.E.2d 795 (1960); *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

§ 50-9. Effect of answer of summons by defendant.—In all cases upon an action for a divorce absolute, where judgment of divorce has heretofore been granted and where the plaintiff has caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a judge of the superior court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judgment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1; 1947, c. 393.)

Cross Reference. — As to procedure in trial generally, see § 1-170 et seq.

§ 50-10. Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. Notwithstanding the above provisions, the right to have the facts determined by a jury shall be deemed to be waived in divorce actions based on a one year separation as set forth in G.S. 50-5 (4) or 50-6, where defendant has been personally served with summons, whether within or without the State, or where the defendant has accepted service of summons, whether within or without the State, unless such defendant, or the plaintiff, files a request for a jury trial with the clerk of the court in which the action is pending, prior to the call of the action for trial.

In all divorce actions tried without a jury as in this section provided the presiding judge shall answer the issues and render judgment thereon. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C. S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4.)

Cross References.—See note to § 50-7. As to competency of spouse as witness in civil actions, see § 8-56.

Editor's Note. — The 1963 amendment added the second sentence of the first paragraph. Section 2 of the amendatory act has been codified as the second paragraph of this section.

The first 1965 amendment added "whether within or without the State," following "served with summons," in the second sentence of the first paragraph.

The second 1965 amendment substituted "a one year" for "two (2) years" in the second sentence.

Purpose of Section.—The object of this section was to prevent a judgment from

being taken by default, or by collusion, and to require the facts to be found by a jury. *Campbell v. Campbell*, 179 N.C. 413, 102 S.E. 737 (1920). See *Moss v. Moss*, 24 N.C. 55 (1841); *Hooper v. Hooper*, 165 N.C. 605, 81 S.E. 933 (1914).

Applies to Cross Action.—This section is applicable to a defendant who files a cross action, and prays for a divorce therein from the plaintiff. *Saunderson v. Saunderson*, 195 N.C. 169, 141 S.E. 572 (1928), citing *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912).

Where the wife's cross action for divorce a mensa is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a di-

vorce absolute upon consent of the parties, the judgment is a nullity. *Saunderson v. Saunderson*, 195 N.C. 169, 141 S.E. 572 (1928).

Presumption of Denial.—The provisions of this section that the allegation of the complaint in an action for divorce “are deemed to be denied,” applies only to the trial upon the merits, since the facts must be found by a jury. *Zimmerman v. Zimmerman*, 113 N.C. 433, 18 S.E. 334 (1893).

The denial by the statute of the plaintiff’s allegations in an action for divorce presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. *Campbell v. Campbell*, 179 N.C. 413, 102 S.E. 737 (1920).

Same—In Cross Action.—The defendant in an action for divorce a vinculo, may file a cross action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue is raised by our statute, and upon a verdict on the required issues, a judgment may be rendered upon the cross action if the pleadings and the evidence are sufficient. *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925).

Same — Time for Answering Not Affected.—The provision of this section putting in a denial of the plaintiff’s allegations in an action for divorce does not affect the defendant’s right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. *Campbell v. Campbell*, 179 N.C. 413, 102 S.E. 737 (1920).

Entry of Specific Denial by Defendant Not Prejudicial. — Since this section declares in effect that the material allegations of the complaint in a divorce action shall be deemed and treated as denied, it is inconsequential whether or not the defendant enters a denial, and the entry of a specific denial by the defendant, under discretionary leave of the court, cannot prejudice the plaintiff. *Walker v. Walker*, 238 N.C. 299, 77 S.E.2d 715 (1953).

Facts That Must Be Alleged Must Be Proved. — Under this section and § 50-8, upon the basic principle that a plaintiff must prove what he must allege, a plaintiff is entitled to a judgment of divorce only if the issues submitted and answered in favor of the plaintiff establish, inter alia, (1) the requisite facts as to residence, and (2) that (except where the alleged cause for divorce is one year’s separation) the facts set forth as grounds for divorce have existed to his or her

knowledge for at least six months prior to the filing of the complaint. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957).

Material Facts Must Be Found by Jury.—This section requires that, in a divorce action, the material facts as to the grounds for divorce must be found by a jury. *Wicker v. Wicker*, 255 N.C. 723, 122 S.E.2d 703 (1961).

Thus Order in Habeas Corpus Proceeding Is Not Res Judicata in Divorce Action.—It is patent that an order entered in a habeas corpus proceeding based on facts found by the trial judge is not res judicata to an action for divorce upon the ground of adultery. *Wicker v. Wicker*, 255 N.C. 723, 122 S.E.2d 703 (1961).

Jury Trial of Divorce for Separation Is Waived by Failure to File Request. — A defendant waives his right to trial by jury in an action for divorce on the ground of two years’ (now one year’s) separation when he fails to file a request therefor prior to the call of the action for trial, and the fact that defendant had alleged a cross action for divorce for adultery does not affect this result when defendant withdraws his cross action before the case is called. *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964).

Provision on Evidence of Adultery Is Plain.—The provision of this section is so pointed and its language so plain—that in divorce trials, neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact—as to leave no room for doubt or construction. *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964), citing *Perkins v. Perkins*, 88 N.C. 41 (1883).

Witnesses in Actions on Ground of Adultery.—The statutory inhibition that the husband and wife will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear that there was no collusion or otherwise; and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. *Hooper v. Hooper*, 165 N.C. 605, 81 S.E. 933 (1914).

It is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men. *Hooper v. Hooper*, 165 N.C. 605, 81 S.E. 933 (1914).

Evidence of Adultery.—In *Vickers v. Vickers*, 188 N.C. 448, 124 S.E. 737 (1924), the court said: "On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the cost of a criminal prosecution against her alleged paramour was competent, not in any sense as a confession of her guilt, but as tending to show interest in and association with him, and as corroborating other testimony as to adulterous intercourse between the parties. *Toole v. Toole*, 112 N.C. 153, 16 S.E. 912 (1893).

Declaration in Presence of Third Person.—A declaration made by a husband to his wife in the presence of a third party is not such a confidential communication, as is privileged. *Toole v. Toole*, 112 N.C. 153, 16 S.E. 912 (1893).

Declaration of Alleged Paramour.—The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce a vinculo matrimonii, tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to the declarations, are admissible as evidence and do not come within the prohibition of this section. *Toole v. Toole*, 112 N.C. 153, 16 S.E. 912 (1893).

Question for Jury.—Where the facts in

§ 50-11. **Effects of absolute divorce.** — After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, provided further, that except in case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period, a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1.)

Editor's Note.—The 1953 amendment rewrote the second proviso.

The 1955 amendment inserted the words "and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period" in the second proviso.

For note on permanent alimony incident

a divorce action were in dispute the case was one for the jury. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945).

Evidence in divorce action held insufficient to carry case to jury. *Moody v. Moody*, 225 N.C. 89, 33 S.E.2d 491 (1945).

Instruction Not at Variance with Section.—In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of this section. *Nelson v. Nelson*, 197 N.C. 465, 149 S.E. 585 (1929).

Verdict of Jury.—In a proceeding for a divorce the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition. *Wood v. Wood*, 27 N.C. 674 (1845).

Same—Eleven Jurors.—In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for the plaintiff. *Hall v. Hall*, 131 N.C. 185, 42 S.E. 562 (1902).

Applied in *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E.2d 617 (1956); *Biggs v. Biggs*, 253 N.C. 10, 116 S.E.2d 178 (1960); *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962).

Quoted in *State v. Davis*, 229 N.C. 386, 50 S.E.2d 37 (1948).

Stated in *State v. Williams*, 220 N.C. 445, 17 S.E.2d 769 (1941).

Cited in *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

to absolute divorce, see 31 N.C.L. Rev. 482 (1953).

Application of Amendments.—The 1953 and 1955 amendments to this statute are inapplicable to a 1951 judgment for absolute divorce. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Public policy respecting the effect of de-

crees of absolute divorce is to be found in the second proviso of this section as well as in the general enactment which the proviso qualifies. *Deaton v. Deaton*, 237 N.C. 487, 75 S.E.2d 398 (1953).

For other cases on the subject, see *Merritt v. Merritt*, 237 N.C. 271, 74 S.E.2d 529 (1953); *Livingston v. Livingston*, 235 N.C. 515, 70 S.E.2d 480 (1952); *Feldman v. Feldman*, 236 N.C. 731, 73 S.E.2d 865 (1953).

Second Proviso Applies Only to Decrees Rendered before Commencement of Divorce Proceedings.—The second proviso to this section applies only to decrees or judgments of the court for alimony rendered before the commencement of the proceeding for absolute divorce. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

No Permanent Alimony.—Upon the granting of an absolute divorce all rights arising out of the marriage cease and determine, and hence the court has no power in such cases to allow permanent alimony. *Duffy v. Duffy*, 120 N.C. 346, 27 S.E. 28 (1897).

Alimony, both temporary and permanent, may be awarded in statutory proceedings for alimony without divorce and in an action for divorce *a mensa et thoro*; in an action for absolute divorce temporary alimony *pendente lite*, but not permanent alimony, may be awarded. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

Pending a wife's action for alimony without divorce, the husband obtained decree of absolute divorce on the ground of separation for the statutory period under § 50-6. It was held that the final judgment in her action would be rendered after absolute divorce, and therefore she would not be entitled to permanent alimony in her action, since under the common law she would not be entitled to alimony after a divorce *a vinculo*, and the proviso of this section would not be applicable. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Prior Award of Alimony Preserved.—Under the proviso in this section, a prior award of alimony is protected from annulment by a decree in absolute divorce based on two years' (now one year's) separation, which would otherwise probably have resulted. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

A judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

But Mere Separation Agreement Is Not

Protected.—This section does not protect a mere separation agreement as an award of alimony, and it is not only against public policy, but contrary to this section, that permanent alimony should be the outcome of an action for divorce *a vinculo*. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

When Prior Award of Alimony Terminated.—A decree of divorce on the ground of two years' (now one year's) separation in an action instituted by the wife terminates the wife's right to alimony without divorce under a prior decree. *Porter v. Citizens Bank*, 249 N.C. 173, 105 S.E.2d 669 (1958).

A judgment for subsistence, entered in an action for alimony without divorce, survives a judgment for absolute divorce obtained under the two-year (now one-year) separation statute. *Simmons v. Simmons*, 223 N.C. 841, 28 S.E.2d 489 (1944); *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E.2d 399 (1955); *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Consent Judgment Not Affected.—Where a consent judgment for alimony without divorce has been entered, a condition of which is that the wife remain unmarried, the subsequent decreeing of a divorce *a vinculo* to the wife is not a violation of the terms of the consent judgment, and the judge has no authority to reduce the amount of alimony provided in the consent judgment upon that ground. *Lentz v. Lentz*, 193 N.C. 742, 138 S.E. 12 (1927).

Counsel Fees for Enforcement of Subsistence Pendente Lite.—Since a wife's right to receive subsistence *pendente lite* is not destroyed by a judgment of absolute divorce, where her action for alimony without divorce is still pending, it would seem that the proviso in this section is broad enough to include counsel fees to the wife to enforce the payment to her of subsistence *pendente lite* in arrears, for without counsel her right to enforce such payments might be impaired or destroyed. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Applied in *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960); *Biggs v. Biggs*, 253 N.C. 10, 116 S.E.2d 178 (1960); *Sears v. Sears*, 253 N.C. 415, 117 S.E.2d 7 (1960).

Quoted in *Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962).

Cited in *Dyer v. Dyer*, 212 N.C. 620, 194 S.E. 278 (1937); *Brown v. Brown*, 224 N.C. 556, 31 S.E.2d 529 (1944); *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945); *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E.2d 469 (1958); *Thurston v. Thurston*, 256 N.C. 663, 124 S.E.2d 852 (1962).

§ 50-11.1. **Children born of voidable marriage legitimate.**—A child born of voidable marriage or a bigamous marriage is legitimate notwithstanding the annulment of the marriage. (1951, c. 893, s. 2.)

Child of Bigamous Marriage Entitled to Proceeds of Insurance Policy on Father.—Under this statute, there can be no question but that a child born of a bigamous marriage is legitimate and as such is entitled to the proceeds of a policy of in-

surance issued to his deceased father pursuant to the Federal Employees' Group Life Insurance Act. *Varker v. Metropolitan Life Ins. Co.*, 184 F. Supp. 159 (M.D.N.C. 1960).

§ 50-12. **Resumption of maiden name or adoption of name of prior deceased husband.**—Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county in which said divorce was granted, and the term of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall provide a permanent book in which shall be recorded all such applications herein provided for, which shall be indexed under the name of the former husband of the applicant and under the maiden name of such applicant. The clerk of the court of the county in which said application shall be recorded shall charge a fee of one (\$1.00) dollar for such registration. The provisions of this section shall apply only in those cases in which the divorce decree is rendered by a court of competent jurisdiction of this State. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. Provided that in the complaint or crossbill for divorce filed by any woman, she may petition the court for a resumption of her maiden name or the adoption by her of the name of a prior deceased husband, or of a name composed of her given name and the surname of a prior deceased husband, and upon the granting of the divorce in her favor, the court is authorized to incorporate in the divorce decree an order authorizing her to resume her maiden name or to adopt the name of a prior deceased husband or a name composed of her given name and the name of a prior deceased husband. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394.)

§ 50-13. **Custody of children in divorce.**—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Provided, custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not pro-

vided for by this section or § 17-39 of the General Statutes of North Carolina, may be determined in a civil action instituted by either of said parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the child, at the time of the filing of the said petition, is a resident. The resident or presiding judge of the district wherein the petition is filed may hear the facts and determine the custody of said children at any place that may be designated in his district after five days' notice of said proceedings to the defendant. Notice of the summons and petition in said proceedings may be served on a nonresident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the child resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice.

In any case where either parent institutes a divorce action when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (1871-2, c. 193, s. 46; Code, ss. 1296, 1570; Rev., s. 1570; C. S., s. 1664; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1965, c. 310, s. 2.)

Cross References.—As to habeas corpus proceeding to determine custody of children of parents who are separated without being divorced, see §§ 17-39 to 17-40. As to examination of minor by judge in chambers without consent of parties to custody proceedings, see note to N.C. Const., Art. II, § 35.

Editor's Note. — The 1965 amendment substituted "civil action" for "special proceeding" in the first sentence of the second paragraph.

For comment on the 1939 amendment to this section, see 17 N.C.L. Rev. 352.

For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 407 (1953).

For note on jurisdictional and full faith and credit requirements of custody awards of minor children, see 30 N.C.L. Rev. 282 (1952).

For note on the domicile rule in custody proceedings, see 35 N.C.L. Rev. 83 (1956).

For case law survey on custody of children, see 41 N.C.L. Rev. 464 (1963).

Jurisdiction of Court in Which Divorce Suit Is Pending Is Exclusive.—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of § 17-39, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or are suing for a decree of divorcement; and where the decree of divorcement has been

granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quære, whether the statutes relating to the juvenile courts, § 110-21 et seq., confer jurisdiction in such instances. In re Blake, 184 N.C. 278, 114 S.E. 294 (1922); Murphy v. Murphy, 261 N.C. 95, 135 S.E.2d 148 (1964).

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the subject matter of the court's jurisdiction in the divorce action. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

When the plaintiff instituted his action for divorce from bed and board in the superior court, in which he specifically prayed "that the court determine the proper custody for the aforesaid minor child of the plaintiff and defendant," that court became vested in his suit with exclusive jurisdiction to enter orders respecting the care, custody and maintenance of this child. Bunn v. Bunn, 258 N.C. 445, 128 S.E.2d 792 (1963).

Extent of Jurisdiction.—Upon the institution of a divorce action the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and is subject to the fundamental requirement of notice and opportunity to be heard. If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through

its coercive jurisdiction. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage, and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. *Story v. Story*, 221 N.C. 114, 19 S.E.2d 136 (1942).

After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E.2d 700 (1963).

A controversy concerning child custody and support accompanies, is collaterally connected with, and is incidental to, an action for divorce or for alimony without divorce, but may not be determined under this section and § 50-16 when it is the only cause of action alleged, except in those special and unusual circumstances provided for in the second paragraph of this section. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Order for Custody Not Entered in Later Action for Subsistence. — Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce. *Reece v. Reece*, 231 N.C. 321, 56 S.E.2d 641 (1949).

Jurisdiction Not Ousted by Decree under § 17-39.—A decree awarding the custody of a child under the provisions of § 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. *Robbins v. Robbins*, 229 N.C. 430, 50 S.E.2d 183 (1948); *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71 (1956).

Institution of Divorce Action Does Not Oust Jurisdiction of Prior Action to Determine Custody.—There is nothing in this section to the effect that institution of a divorce action ousts jurisdiction of another court, previously acquired, to determine the rights of custody of the children of the marriage. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

Habeas Corpus Is Not an Appropriate Writ When Parties Are Divorced. — Al-

though statutory habeas corpus is an appropriate writ to determine the custody of children as between married parents living in a state of separation under § 17-39, it is not appropriate when they are divorced. *McEachern v. McEachern*, 210 N.C. 98, 185 S.E. 684 (1936).

Remedy of Plaintiff in Divorce Suit Is by Motion in the Cause.—Where a wife institutes suit for divorce, her remedy to require the defendant to provide support for a minor child of the marriage is by motion in the cause, which may be filed either before or after final judgment. *Winfield v. Winfield*, 228 N.C. 256, 45 S.E.2d 259 (1947).

Jurisdiction to Award Custody of Children without the State. — Insofar as this section undertakes to vest a judge with authority, without the service of process and without notice, to enter an effective binding order awarding the custody of an infant beyond the confines of the State, it is invalid. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

Court did not have jurisdiction to award custody of a child in a custody proceeding filed after divorce decree where child was with the father, a nonresident. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71 (1956).

Domicile of Husband Not Necessarily Domicile of Wife and Children. — Where the husband in his divorce action alleges that he had notified his wife that he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

Purpose of Second Paragraph of Section. —The second paragraph of this section as adopted by the 1949 amendment was designed (1) to meet the decision in *Phipps v. Vannoy*, 229 N.C. 629, 50 S.E.2d 906 (1948), in which it was held that the juvenile court has exclusive jurisdiction, and (2) to simplify proceedings to determine the custody of children in cases not arising under § 17-39. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

Where Divorce Decree Entered in Another State.—A decree for absolute divorce which awarded the custody of the child of the marriage was entered in another state and the parties thereafter moved to this State. The proper procedure for either party to determine the right to the custody of the child is by a special proceeding under this section. *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949).

Where a court of a foreign jurisdiction has entered a divorce decree and order concerning the custody of the children, unless the children were domiciled in North Carolina at the time the proceeding under this section was instituted, the North Carolina court is without jurisdiction to award their custody, except in conformity with the foreign decree theretofore entered. *Allman v. Register*, 233 N.C. 531, 64 S.E.2d 861 (1951).

A modification of the provisions of a foreign divorce decree in regard to the custody of a minor child of the marriage, entered in the foreign jurisdiction while the child of the marriage was domiciled in this State with her resident grandfather, is not binding on the courts of this State, and does not come under the full faith and credit clause of the federal Constitution, Article IV, § 1. *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E.2d 96 (1957).

Civil Action to Obtain Custody of Illegitimate Child.—Under the 1949 amendment to this section either parent may institute a special proceeding (now civil action) to obtain custody of his or her child in cases not theretofore provided for by this section or by § 17-39 and this amendment authorizes such 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). See *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

Where the mother of an illegitimate child, after her marriage to a person not its father, institutes habeas corpus proceedings against her aunt with whom she had left the child, to regain its custody, and the respondent files answer and thus makes a general appearance and at no time challenges the jurisdiction of the court, the Supreme Court, in its discretion, will treat the petition as a proceeding under this section, and consider the appeal on its merits. In *re Cranford*, 231 N.C. 91, 56 S.E.2d 35 (1949).

The mother of a bastard child is its natural guardian, and, as such, has a legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child. But this rule is not absolute, and the custody of a bastard child may be taken from the mother, and placed elsewhere, where it clearly and manifestly appears that the best interests and welfare of the

child demand it. *Wall v. Hardee*, 240 N.C. 465, 82 S.E.2d 370 (1954).

As against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

It would be anomalous indeed if the law should sanction an award of custody to the putative father when there is a specific finding that the mother is now of good character and reputation and is a fit and suitable person to have the custody of minor children. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Provision that the procedure herein provided may be used in "controversies respecting the custody of children not provided for by this section or § 17-39 of the General Statutes of North Carolina," is sufficiently broad and comprehensive to include a proceeding by a putative father for custody of his illegitimate child. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

The putative father of an illegitimate child, even though his right to custody is not primary, has such an interest in the welfare of his child that he can bring a proceeding against the mother under this section for its custody. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Jurisdiction of Juvenile Court.—The juvenile court, under § 110-21, has exclusive original jurisdiction of a child under sixteen years of age "whose custody is subject to controversy" in all cases except those in which the superior court is given jurisdiction by § 17-39 or this section. In *re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

Court Acquires Jurisdiction of Child as Well as Parent.—In a custody case, the court acquires jurisdiction of the child as well as the parent, and the child thus becomes a ward of the court. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962).

Meaning of Word "Parents."—The word "parents" in this section and § 49-1 and the word "parent" in § 49-2 relate to the rights and duties of parents in respect to their children, and are in *pari materia*. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

Section 49-12 and this section must be

construed in *pari materia*, and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock (§ 49-12), and such child is a minor child of the marriage within the purview of this section, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce. *Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).

Proceeding Is In Rem.—The awarding of the custody of the children in an action for divorce is in rem, and the court must have jurisdiction over the children, who are the res, or must have jurisdiction of the person of their custodian, who is given notice and an opportunity to be heard in order to have authority to enforce its decree by coercive action. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948); *Hoskins v. Currin*, 242 N.C. 432, 88 S.E.2d 228 (1955).

An action which relates to the custody of a child is in the nature of an in rem proceeding. Therefore, the child is the res over which the court must have jurisdiction before it may enter a valid and enforceable order. *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E.2d 96 (1957).

Necessity for Service.—Where a parent is about to abscond and take her children beyond the jurisdiction of the court for the purpose of avoiding the service of process, the court may act and act promptly. But even then its order becomes effective and binding only upon service. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

Five Days' Notice Is for Protection of Parent Who Does Not Have Control of Child.—The provision in the statute dispensing with the notice of five days, when it appears that the parent having possession or control of the infant child of the parties to the action has removed or is about to remove such child from the jurisdiction of the court, is applicable only where the application or motion is made by the parent who does not have possession or control of the child, and is for the protection of the rights of such parent, and not of the parent who has possession or control of the child at the time the application or motion is made. In such case, no notice to the adverse party is required. *Burrowes v. Burrowes*, 210 N.C. 788, 188 S.E. 648 (1936).

Notice of Motion for Custody Served on Counsel of Record. — A court which acquired jurisdiction of husband in a divorce proceeding before he left the State

had jurisdiction to hear motion for custody filed after divorce decree where notice of motion was served on husband's counsel of record. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E.2d 71 (1956).

Order Made without Jurisdiction and in Denial of Due Process. — An order of a judge of the superior court awarding custody of minor children to a plaintiff under this section, is made without jurisdiction and in denial of due process of law, when at the time such order was made there had been neither service of summons upon nor notice to the defendant, and when both the defendant and the minor children were without the State. *Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948).

Judge Is without Jurisdiction to Hear Matter outside District.—Upon application for the custody of the children of the marriage after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. *Patterson v. Patterson*, 230 N.C. 481, 53 S.E.2d 658 (1949).

Jury Trial. — Whether a child is a "minor child of the marriage" within the purview of this section may be a question of fact rather than an issue of fact, but so, the trial court may call a jury to its aid to hear the evidence and determine the question. *Carter v. Carter*, 232 N.C. 614, 61 S.E.2d 711 (1950).

Child Is under Protective Custody of Court.—Even though an order requiring the husband to make payments for the support of his child was entered by consent of the parents, the child was under the protective custody of the court. *Smith v. Smith*, 247 N.C. 223, 100 S.E.2d 370 (1957).

Wide Discretionary Power Is Vested in Trial Court.—In applying the provisions of this section, the decisions of the Supreme Court, while emphasizing that the welfare of the child is always to be treated as the paramount consideration, to which even parental love must yield, recognize that wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133 (1953).

And Its Findings of Fact Based on Competent Evidence Are Ordinarily Con-

clusive.—The rule is well established that findings of fact by the trial court in a proceeding to determine the custody of a minor child ordinarily are conclusive when based on competent evidence. *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133 (1953).

In a hearing to determine the right to custody of the children of the marriage, the court's findings of fact are conclusive if supported by competent evidence. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Welfare of Child Is Controlling in Determining Custody.—The welfare of the child at the time of the contest is controlling in determining the right to the custody of the child as between its divorced parents. *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949).

In applying this statute the question of granting the custody and tuition of the child to the father or mother is discretionary with the court. The welfare of the child is the paramount consideration, or, as stated in *In re Lewis*, 88 N.C. 31 (1883), "the polar star by which the discretion of the court is to be guided." *Brake v. Brake*, 228 N.C. 609, 46 S.E.2d 643 (1948); *Finley v. Sapp*, 238 N.C. 114, 76 S.E.2d 350 (1953).

The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Court Is Not Bound by Agreement between Husband and Wife Regarding Custody.—A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. *In re Albertson*, 205 N.C. 742, 172 S.E. 411 (1934).

The fact that petitioner agreed when the separation took place between her and her husband that the custody of their child should remain with the father is not binding on the court. *Finley v. Sapp*, 238 N.C. 114, 76 S.E.2d 350 (1953).

Valid separation agreements, including consent judgments based on such agreements with respect to marital rights, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Provisions in a deed of separation for support of the minor children of the marriage, entered as a consent judgment by the court, cannot deprive the superior court of its inherent and statutory authority to protect the interests and provide for the welfare of the infants, and therefore judgment increasing the allowance for the minor children upon findings of change of circumstances warranting such increase, will be affirmed. *Bishop v. Bishop*, 245 N.C. 573, 96 S.E.2d 721 (1957).

No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; but they cannot thus withdraw children of the marriage from the protective custody of the court. *State v. Duncan*, 222 N.C. 11, 21 S.E.2d 822 (1942); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty towards its ward—the children of the State whose personal or property interests require protection. *State v. Duncan*, 222 N.C. 11, 21 S.E.2d 822 (1942).

But provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Court May Divide Custody between Parents or Award General Custody Subject to Visitation Privileges.—This section confers upon the trial court discretionary power either to divide custody between contending parents for alternating periods, or to award general custody to one parent subject to visitation privileges in favor of the unsuccessful parent. *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133 (1953).

Conviction of Abandonment Did Not Preclude Finding of Fitness.—The fact that the father had been convicted of abandonment of his children and ordered to provide for their support did not preclude the court from finding upon a hearing of a subsequent motion for the custody of the children in a divorce action that the father was a fit and suitable person to have custody of the children when there was uncontradicted evidence upon the hearing that the father had a good reputation in the community in which he lived. *Thomas*

v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963).

Custody of Grandparents. — Where the custody of a minor child has been awarded the mother in a divorce proceeding and subsequently, after both parents, who are proper and fit persons to have the custody of such child, have moved out of the State, the child being left by the mother with her parents, residents of the State and highly proper persons to rear the child, upon petition of the father for custody of the child, the court has authority under this section to order that the child continue in the custody of the grandparents. *Walker v. Walker*, 224 N.C. 751, 32 S.E.2d 318 (1944).

Where the court's conclusions that the mother was an unfit person to have custody of the children and that the father was a fit and suitable person to have their custody was supported by the findings, and it further appeared that neither the father nor the paternal grandparents had a suitable home for the children but that the maternal grandparents, with whom the children were then living, had such a home, order awarding the custody of the children to the father on condition that the physical custody of the children be vested in their maternal grandparents and the father pay for their support, would not be disturbed on appeal, the welfare of the children being the determinative factor in the award of custody. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Decree Awarding Custody to Grandfather Affirmed.—See *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E.2d 96 (1957).

Father Primarily Liable for Support.—The liability of the father primarily to support the children remains after the divorce, as well as before such divorce, and even where the custody of the children has been awarded to the mother. And the order may be made a lien on his land. *Sanders v. Sanders*, 167 N.C. 319, 83 S.E. 490 (1914). See *Bailey v. Bailey*, 127 N.C. 474, 37 S.E. 502 (1900).

Amount Set by Agreement Is Presumptively Just and Reasonable.—Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Ability to Pay Considered.—Ordinarily, in entering a judgment for the support of a minor child, the ability to pay as well as the needs of such child will be taken into consideration. *Bishop v. Bishop*, 245

N.C. 573, 96 S.E.2d 721 (1957); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963); *Coggins v. Coggins*, 260 N.C. 765, 133 S.E.2d 700 (1963).

In a support proceeding the issue before the court involves a consideration of the needs of the children, and an order for their maintenance in an amount fair and not confiscatory in the light of the father's earning ability. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

And Also Father's Living Expenses. — In determining the amount of an order for the support of children a reasonable allowance should be made for the living expenses of their father in the light of his earnings. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Dividing His Income by Number of Dependents Is Disapproved. — Fixing the amount of support for minor children by dividing the income of the husband by the number of people dependent upon him for support is not approved. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Support and Counsel Fees Pendente Lite Where Husband Denies Paternity. — Where, upon the wife's motion in the cause to require defendant to provide support for the minor child of the marriage, made after decree of absolute divorce, the husband files affidavit denying paternity, and at his instance the issue is transferred to the civil issue docket, the trial court has the discretionary power to order defendant to provide for support of the child and counsel fees pendente lite. *Winfield v. Winfield*, 228 N.C. 256, 45 S.E.2d 259 (1947).

Award Not Disturbed Unless Discretion Abused.—The amount to be allowed for the support of the children of the marriage in proceedings under this section is within the sound discretion of the trial judge and will not be disturbed except where such discretion has been grossly abused. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E.2d 700 (1963).

Findings Sufficient to Sustain Decree.—Findings that the parties have been married and divorced, that the wife is a person of good character, resident in this State, that the husband is financially responsible, and that the best interest of the minor child of the marriage would be promoted by awarding its custody to the wife, are sufficient to sustain a decree awarding its custody to her and requiring the husband to make contributions for the support of the child. *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949).

Consent Judgments. — Where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for the children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. *Sanders v. Sanders*, 167 N.C. 317, 83 S.E. 489 (1914).

Same—Award of Custody Does Not Affect.—Where a consent judgment in an action for a divorce *a mensa* operates as a gift to the wife of an estate in the husband's land, the fact that the court awards custody of the children does not affect it. *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25 (1920).

Without the consent of the parties to vacate or moderate a properly entered consent judgment, the court is without power to do so. *Lentz v. Lentz*, 193 N.C. 742, 138 S.E. 12 (1927).

Consent Judgment on Issue of Divorce Does Not Divest Jurisdiction as to Custody of Child.—Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with approval of the court, especially where such consent judgment expressly provides that either party may thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children under this section. *Tyner v. Tyner*, 206 N.C. 776, 175 S.E. 144 (1934).

Effect of Defendant's Petition for Custody on Plaintiff's Right to Voluntary Nonsuit.—A wife instituted action for divorce and defendant husband filed his petition in the cause praying the court for a determination of his custodial rights with respect to the child. The defendant in petitioning for the custody of the child was seeking affirmative relief of a substantial nature. This being so, it was not within the power of the clerk to divest the superior court of its jurisdiction by allowing the plaintiff to submit to a voluntary nonsuit during the course of the hearings and while the issue of custody was in fieri before the presiding judge. *Cox v. Cox*, 246 N.C. 528, 98 S.E.2d 879 (1957).

Effect of Appeal.—An appeal removes the entire proceeding to the Supreme

Court and leaves the superior court *functus officio* until the cause is remanded, and this seems to be true even in custody cases both as to the order of custody and as to allowance for the child's support. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962).

Appeals by Both Wife and Children.—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. *Sanders v. Sanders*, 167 N.C. 317, 83 S.E. 489 (1914).

Judgment out of Term.—Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority under this section to render such judgment. *Pate v. Pate*, 201 N.C. 402, 160 S.E. 450 (1931).

Decree Subject to Modification upon Change of Circumstances.—A decree for the support of a minor child is subject to alteration upon a change of circumstances affecting the welfare of the child. *Bishop v. Bishop*, 245 N.C. 573, 96 S.E.2d 721 (1957).

A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent and may be later modified by the court upon change of conditions. *Hardee v. Mitchell*, 230 N.C. 40, 51 S.E.2d 884 (1949); *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133 (1953).

The superior court has jurisdiction under this section to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce, and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce. *Story v. Story*, 221 N.C. 114, 19 S.E.2d 136 (1942).

Where, in a decree of divorce the father is ordered to pay a certain sum monthly for the support of his infant daughter, and by its first order the court has retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision the court later, upon the father's insolvency, made the sums assessed a charge on the plaintiff's homestead and personal property exemptions when allotted, the modification is authorized by this section

as well as by the order of the courts. *Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933).

All decrees with respect to custody and support of minor children are subject to further orders of the court. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

A judgment for the support of a minor child or children is subject to alteration upon a change of circumstances affecting the welfare of the child or children. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

A decree awarding the custody of minor children determines the present rights of the parties to the contest with respect to such custody, is not permanent in its nature, and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the children. This is one of the exceptions to the general rule that ordinarily one superior court judge has no power to alter, modify, or reverse the judgment of another superior court judge previously made in the same action. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

An order of the court, entered pursuant to § 50-16, awarding custody of the children to the wife did not preclude another judge of the superior court from awarding custody of the children to the husband in the wife's later action for absolute divorce under § 50-6. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Wife who had gone out of State after she had been awarded custody of children and who later returned with a bastard child begotten on her body was a change of circumstances affecting the welfare of the children, which empowered the court to alter or modify the custody order if it was deemed necessary to do so to further the welfare of the children. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

A change of condition and circumstances

must be established before an order for the support of children and permanent alimony can be modified. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

The court upon motion for an increase in allowance for support of minor children is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Modification of Decree Entered by Court of Another State.—Where parents were divorced in Nevada, decree providing for support of children by father, a resident of North Carolina, and Nevada law provided for modification of support decrees, the superior court was held to have jurisdiction to consider and adjudicate the question of adequacy of that support. However, the Nevada decree is binding on North Carolina courts under the full faith and credit clause of the Constitution of the United States unless the plaintiffs show such changed conditions and circumstances as to justify an increase in the allowance made by the Nevada court. *Thomas v. Thomas*, 248 N.C. 269, 103 S.E.2d 371 (1958).

Refusal to Modify Custody Decree Where Child Actually in Custody of Another Married Couple.—See *Fearrington v. Fearrington*, 251 N.C. 694, 111 S.E.2d 850 (1960).

Applied in *Gafford v. Phelps*, 235 N.C. 218, 69 S.E.2d 313 (1952); *Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957).

Cited in *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945); *In re McGraw*, 228 N.C. 46, 44 S.E.2d 349 (1947); *James v. Pretlow*, 242 N.C. 102, 86 S.E.2d 759 (1955); *Richter v. Harmon*, 243 N.C. 373, 90 S.E.2d 744 (1956); *Kovacs v. Brewer*, 356 U.S. 604, 78 Sup. Ct. 963, 2 L. Ed. 2d 1008 (1958).

§ 50-14. Alimony on divorce from bed and board.—When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered. (1871-2, c. 193, s. 37; Code, s. 1290; Rev., s. 1565; C. S., s. 1665.)

Alimony Defined.—See *Rogers v. Vines*, 28 N.C. 293 (1846); *Taylor v. Taylor*, 93 N.C. 418 (1885).

The alimony allowed under this section is incident to and dependent upon a decree of divorce a mensa, and where no divorce

a mensa was granted on the verdict no permanent alimony could be allowed. *Silver v. Silver*, 220 N.C. 191, 16 S.E.2d 834 (1941).

Permanent alimony under this section may be allowed only upon decree for di-

vorce a mensa, and is erroneously granted in the wife's cross action in which divorce a mensa is neither prayed nor decreed. *Silver v. Silver*, 220 N.C. 191, 16 S.E.2d 834 (1941).

Court on Decree for Divorce a Mensa Can Order Permanent Alimony.—The court had the power when it rendered a judgment granting defendant a divorce a mensa et thoro to decree in the judgment that the plaintiff should pay permanent alimony for the subsistence of defendant and their infant children. *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E.2d 399 (1955).

And Award Can Be Increased When Changed Circumstances Require It.—An award of subsistence for defendant and the children born of the marriage, decreed by a court under this section in conjunction with a divorce a mensa et thoro, before the commencement of a proceeding by the wife for a divorce a vincula under the provisions of § 50-6, which she obtained, can be increased in amount by the court in its discretion, on her motion in the action when and where subsistence was awarded, when changed circumstances of the parties reasonably require it. *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E.2d 399 (1955).

But There Can Be No Award Where Husband Has Performed Separation Agreement.—Where the wife sought a divorce a mensa and alimony notwithstanding the provision of a valid separation agreement which the husband had "fully performed," she could not, after her husband had performed his part of the contract, obtain an award of alimony. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

A decree of divorce a mensa may assign one third of the husband's estate to the wife. *Davis v. Davis*, 68 N.C. 180 (1873).

§ 50-15. Alimony pendente lite; notice to husband.—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall probably entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, it shall be lawful for such judge to order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of anyone interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or § 50-16, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the State or is in parts unknown, or is about to remove or dispose of his property for the purpose of de-

The limitation imposed by this section is not applicable when plaintiff seeks alimony pendente lite or without divorce, but the limitation expressed herein ought not to be completely ignored when the court is called upon to make an award as provided by § 50-16. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960).

But Is Applicable Only to Divorce a Mensa.—Except when the allowance is made following a decree of divorce a mensa et thoro, the court, in making the allowance, is not confined to a one-third part of the defendant's net annual income. *Harris v. Harris*, 258 N.C. 121, 128 S.E.2d 123 (1962).

Effect of Reconciliation or Death of Party.—Alimony is in its nature a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. *Rogers v. Vines*, 28 N.C. 293 (1846).

Effect of Wife's Abandonment.—The voluntary abandonment by the wife of her husband without legal justification will not entitle her to alimony in her suit for divorce from bed and board. *McManus v. McManus*, 191 N.C. 740, 133 S.E. 9 (1926).

Appeal.—Whether the wife is entitled to alimony is a question of law upon the facts found, and is reviewable upon the appeal by either party. *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902).

Cited in *Dyer v. Dyer*, 212 N.C. 620, 194 S.E. 278 (1937); *Story v. Story*, 221 N.C. 114, 19 S.E.2d 136 (1942); *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E.2d 444 (1943); *Feldman v. Feldman*, 236 N.C. 731, 73 S.E.2d 865 (1953); *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956).

feating the claim of his wife, no notice is necessary. All motions pendente lite made under this section may be heard in the same manner, at the same places, and by the same judges as motions pendente lite are now heard under § 50-16. (1871-2, c. 193, s. 38; 1883, c. 67; Code, s. 1291; Rev., s. 1566; C. S., s. 1666; 1961, c. 80.)

- I. In General.
- II. Application and Proceedings Thereon.
- III. Prerequisites to Award.
- IV. Notice.
- V. The Order.
 - A. In General.
 - B. Amount.
- VI. Pleading and Practice.

I. IN GENERAL.

Editor's Note. — It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. *Wilson v. Wilson*, 19 N.C. 377 (1837); *Reeves v. Reeves*, 82 N.C. 348 (1880). In 1852 the legislature passed an act authorizing the courts upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. See *Everton v. Everton*, 50 N.C. 202 (1857). In *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918), the court overruled the former doctrine mentioned above, and stated that the courts possessed the right to grant alimony pendente lite by virtue of the common law—the practice having come down from the English ecclesiastical courts.

The effect of this holding is to make the statute remedial in its nature, affirmative in its terms and cumulative in its effect, not abrogating the common law existent on the subject nor withdrawing from the court any powers already possessed in administering its principles. *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918), overruling *Reeves v. Reeves*, 82 N.C. 348 (1880), on this point.

As to basis of award of alimony pendente lite in North Carolina, see 39 N.C.L. Rev. 189 (1961).

Right to Alimony Pending Trial Is Grounded on Common Law.—The right of a defendant wife to an allowance for her subsistence pending trial and for counsel fees in a suit for absolute divorce by her husband is not derived from this section or from § 50-16 but is grounded on the common law. *Branon v. Branon*, 247 N.C. 77, 100 S.E.2d 209 (1957).

Common-Law Principle Not Abrogated.—This section does not abrogate the principle on which alimony was allowed at common law. *Cameron v. Cameron*, 231 N.C. 123, 56 S.E.2d 384 (1949).

Purpose of Section.—The purpose of this section is to afford the wife present

pecuniary relief pending the progress of the action, and to afford the husband some measure of protection in a motion so important, which is made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment. *Morris v. Morris*, 89 N.C. 109 (1883).

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Alimony When the Wife Is Defendant.—When the wife is the defendant she has a right to claim alimony pendente lite under this section. *Webber v. Webber*, 79 N.C. 572 (1878); *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904).

And this is true although she may be concluded by the judgment against her in her former and independent action for divorce a mensa under the provisions of the statute. *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918).

When the husband sues the wife for an absolute divorce, the wife may plead a cause of action for divorce from bed and board as a cross action, and obtain upon a proper showing allowances from the estate or earnings of her husband for her support during the pendency of the action and for counsel fees for her attorneys. *Johnson v. Johnson*, 237 N.C. 383, 75 S.E.2d 109 (1953).

Since the decision to the contrary in *Reeves v. Reeves*, 82 N.C. 348 (1880), is expressly abrogated in *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857 (1918), the wife may be allowed alimony pending the action and counsel fees in a suit against her for divorce, even though she seeks no affirmative relief and merely endeavors to defeat her husband's case. It follows, therefore, that in an action by the husband for an absolute divorce, the wife may deny the validity of the cause of action alleged by the husband, or plead an affirmative defense to it, and obtain upon a proper showing in either event allowances from the estate or earnings of the husband for her support during the pendency of the action and for counsel fees for her attorneys. *Johnson v. Johnson*, 237 N.C. 383, 75 S.E.2d 109 (1953).

Applied in *Phillips v. Phillips*, 241 N.C. 617, 86 S.E.2d 95 (1955).

Quoted in *Ipock v. Ipock*, 233 N.C. 387, 64 S.E.2d 283 (1951).

Cited in *Dyer v. Dyer*, 212 N.C. 620, 191 S.E. 278 (1937); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946); *Livingston v. Livingston*, 235 N.C. 515, 70 S.E.2d 480 (1952); *Morris v. Wilkins*, 241 N.C. 507, 85 S.E.2d 892 (1955); *Bolin v. Bolin*, 242 N.C. 642, 89 S.E.2d 303 (1955); *Sgueros v. Sgueros*, 252 N.C. 408, 114 S.E.2d 79 (1960).

II. APPLICATION AND PROCEEDINGS THEREON.

An application for alimony pendente lite can be made by motion in the cause. *Reeves v. Reeves*, 82 N.C. 348 (1880).

Verified Answer and Cross Action Sufficient to Sustain Order.—In an action for divorce, a verified answer and cross action setting forth a cause of action for divorce a mensa, is sufficient to sustain an order allowing alimony pendente lite. *Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948).

Where Motion May Be Heard.—A motion for alimony pendente lite may be heard anywhere in the judicial district. *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902). Also a motion to reduce alimony. *Moore v. Moore*, 131 N.C. 371, 42 S.E. 822 (1902).

But a resident judge holding court in another district cannot hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. *Moore v. Moore*, 131 N.C. 371, 42 S.E. 822 (1902).

Insofar as the alimony pendente lite and counsel fees for the plaintiff are concerned, a hearing could be held on proper notice anywhere in the judicial district. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962).

Alimony pendente lite may be allowed before the return term if the complaint has been filed. *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902).

Judge Will Look into Merits of Action.—In passing on a motion for alimony pendente lite the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

When Wife Demands Alimony Pendente Lite and Alimony without Divorce.—In the husband's suit for divorce, in which the

wife files answer demanding alimony pendente lite and alimony without divorce, it is error for the court, upon the hearing for alimony pendente lite under this section, to issue an order for alimony without divorce under § 50-16. *Adams v. Adams*, 212 N.C. 373, 193 S.E. 274 (1937).

Kind of Divorce Warranted Immaterial.—Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo, or only a divorce a mensa et thoro. *Little v. Little*, 63 N.C. 22 (1868).

Presumption.—When the trial judge allows alimony under this section, and there is evidence sufficient to sustain his action, it is presumed: (1) That he found the facts and resolved them in the wife's favor and (2) that it appeared to him that the wife lacked sufficient means on which to subsist during the pendency of the suit. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

III. PREREQUISITES TO AWARD.

Prima Facie Case.—Under this section a petitioner for divorce is entitled to alimony pendente lite upon making out a prima facie case. *Sparks v. Sparks*, 69 N.C. 319 (1873).

Necessity for Finding of Facts.—Prior to 1961, when this section was amended, for a wife to obtain temporary alimony under this section, the requirement of this section was that she set forth in her complaint facts which would entitle her to the relief demanded, which facts "shall be found by the judge to be true." *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

The 1961 amendment removed from this section the requirement that the judge make specific findings that the facts set forth in the complaint are true and entitle plaintiff to the ultimate relief demanded therein as a condition precedent to an award pendente lite. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Apparently, the purpose of the 1961 amendment was to eliminate the distinction between this section and § 50-16 insofar as finding the facts with reference to the truth of the allegations of the complaint is concerned. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

But the 1961 amendment to this section does not dispense with the requirement that the judge hear the evidence of both parties and determine in his sound legal discretion whether movant is entitled to the relief sought. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

There is, and has been, no requirement in this section that the judge shall find specific facts with reference to the wife's financial condition. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Upon application for alimony pendente lite the trial court is required to find the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon a finding that defendant was the owner of certain properties is error. *Dawson v. Dawson*, 211 N.C. 453, 190 S.E. 749 (1937), decided under this section as it stood before the 1961 amendment.

In an application for alimony pendente lite under this section, it is required that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. *Caudle v. Caudle*, 206 N.C. 484, 174 S.E. 304 (1934), decided under this section as it stood before the 1961 amendment.

Finding Facts as Alleged Sufficient.—Upon a motion for alimony it is sufficient for the court to find that the facts are as alleged in the answer and the affidavits filed in support of the motion. *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889); *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904); *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492 (1937); *Ragan v. Ragan*, 214 N.C. 36, 197 S.E. 554 (1938), decided under this section as it stood before the 1961 amendment.

Judge May Leave Charges Open.—Where the allegations of the complaint are sufficient under the terms of this section, and are found to be true and sufficient by the judge of the superior court, in the wife's action for a divorce a mensa et thoro, the court may leave open the charges made by each of the parties against the other, and award alimony pendente lite, including a reasonable attorney's fee, taking into consideration the circumstances of the case. *Hennis v. Hennis*, 180 N.C. 606, 105 S.E. 274 (1920).

Adultery Does Not Bar Alimony Pendente Lite.—In action by wife for divorce a mensa, allegation of adultery on part of wife does not bar alimony pendente lite, as provision making adultery of wife bar to alimony is a part of § 50-16, but is not included in this section. *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E.2d 496 (1946).

Where the wife is charged with adultery in a suit for absolute divorce by her hus-

band, before she is entitled to an allowance for subsistence and counsel fees, the court must find as a fact that her denial under oath of the alleged adultery was made in good faith; and before making this determination the court must hear the evidence of the parties. *Branon v. Branon*, 247 N.C. 77, 100 S.E.2d 209 (1957), decided under this section as it stood before the 1961 amendment.

Where the wife's action is for a divorce a mensa on the ground of abandonment, stating that she was compelled to leave home by the conduct of her husband, the judge, in allowing alimony pendente lite, must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. *Horton v. Horton*, 186 N.C. 332, 119 S.E. 490 (1923), decided under this section as it stood before the 1961 amendment.

It need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. *Lassiter v. Lassiter*, 92 N.C. 130 (1885).

Validity of Separation Agreement Need Not Be First Determined.—The cases of *Oldham v. Oldham*, 225 N.C. 476, 35 S.E.2d 332 (1945) and *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171 (1929), holding that in an action for alimony without divorce the validity or reasonableness of a separation agreement need not be determined before the court can award temporary allowances, although decided under § 50-16, are equally applicable to a motion for temporary alimony under this section, pending the trial of an action for divorce from bed and board. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

The lapse of seven years from the time of the separation does not bar a cross action for divorce a mensa on the ground of constructive abandonment or application for alimony pendente lite, either by laches or any statute of limitation. *Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948).

Wife's Need for Temporary Alimony.—The 1961 amendment did not materially change the wording of this section with reference to the wife's need for temporary alimony as a requirement for an award. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Wife's Estate Insufficient for Her Support and Expenses of Suit.—A married woman is entitled to alimony pendente lite from her husband's estate, when the income from her separate estate is not sufficient for her support and to defray the

necessary expenses in prosecuting her suit. *Miller v. Miller*, 75 N.C. 70 (1876).

Where Wife Has Ample Means. — The right of alimony pendente lite, both under this section and under the common law, is predicated upon the justice of affording the wife sufficient means to cope with her husband in presenting their case before the court, and a finding, supported by evidence, that the wife has earnings and means of support equal to that of her husband, sustains the court's order denying her motion for alimony pendente lite. *Oliver v. Oliver*, 219 N.C. 299, 13 S.E.2d 549 (1941).

When Husband Denies Having Property. — Where the husband denies having any property but admits that he is an able-bodied man, the court may order an allowance without inquiry into the value of his property. *Muse v. Muse*, 84 N.C. 35 (1881).

Allegations Held Sufficient. — In an action by a wife for a divorce a mensa, where acts of cruelty were alleged as the ground of separation, and also an estimate was made of the value of the defendant's estate, it was held that there was sufficient evidence to decree alimony and fix the amount. *Pain v. Pain*, 80 N.C. 322 (1879). Also where acts were alleged which were well calculated to make her condition intolerable and her life burdensome and the bill set forth an estimate of the amount of the defendant's property. *Gaylord v. Gaylord*, 57 N.C. 74 (1858).

Findings Held Sufficient. — Where the facts as found by the judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they per se constitute sufficient ground to award alimony pendente lite. *Lassiter v. Lassiter*, 92 N.C. 130 (1885).

Where, in the husband's action for divorce on the ground of adultery, the wife files answer denying the charges and sets up a cross action for divorce from bed and board, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, and that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action, and was without means of support and that the husband was financially able to make the payments ordered, is sufficient to support the court's order of alimony pendente lite. *Covington v. Covington*, 215 N.C. 569, 2 S.E.2d 558 (1939).

Alimony Granted. — Where the complaint of a feme plaintiff seeking a divorce alleges facts which, if believed, entitled

her to the relief demanded, and is supplemented by an affidavit that the husband is trying to dispose of his property and has offered his land for sale with the avowed purpose of leaving the State, and that the children are small and need the mother's care, it is proper to grant an order for alimony pendente lite, and it is also competent for the court to award to the mother the custody of the younger children. *Scroggins v. Scroggins*, 80 N.C. 319 (1879).

IV. NOTICE.

When Five Days' Notice Required. — The provision requiring five days' notice applies only when the motion is heard out of term, and parties are fixed with notice of all motions or orders made during the term of the court. *Coor v. Smith*, 107 N.C. 431, 11 S.E. 1089 (1890); *Zimmerman v. Zimmerman*, 113 N.C. 433, 18 S.E. 334 (1893); *Jones v. Jones*, 173 N.C. 279, 91 S.E. 960 (1917).

When Five Days' Notice Dispensed with. — An affidavit of the wife that husband had left the State the day after the filing of the complaint, and that she had good reason to believe that he had left to defeat her claim for alimony, having been selling his property for several months with that purpose in view, dispenses with the necessity for notice. *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904).

Time of Hearing Not Specified. — The fact that a notice of a motion for alimony pendente lite, duly served upon the defendant, did not specify the time of hearing, will not invalidate the order allowing the same, it having been heard at a term of court at which the cause stood regularly for trial. *Zimmerman v. Zimmerman*, 113 N.C. 433, 18 S.E. 334 (1893).

An order of court continuing the motion for alimony to a future term of court made in the presence of counsel for both parties is sufficient notice, under the statute, of such motion. *Lea v. Lea*, 104 N.C. 603, 10 S.E. 488 (1889).

V. THE ORDER.

A. In General.

An order for support is not final, and may be modified or set aside on a showing of changed conditions. *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943).

Effect of Insufficient Finding. — An order allowing the wife alimony pendente lite may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void. *Moody v. Moody*, 118 N.C. 926, 23 S.E. 933 (1896); *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920).

If Allegations Not Controverted.—If the allegations in the complaint are not controverted, it is sufficient if the judge finds that no answer was filed and adjudges alimony to be paid. *Zimmerman v. Zimmerman*, 113 N.C. 433, 18 S.E. 334 (1893).

Enforcement.—An order to pay alimony may be enforced by imprisonment for contempt. *Pain v. Pain*, 80 N.C. 322 (1879); *Zimmerman v. Zimmerman*, 113 N.C. 433, 18 S.E. 334 (1893).

Alimony May Be Decreed a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situated here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. *Bailey v. Bailey*, 127 N.C. 474, 37 S.E. 502 (1900); *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920).

B. Amount.

Discretion of Court.—While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. *Schonwald v. Schonwald*, 62 N.C. 215 (1867); *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904). This is subject to the limitation that the amount is not in excess of the net income of the defendant. *Davidson v. Davidson*, 189 N.C. 625, 127 S.E. 682 (1925). See *Wright v. Wright*, 216 N.C. 693, 6 S.E.2d 555 (1940).

Not in Excess of One Third of Net Income.—Excepting attorney's fees and expenses, the amount ordinarily allowed pendente lite under this section is not in excess of the amount prescribed by § 50-14 upon a final judgment for divorce from bed and board; that is, one third of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. But this rule is not inflexible, and the amount to be allowed is not arbitrarily fixed by the statute. *Davidson v. Davidson*, 189 N.C. 625, 127 S.E. 682 (1925).

Amount May Be Altered by Court.—Alimony regularly ordered to be paid a wife pendente lite may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her. *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920).

Allowance for Children. — Where in

passing upon a motion of feme plaintiff in her action for divorce a mensa for alimony, etc., pendente lite, if the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. *Jones v. Jones*, 173 N.C. 279, 91 S.E. 960 (1917).

Not Reviewable Unless Abuse Shown.—The question of the amount allowed, in proper instances, by the superior court judge to the wife, in her action for divorce a mensa et thoro, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused. *Jones v. Jones*, 173 N.C. 279, 91 S.E. 960 (1917); *Hennis v. Hennis*, 180 N.C. 606, 105 S.E. 274 (1920).

VI. PLEADING AND PRACTICE.

How Allegations Controverted.—In application for alimony pendente lite, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer. *Griffith v. Griffith*, 89 N.C. 113 (1883); *Lassiter v. Lassiter*, 92 N.C. 130 (1885); *Easeley v. Easeley*, 173 N.C. 530, 92 S.E. 353 (1917).

Effect of Demurrer. — In an action for divorce a vinculo, the admissions of parties are not competent evidence; but a demurrer to the petition for divorce admits that the facts alleged are true and can and will be proved, so as to secure the verdict of a jury. *Steel v. Steel*, 104 N.C. 631, 10 S.E. 707 (1889).

Deed of Separation May Be Bar. — A deed of separation, approved by a consent judgment, may be pleaded as complete bar to the wife's application for alimony pendente lite and for reasonable counsel fees, as provided by this section. *Brown v. Brown*, 205 N.C. 64, 169 S.E. 818 (1933).

Whether the wife is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party. *Morris v. Morris*, 89 N.C. 109 (1883); *Moore v. Moore*, 130 N.C. 333, 41 S.E. 943 (1902); *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904).

Court Must Find Facts upon Request.—On a motion for alimony pendente lite and counsel fees in an action instituted by a wife against her husband under the provisions, of this section, whether the wife is entitled to alimony is a question of law upon the facts found, and the court below must find the facts, upon request. *Holloway v. Holloway*, 214 N.C. 662, 200 S.E. 436 (1939).

Exceptions.—Where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, an exception thereto will be sustained. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Facts Found Must Be Set Out for Purpose of Appeal.—The superior court judge, in allowing alimony to the wife pendente lite, under the provisions of this section, must find the essential and issuable facts and set them out in full for the purpose of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient. *Morris v. Morris*, 89 N.C. 109 (1883); *Easeley v. Easeley*, 173 N.C. 530, 92 S.E. 353 (1917); *Horton v. Horton*, 186 N.C. 332, 119 S.E. 490 (1923).

Where Husband Appeals, Injunction Should Issue. — Where alimony pendente lite is allowed the wife, and the husband appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal. *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904).

New Motion after Failure of Original.—Where a motion to reduce alimony pendente lite has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing. *Moore v. Moore*, 131 N.C. 371, 42 S.E. 822 (1902).

§ 50-16. Alimony without divorce; custody of children.—If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board; and the husband may seek a decree of divorce, either absolute or from bed and board, in any action brought by his wife under this section. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought or any judge holding a term of superior court, either civil or criminal, in the county in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days' notice thereof; but if the husband shall have abandoned his wife and left the State, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of anyone interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in § 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees.

In a proceeding instituted under this section, the plaintiff or the defendant may

ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this section.

The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding.

In any action instituted by the wife under the provisions of this section when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (1871-2, c. 193, s. 39; Code, s. 1292; Rev., s. 1567; 1919, c. 24; C. S., s. 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189.)

- I. General Consideration.
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 - A. In General.
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 - A. In General.
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- VII. Custody and Support of Children.

Cross References.

As to the criminal aspect of abandonment of family by husband, see §§ 14-322 to 14-325. As to abandonment by husband as forfeiture of right and interest in wife's property and estate, see § 52-21.

I. GENERAL CONSIDERATION.

Editor's Note. — Prior to the year 1872 there was no statute regulating the question of alimony without divorce, but in this State it was held that this relief in proper cases could be granted by courts of equity. See *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918). By Laws 1872, c. 193, the legislature provided for this relief, but in that act there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. See *Hodges v. Hodges*, 82 N.C. 122 (1880). In 1919 an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. Laws 1919, c. 24.

For brief comment on the 1953 amend-

ment to this section, see 31 N.C.L. Rev. 407 (1953).

As to basis of the award of alimony pendente lite in North Carolina, see 39 N.C.L. Rev. 189 (1961).

This section is one solely for support. It provides a remedy for an abandoned wife to obtain support from the estate or earnings of her husband. *Shore v. Shore*, 220 N.C. 802, 18 S.E.2d 353 (1942).

This section was enacted to establish an efficient procedure for enforcement of the marital right of the wife to support by the husband. Such right does not exist, however, in favor of a wife who has abandoned her husband without just cause. *Reece v. Reece*, 232 N.C. 95, 59 S.E.2d 363 (1950).

Suits Are within Analogy of Divorce Laws.—Suits for alimony without divorce are within the analogy of divorce laws. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

Two separate remedies are provided by this section, one for alimony without divorce, and one for reasonable subsistence and counsel fees pendente lite. The amounts allowed are determined by the trial court in its discretion and are not reviewable. Either party may apply for a modification at any time before the trial of the action. *Oldham v. Oldham*, 225 N.C. 476, 35 S.E.2d 332 (1945); *Bateman v. Bateman*, 233 N.C. 357, 64 S.E.2d 156 (1951); *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

In considering this section it must be noted that two distinct remedies are therein provided—first the action for alimony

without divorce — second the application for an allowance for subsistence pendente lite. *McFetters v. McFetters*, 219 N.C. 731, 14 S.E.2d 833 (1941).

The statute provides two remedies—one, for alimony without divorce; and the other, for a reasonable subsistence and counsel fees pendente lite. *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E.2d 226 (1952).

Temporary and permanent alimony may both be awarded under this section. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Section Applies Only to Actions Instituted by Wife.—A child of divorced parents is not entitled to an allowance of counsel fees and suit money pendente lite in her action against her father to force him to provide for her support, this section and § 50-15 applying only to actions instituted by the wife, and such right not existing at common law. *Green v. Green*, 210 N.C. 147, 185 S.E. 651 (1936).

Action Not Abated by Prior Action of Husband for Absolute Divorce. — The prior institution of an action by the husband for an absolute divorce does not abate the wife's subsequent action for alimony without divorce, or deprive the court of power to award her alimony and counsel fees pendente lite therein. *Reece v. Reece*, 231 N.C. 321, 56 S.E.2d 641 (1949).

Notwithstanding the first 1955 amendment to this section, permitting the wife to set up her cause of action for alimony without divorce as a cross action in her husband's action for divorce, the pendency of the husband's action for absolute divorce under § 50-6 is not ground for abatement of the wife's subsequent action for alimony without divorce under this section. *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957), commented on in 36 N.C.L. Rev. 203 (1958).

This section applies only to independent suits for alimony and an application for alimony pendente lite in an action for divorce may not be treated as an application for alimony under this section. *Dawson v. Dawson*, 211 N.C. 453, 190 S.E. 749 (1937), citing *Reeves v. Reeves*, 82 N.C. 348 (1880); *Skittletharpe v. Skittletharpe*, 130 N.C. 72, 40 S.E. 851 (1902).

Section Permits but Does Not Require Wife to Set Up Right in Cross Action.—The 1955 amendment to this section merely gives a wife the right to set up a cross action for alimony without divorce in the husband's suit for divorce, either absolute or from bed and board, without disturbing the right of the wife to bring an independent action under the statute for alimony

without divorce, the alternate procedure being permissive but not mandatory. *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957).

This section specifically authorizes the wife to assert a cause of action for alimony without divorce as a cross action in the husband's suit for divorce. *Scott v. Scott*, 259 N.C. 642, 131 S.E.2d 478 (1963).

This section as it stood before the 1955 amendment could not be used by the wife as the basis of a cross action in a suit for divorce instituted by the husband. *Silver v. Silver*, 220 N.C. 191, 16 S.E.2d 834 (1941); *Shore v. Shore*, 220 N.C. 802, 18 S.E.2d 353 (1942). See *Ericson v. Ericson*, 226 N.C. 474, 38 S.E.2d 517 (1946).

Notice of Cross Action Does Not Preclude Taking of Voluntary Nonsuit.—Plaintiff in an action for absolute divorce is entitled as a matter of right to take a voluntary nonsuit upon paying costs and alimony pendente lite to the date of motion, notwithstanding he has notice of defendant's intention to file a cross action for alimony without divorce, and, the nonsuit having been taken, no action is pending in which defendant may amend her answer to assert such cross action. *Scott v. Scott*, 259 N.C. 642, 131 S.E.2d 478 (1963).

The rule that plaintiff is entitled as a matter of right to take a voluntary nonsuit if defendant has not set up a counterclaim arising out of the same transaction alleged in the complaint, is held to apply to actions for divorce. *Scott v. Scott*, 259 N.C. 642, 131 S.E.2d 478 (1963).

The only material facts at issue in the action for alimony without divorce are the questions of the existence of the marriage relation and whether the husband abandoned the wife. *Skittletharpe v. Skittletharpe*, 130 N.C. 72, 40 S.E. 851 (1902); *Hooper v. Hooper*, 164 N.C. 1, 80 S.E. 64 (1913).

Effect of § 14-322. — Section 14-322, requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies under the provisions of this section. *State v. Falkner*, 182 N.C. 793, 108 S.E. 756 (1921).

Issues of Fact for Jury.—In actions under this section, when there are issues of fact raised, they should be found by a jury. *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918). See also *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940).

And the trial judge may not pass upon the issuable facts in proceedings for alimony without divorce, under this section, upon evidence introduced before him

theretofore upon a trial of the husband for criminal abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918), distinguishing *Cooper v. Southern R.R.*, 170 N.C. 490, 87 S.E. 322 (1915).

Issues Where Claim for Alimony Based upon § 50-7.—Where the wife's claim for alimony without divorce under this section was based upon § 50-7, the issues submitted to the jury should have been framed upon the allegations in the pleadings and the evidence introduced under those allegations, with reference to the provisions of § 50-7 upon which the plaintiff relied as grounds for divorce from bed and board. *Bateman v. Bateman*, 232 N.C. 659, 61 S.E.2d 909 (1950).

Effect of Reconciliation and Resumption of Marital Relations.—Where an order for alimony pendente lite has been rendered under this section, but subsequent thereto there is a reconciliation and a resumption of marital relations in the home, the necessity for alimony ceases, and a judge of the superior court has no power to reactivate the order for alimony pendente lite. However, the original cause is still pending and upon a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing. *Hester v. Hester*, 239 N.C. 97, 79 S.E.2d 248 (1953).

And of Wife Not Demanding Support.—The mere fact that the wife does not demand that the husband support her does not excuse him from the performance of his duty. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960).

Applied in *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E.2d 496 (1946); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948); *Deaton v. Deaton*, 237 N.C. 487, 75 S.E.2d 398 (1953); *Jarrell v. Jarrell*, 241 N.C. 73, 84 S.E.2d 328 (1954); *Bishop v. Bishop*, 245 N.C. 573, 96 S.E.2d 721 (1957); *Whitener v. Whitener*, 255 N.C. 731, 122 S.E.2d 705 (1961); *Mills v. Mills*, 257 N.C. 663, 127 S.E.2d 232 (1962); *Kiger v. Kiger*, 258 N.C. 126, 128 S.E.2d 235 (1962); *Coe v. Coe*, 261 N.C. 174, 134 S.E.2d 197 (1964); *Pressley v. Pressley*, 261 N.C. 326, 134 S.E.2d 609 (1964); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964); *Adams v. Adams*, 262 N.C. 556, 138 S.E.2d 204 (1964); *Brown v. Brown*, 264 N.C. 485, 141 S.E.2d 875 (1965).

Cited in *Jeffreys v. Hocutt*, 195 N.C. 339, 142 S.E. 226 (1928); *Rodman v. Rodman*, 198 N.C. 137, 150 S.E. 874 (1929) (fees based on the defendant's means and

condition in life); *Black v. Black*, 198 N.C. 809, 150 S.E. 925 (1929); *Brown v. Brown*, 205 N.C. 4, 169 S.E. 818 (1933); *Caudle v. Caudle*, 206 N.C. 484, 174 S.E. 304 (1934); *Reynolds v. Reynolds*, 208 N.C. 578, 182 S.E. 341 (1935); *Hagedorn v. Hagedorn*, 210 N.C. 164, 185 S.E. 768 (1936); *Adams v. Adams*, 212 N.C. 373, 193 S.E. 274 (1937); *Dyer v. Dyer*, 212 N.C. 620, 194 S.E. 278 (1937); *Story v. Story*, 221 N.C. 114, 19 S.E.2d 136 (1942); *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E.2d 444 (1943); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946); *Norman v. Norman*, 230 N.C. 61, 51 S.E.2d 927 (1949); *Kelly v. Kelly*, 232 N.C. 734, 62 S.E.2d 55 (1950); *Livingston v. Livingston*, 235 N.C. 515, 70 S.E.2d 480 (1952); *Bond v. Bond*, 235 N.C. 754, 71 S.E.2d 53 (1952); *Feldman v. Feldman*, 236 N.C. 731, 73 S.E.2d 865 (1953); *Smith v. Smith*, 242 N.C. 646, 89 S.E.2d 255 (1955); *Workman v. Workman*, 242 N.C. 726, 89 S.E.2d 390 (1955); *Smith v. Smith*, 248 N.C. 298, 103 S.E.2d 400 (1958); *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962); *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962).

II. WHEN WIFE ENTITLED TO RELIEF.

Grounds Stated in §§ 50-5, 50-7.—Under this section there are available to the wife not only the grounds specifically set forth, but also any ground that would constitute cause for divorce from bed and board under § 50-7, or cause for absolute divorce under § 50-5. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946); *Bailey v. Bailey*, 243 N.C. 412, 90 S.E.2d 696 (1956).

This section incorporates the indignities subdivision of § 50-7. *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964).

Plaintiff Must Meet Requirements of § 50-7.—Plaintiff, in order to obtain affirmative relief under the provisions of this section, must meet the requirements of § 50-7 for divorce from bed and board. *Blanchard v. Blanchard*, 226 N.C. 152, 36 S.E.2d 919 (1946); *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E.2d 790 (1961).

The existence of grounds for divorce is a prerequisite to any allowance to the wife under this section. To warrant an allowance pendente lite she must allege and prove a cause of action for divorce. *Briggs v. Briggs*, 234 N.C. 450, 67 S.E.2d 349 (1951).

Plaintiff is not required to wait until she can maintain an action for divorce on ground of adultery before instituting an action under this section. *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E.2d 375 (1951).

But She Must Show Abandonment or Misconduct Constituting Cause for Divorce.

—Alimony without divorce may not be awarded unless the husband separates himself from his wife and fails to provide her with the necessary subsistence according to his income and condition in life, or unless he shall be guilty of such misconduct or acts as would constitute a cause for divorce, either absolute or from bed and board. *Ipock v. Ipock*, 233 N.C. 387, 64 S.E.2d 283 (1951).

As grounds for relief under this section the wife must allege and prove that the husband has been guilty of misconduct or acts that would constitute cause for divorce. *Bateman v. Bateman*, 233 N.C. 357, 64 S.E.2d 156 (1951).

Establishing of One Cause for Divorce Is Sufficient Although Three Alleged.—

In a suit for alimony without divorce where three separate grounds for divorce a mensa et thoro were alleged in the complaint, it was held not necessary for the plaintiff to establish all of them in order to sustain her action, it being sufficient under this section if she established the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in § 50-7. *Albritton v. Albritton*, 210 N.C. 111, 185 S.E. 762 (1936). See also *Hagedorn v. Hagedorn*, 211 N.C. 175, 189 S.E. 507 (1937); *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

Cruelty Causing Wife to Leave Home.—

When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, and is sufficient ground for alimony without divorce. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E.2d 243 (1948).

Indignities.—If the wife is compelled to leave the home of the husband because he offers such indignities to her person as to render her condition intolerable and life burdensome, his acts constitute in law an abandonment of the wife by the husband, and allegations to this effect are sufficient to state a cause of action for alimony without divorce. *Barwick v. Barwick*, 228 N.C. 109, 44 S.E.2d 597 (1947).

The acts of a husband which will constitute such indignities to the person of his wife as to render her condition intolerable and life burdensome largely depend upon the facts and circumstances in each particular case. And such facts and circumstances are for the jury to pass upon unaffected by any temporary order entered

for subsistence and attorney's fees. *Barwick v. Barwick*, 228 N.C. 109, 44 S.E.2d 597 (1947).

Habitual Drunkenness.—Allegations in a complaint that defendant had been an habitual drunkard during the prior three years are sufficient to state a cause of action for alimony without divorce under the term "shall be a drunkard" within the meaning of this section. *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947).

Adultery Revived after Condonation.—

Under this section an allegation of adultery cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation, which revive the old grounds. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

Wrongful Abandonment by Wife.—This section does not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees. *Byerly v. Byerly*, 194 N.C. 532, 140 S.E. 158 (1927); *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

The right to subsistence pending trial in a wife's action under this section does not exist in favor of a wife who has abandoned her husband without just cause. *Reece v. Reece*, 232 N.C. 95, 59 S.E.2d 363 (1950).

Where the pleadings place in issue the crucial question whether the husband has separated himself from the wife, there is nothing in the language or meaning of the statute which precludes the husband from proving as a defense that in point of fact and in legal contemplation it was the wife who separated herself from the husband. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953).

In a wife's action for an allowance pendente lite under this section the husband is not precluded from asserting and proving as a defense to his wife's action and motion that she has separated herself from him or abandoned him. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

A wife who has abandoned her husband without just cause or who, by her wrongful conduct, has forced him to leave home, has no right to alimony. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Where in his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house,

paid bills for necessities and given them cash weekly, and had theretofore furnished them with necessary subsistence in accordance with his means in life, the answer raises issues of fact determinative of the right to the relief sought, which issues must be submitted to the jury, and the granting of plaintiff's motion for judgment on the pleadings was error. *Masten v. Masten*, 216 N.C. 24, 3 S.E.2d 274 (1939).

Previous Contract of Separation.—Where the defendant resists his wife's application for alimony without divorce under this section, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the written contract of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. *Moore v. Moore*, 185 N.C. 332, 117 S.E. 12 (1923).

Unimpeached Deed of Separation Bars Alimony.—A wife who, in a valid deed of separation, has released her husband from his obligation to support is remitted to her rights under the agreement, and as long as the deed of separation stands unimpeached, the court is without power to award her alimony and counsel fees. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Where the wife sought a divorce a mensa and alimony, notwithstanding the provision of a valid separation agreement which the husband had "fully performed," she could not, after her husband had performed his part of the contract, obtain an award of alimony. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

But resumption of marital relations rescinds such deed of separation. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Suit Held Not Barred by Separation Agreement.—Jurisdiction of the court invoked under this section was not barred by separation agreement pleaded, where wife sued for alimony and support without divorce on grounds of specific acts of cruelty by husband and declared intention to sue for divorce in two years. *Butler v. Butler*, 226 N.C. 594, 39 S.E.2d 745 (1946).

Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several in-

stallements, discontinued the payments, he cannot set up the agreement in bar of her action for support under this section, even though he discontinued the payments because she demanded that the allowance be increased. *Cram v. Cram*, 116 N.C. 288, 21 S.E. 197 (1895).

Wife Not Estopped by Prior Action for Divorce Instituted by Husband.—If an action for absolute divorce is instituted and the wife is the defendant therein, she is not estopped from bringing an action for alimony without divorce during the pendency of such action. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

Effect of Decree of Divorce.—Where the husband's action for divorce on the ground of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife in the second action upon the verdict of the jury and the wife appealed in both actions, the decree of absolute divorce terminates all the rights arising out of marriage, including the right to alimony, and upon dismissal of the appeal from the judgment of divorce, the judgment in the action for alimony will be affirmed. *Hobbs v. Hobbs*, 218 N.C. 468, 11 S.E.2d 311 (1940).

An absolute divorce terminates the husband's legal duty to support, and he cannot thereafter be held in contempt for nonsupport even though he has contracted to provide support. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

The husband's legal duty to support his wife, unlike his contractual obligation, terminates when the marriage relationship has been terminated by a divorce a vinculo. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

A husband who has obtained a divorce cannot thereafter be required to pay alimony, nor does the divorce constitute a breach of the separation agreement the parties executed. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that the court of a state having jurisdiction over the parties has declared them not husband and wife. *Bidwell v. Bidwell*, 139 N.C. 402, 52 S.E. 55 (1905).

Answer Setting Up Defense of Adultery.—In a wife's action for alimony without divorce in which defendant's answer sets up the defense of adultery, it is error for the court to order temporary alimony to

plaintiff without finding the facts with respect to the plea of adultery. *Williams v. Williams*, 230 N.C. 660, 55 S.E.2d 195 (1949).

Evidence Sufficient to Support Judgment for Wife. — See *Bateman v. Bateman*, 233 N.C. 357, 64 S.E.2d 156 (1951).

Nonsuit held proper in action for alimony without divorce because of failure of evidence to support allegations of complaint setting forth the cause of action. *Crouse v. Crouse*, 236 N.C. 763, 73 S.E.2d 922 (1953).

III. JURISDICTION AND VENUE.

Jurisdiction Depends on Statute.—Jurisdiction over the subject matter of divorce or an action for alimony without divorce is given only by statute. *Hodges v. Hodges*, 226 N.C. 570, 39 S.E.2d 596 (1946).

Jurisdiction of Judge.—The fact that the summons, in a proceeding under this section, of which a judge of the superior court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter. *Cram v. Cram*, 116 N.C. 288, 21 S.E. 197 (1895).

Section Does Not Prescribe Exclusive Venue. — The provision that a wife may institute action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action. *Dudley v. Dudley*, 219 N.C. 765, 14 S.E.2d 787 (1941).

The phrase "may institute an action" as used in this section is permissive and not mandatory. *Miller v. Miller*, 205 N.C. 753, 172 S.E. 493 (1934). See *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923).

Residence Not a Condition to Maintenance of Action.—Residence is a condition to the maintenance of an action for divorce, but this is not true of an action brought under this section. *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962).

Wife May Bring Action in County Where Parties Were Living at Time of Abandonment. — The wife may institute action under this section in the county in which they were living at the time of the husband's alleged abandonment. *Robbins v. Robbins*, 262 N.C. 749, 138 S.E.2d 632 (1964).

In *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962), plaintiff, though she and defendant were both domiciled in South Carolina, was allowed to maintain an action under this section in a county in North Carolina where defendant had large properties, including a farm and house in

which the parties were living when defendant abandoned plaintiff.

Intent of Nonresident Plaintiff to Establish Residence Is Not Sufficient.—Intent of plaintiff, a nonresident, to establish a residence in the future in Madison County, did not authorize a trial of the suit in that county, but proper place for trial was in Haywood County, where defendant was a resident. *Burrell v. Burrell*, 243 N.C. 24, 89 S.E.2d 732 (1955).

Suits for alimony without divorce are within the analogy of divorce laws, and where a wife has been forced by her husband's conduct to leave his residence, she may bring an action for alimony without divorce in the county where she resides, notwithstanding the provision of this section that "the wife may institute an action in the superior court of the county in which the cause of action arose." *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923).

Husband Not Entitled to Removal.—A wife who has been forced by her husband to leave his home and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right under the provisions of this section and §§ 1-82, 50-3. *Miller v. Miller*, 205 N.C. 753, 172 S.E. 493 (1934).

Effect of Subsequent Divorce in Another State.—Where the children of the marriage are residents of this State and the parents are personally before the court, the courts of this State have jurisdiction in the wife's action for subsistence under this section to award the custody of the children to the wife and decree the amount defendant should contribute for their support, and to punish him as for contempt for willful failure to comply with its order, notwithstanding that the husband may have obtained a decree of divorce in another state after the entry of the order for support. *Whitford v. Whitford*, 261 N.C. 353, 134 S.E.2d 635 (1964).

IV. PLEADINGS.

The Complaint Must Be Verified.—The court does not obtain jurisdiction in an action brought for relief under the provisions of the statutes relating to divorce, alimony, or divorce and alimony, unless the complaint is verified, and the form of the verification depends upon the character of the relief sought. *Hodges v. Hodges*, 226 N.C. 570, 39 S.E.2d 596 (1946).

The provision of this section is mandatory as to the verification of pleadings, but relieves the wife of the necessity of

filing the affidavit formerly required by § 50-8, and substitutes therefor the form prescribed for the verification of pleadings in ordinary civil actions. *Hodges v. Hodges*, 226 N.C. 570, 39 S.E.2d 596 (1946); *Rowland v. Rowland*, 253 N.C. 323, 116 S.E.2d 795 (1960).

In an action brought under this section the wife was not required to file the affidavit formerly provided in § 50-8. The verification of the complaint shall be the same as prescribed in the case of ordinary civil actions. *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E.2d 375 (1951).

And Must Allege Good Cause.—The complaint must allege facts sufficient to constitute a good cause of action under the provision of this section, when the wife proceeds thereunder, for the court to allow her from the estate or earnings of her husband a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. *McManus v. McManus*, 191 N.C. 740, 133 S.E. 9 (1926).

The essential elements required to be alleged in an action for alimony without divorce under this section are (1) separation of the husband from the wife, and (2) his failure to provide her with necessary subsistence according to his means and condition in life. *Trull v. Trull*, 229 N.C. 196, 49 S.E.2d 225 (1948); *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960).

Where a wife elects to proceed under the first classification of causes mentioned in the statute, it suffices for her to allege and prove (1) the existence of a valid marriage between the parties, and (2) that the husband has separated himself from the wife and failed to provide her (and the children of the marriage) with necessary subsistence according to his means—or instead of the latter, that the husband is a drunkard or spendthrift. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953).

A wife's complaint states a cause of action for alimony without divorce under this section if it alleges separation without providing subsistence, if the husband is a drunkard or spendthrift, or "be guilty of any misconduct or acts that would be or constitute cause for divorce either absolute or from bed and board." *Thurston v. Thurston*, 256 N.C. 663, 124 S.E.2d 852 (1962).

To state a cause of action under this section it is necessary to allege: (1) The marriage, (2) the separation of the hus-

band from the wife and his failure to provide the wife and children of the marriage reasonable subsistence, i.e., abandonment, or some conduct on the part of the husband constituting cause for divorce, either absolute or from bed and board, and (3) want of provocation on the part of the wife. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Plaintiff must meet the requirements of the statute for divorce from bed and board, and must allege with particularity the acts of defendant constituting the basis of the charge that he offered such indignities to her person as to render her condition intolerable, and allege that such acts were without adequate provocation on her part. *Pollard v. Pollard*, 221 N.C. 46, 19 S.E.2d 1 (1942); *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947); *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955); *McDowell v. McDowell*, 243 N.C. 286, 90 S.E.2d 544 (1955).

In an action by a wife against her husband for divorce from bed and board, she must not only set out with particularity the acts of cruelty on the part of the husband upon which she relies, but she is also required to aver, and consequently to prove, that such acts were without adequate provocation on her part. *Bateman v. Bateman*, 232 N.C. 659, 61 S.E.2d 909 (1950); *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955).

But the plaintiff, in an action for alimony without divorce on the ground of abandonment, is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. *Sgueros v. Sgueros*, 252 N.C. 408, 114 S.E.2d 79 (1960).

In an action for alimony without divorce, allegations that the husband had been abusive and violent toward plaintiff and she had been made to fear for her safety, are insufficient, it being necessary that plaintiff allege specific acts of misconduct on the part of the husband so that the court may determine whether his conduct was in fact such as constituted cause for divorce from bed and board, and also specify what, if anything, she did or said at the time, in order that the court may determine whether she provoked the difficulty. *Ollis v. Ollis*, 241 N. C. 709, 86 S.E.2d 420 (1955).

Allegation That Acts of Husband Were without Provocation.—An allegation in an action for alimony without divorce that

the separation of defendant from plaintiff wife was without fault or misconduct on her part, is a sufficient allegation that his acts were without provocation on her part. *Trull v. Trull*, 229 N.C. 196, 49 S.E.2d 225 (1948).

In an action under this section, as in an action for divorce a mensa et thoro by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation on her part. The omission of such allegations is fatal and demurrer will be properly sustained. *Howell v. Howell*, 223 N.C. 62, 25 S.E.2d 169 (1943); *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947); *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955).

In an action by the wife for alimony without divorce on the ground of mistreatment constituting constructive abandonment, the absence of an allegation that defendant's misconduct was without adequate provocation is fatal. *Barker v. Barker*, 232 N.C. 495, 61 S.E.2d 360 (1950).

Such Allegation Unnecessary Where Adultery Is Charged.—Where complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

Allegations of Adultery Taken as Controverted.—Where plaintiff did not reply and expressly deny defendant's allegations of adultery, but these allegations did not relate to a counterclaim, they were taken as controverted. *Creech v. Creech*, 256 N.C. 356, 123 S.E.2d 793 (1962).

Section 50-10 applies to actions under this section and all allegations of the complaint are deemed denied whether actually denied by pleading or not. *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E.2d 790 (1961).

Complaint Praying for Subsistence and Other Relief.—Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage, and for such other relief as may be just and proper, without prayer for divorce, the cause is an

action for alimony without divorce under this section. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

Indefinite Allegations in Answer.—Vague and indefinite allegations of infidelity on the part of a wife made by a husband in his answer to her complaint in a proceeding for support and maintenance, will not be allowed to affect the question of the husband's liability in such proceedings. *Cram v. Cram*, 116 N.C. 288, 21 S.E. 197 (1895).

Allegations Held Sufficient.—See *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955).

Allegations in an action for alimony without divorce to the effect that defendant constantly mistreated plaintiff and offered such indignities to her person as to endanger her health and safety, and forced her to separate herself from defendant, that defendant drank excessively and failed to provide for her support, and that plaintiff had at all times been a dutiful wife, held sufficient to state a cause of action for alimony without divorce and defendant's demurrer thereto was properly overruled. *Bateman v. Bateman*, 232 N.C. 659, 61 S.E.2d 909 (1950).

Allegations to the effect that plaintiff was compelled to leave her husband by reason of his willful failure and refusal to provide her with sufficient support and necessary medical attention and that such willful failure was without fault or provocation on her part, are sufficient to state a cause of action for divorce on the ground of abandonment. *McDowell v. McDowell*, 243 N.C. 286, 90 S.E.2d 544 (1955).

The allegation that the defendant had become a habitual drunkard constituted a ground for divorce from bed and board, § 50-7 (5), and hence was sufficient to support an action for alimony without divorce even though other insufficient allegations also appeared in the complaint. *Allen v. Allen*, 244 N.C. 446, 94 S.E.2d 325 (1956).

Exceptions.—Where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, an exception thereto will be sustained. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

V. ALLOWANCE PENDENTE LITE AND COUNSEL FEES.

A. In General.

Allowance of Subsistence Pendente Lite Is Constitutional.—Defendant's contention that the provisions of this section empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in her action for alimony without divorce

are unconstitutional as depriving him of a property right without trial by jury is untenable, since he is under duty to support plaintiff until the adjudication of issues relieving him of that duty, and since such allowance by the court does not form any part of the ultimate relief sought nor affect the final rights of the parties. *Peele v. Peele*, 216 N.C. 298, 4 S.E.2d 616 (1939).

Derivation of Right to Allowance.—See note to § 50-15.

The resident judge of the district has the jurisdiction to hear and determine the motion for reasonable subsistence and counsel fees pendente lite in an action for alimony without divorce. *Herndon v. Herndon*, 248 N.C. 248, 102 S.E.2d 862 (1958).

Motion May Be Heard Out of Term.—In an action for alimony without divorce, a motion for alimony pendente lite may be heard out of term, after five days' notice to the husband. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962).

Necessity for Notice to Defendant.—An order entered in the wife's action for alimony without divorce requiring defendant to pay subsistence and counsel fees pendente lite is void when the order is entered without notice to defendant. *Barnwell v. Barnwell*, 241 N.C. 565, 85 S.E.2d 916 (1955).

An order allowing alimony pendente lite without notice is void. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962).

Effect of Suit for Divorce Instituted after Suit Under This Section.—Where, after the wife instituted a suit for alimony without divorce, in which action the question of the custody of the minor child of the marriage was not raised, the husband instituted suit for absolute divorce, it was held that the 1953 amendment to this section did not affect the jurisdictional power of the court to award subsistence for the mother and child pendente lite in her action. *Barnwell v. Barnwell*, 241 N.C. 565, 85 S.E.2d 916 (1955).

Purpose and Amount of Allowance.—The remedy established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. In arriving at the proper amount to be allotted, the court should take into consideration all the circumstances of the family, including the separ-

ate estate of the wife and the estate and earnings of the husband, and make only such allowances as are contemplated by the statute. *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E.2d 226 (1952).

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

What Must Be Proved to Obtain Subsistence and Counsel Fees Pendente Lite.—Subsistence and counsel fees pendente lite may now be allowed under this section, and although plaintiff does not ask for divorce, she must charge and prove such injurious conduct on the part of the husband as would entitle her to a divorce a mensa et thoro, at least. Abandonment, failure to support, and adultery, are sufficient to satisfy the statute. *Phillips v. Phillips*, 223 N.C. 276, 25 S.E.2d 848 (1943).

The provisions of this section, as amended, require as a prerequisite to the awarding of alimony pendente lite, or permanent alimony, the pendency of an action in which verified pleadings have been filed and in which the wife has alleged facts at least sufficient to meet the requirements of the statute for divorce a mensa et thoro. *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956).

Complaint Must Allege Facts Constituting Cause of Action.—Alimony pendente lite and counsel fees should not be awarded unless the plaintiff alleges in her complaint facts sufficient to constitute a good cause of action under the provisions of this section. *Ipock v. Ipock*, 233 N.C. 387, 64 S.E.2d 283 (1951).

The existence of grounds for divorce is a prerequisite to any allowance to the wife under this section. To warrant an allowance pendente lite she must allege and prove a cause of action for divorce. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

As a prerequisite to any allowance to a wife under this section, she must show that she did not by her own conduct provoke the wrongs and abuses of which she complains. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

And Mere Institution of Suit and Allegations Are Not Enough.—A wife is not entitled to an order for support pendente lite merely because she has instituted an action and alleged grounds for divorce or alimony. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

Nor Mere Separation.—This section does

not authorize the judge, in passing on a motion for alimony pendente lite, to award a wife subsistence and counsel fees merely because she and her husband have separated. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Where complaint states a cause of action it is a sufficient basis for an order allowing alimony pendente lite. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E.2d 909 (1946).

Allowance as a Legal Right.—Generally, excluding statutory grounds for denial, allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under this section is so strongly entrenched in practice as to be considered an established legal right. *Butler v. Butler*, 226 N.C. 594, 39 S.E.2d 745 (1946).

The allowance in a proper case of subsistence and counsel fees pendente lite to the wife in an action for alimony without divorce is authorized by this section, and is so entrenched in North Carolina practice as to be considered an established legal right. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Countercharges Immaterial.—Under the provisions of Laws 1919, c. 24, amending this section, it is immaterial what countercharges the defendant makes against the plaintiff, his wife, in her application for necessary "subsistence" pendente lite, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury. *Allen v. Allen*, 180 N.C. 465, 105 S.E. 11 (1920).

Only Adultery Is Absolute Bar.—There is no defense that limits the power of the trial court to award subsistence pendente lite, under this section, except the defense of wife's adultery, so that the reasonableness of a separation agreement need not be determined before the court can award temporary allowances. *Oldham v. Oldham*, 225 N.C. 476, 35 S.E.2d 332 (1945); *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Validity of Separation Agreement Need Not Be First Determined.—Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under this section it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the

issues." *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171 (1929).

The existence of a separation agreement is not a bar to an award of alimony pendente lite. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Allowance of Reasonable Amount.—In an action for alimony without divorce under this section upon issuance of summons and the filing of a verified complaint setting forth facts sufficient to entitle the complaint to the relief sought, the judge of the superior court has power to require the payment by the husband of a reasonable amount for the wife's subsistence and counsel fees pendente lite. *Perkins v. Perkins*, 232 N.C. 91, 59 S.E.2d 356 (1950).

Section Does Not Involve an Accounting.—The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961).

The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. It is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. Its purpose is to give her reasonable subsistence pending trial and without delay. *Harrell v. Harrell*, 256 N.C. 96, 123 S.E.2d 220 (1961).

Nor a Determination of Property Rights.—The provision for temporary subsistence pending the trial on the merits is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961).

Order Cannot Set Up Savings Account.—A pendente lite order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. *Sgueros v. Sgueros*, 252 N.C. 408, 114 S.E.2d 79 (1960).

The allowance of subsistence and counsel fees pendente lite is in the discretion of the trial court, who is not required to make formal findings of fact upon such a motion, unless the charge of adultery is made against the wife; and the court's ruling will not be disturbed in the absence of abuse of discretion. *Phillips v. Phillips*, 223 N.C. 276, 25 S.E.2d 848 (1943); *Mercer v. Mercer*, 253 N.C. 164, 116 S.E.2d 443 (1960).

The amounts allowed to a plaintiff for subsistence pendente lite and for counsel

fees are determined by the trial judge in his discretion and are not reviewable. *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E.2d 375 (1951).

The amount of the allowance for subsistence pendente lite is for the trial judge. He has full power to act without the intervention of a jury and his discretion in this respect is not reviewable, except in case of manifest abuse of discretion. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961); *Harrell v. Harrell*, 256 N.C. 96, 123 S.E.2d 220 (1961).

The amount of the allowances to plaintiff for her subsistence pendente lite and for her counsel fees is a matter for the trial judge. He has full power to act without the intervention of the jury, and his discretion in this respect is not reviewable, except in case of an abuse of discretion. The only way by which the power of the court to make these allowances can be circumvented is by allegation and proof of the wife's adultery. *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E.2d 226 (1952); *Rowland v. Rowland*, 253 N.C. 328, 116 S.E.2d 795 (1960).

Discretion Is Not Absolute and Unreviewable.—The allowance of support and counsel fees pendente lite in a suit by wife against husband for divorce or alimony without divorce is not an absolute discretion to be exercised at the pleasure of the court and unreviewable, but is to be exercised within certain limits and with respect to factual conditions. *Butler v. Butler*, 226 N.C. 594, 39 S.E.2d 745 (1946). But see *Tiedemann v. Tiedemann*, 204 N.C. 682, 169 S.E. 422 (1933).

That the judge is not required to find the facts as a basis for his order for temporary subsistence of the wife, except when her adultery is alleged by the husband as a bar to her recovery, does not mean, however, that in considering a motion for alimony pendente lite, in such action, that unless the adultery of the wife is pleaded, the court may exercise an absolute and unreviewable discretion based solely upon the allegations of the complaint and the plaintiff's evidence offered in support thereof, and refuse to hear the evidence of the defendant. The judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. *Ipock v. Ipock*, 233 N.C. 387, 64 S.E.2d 283 (1951).

No Allowance Where Plaintiff, in Law,

Has No Case.—Discretion in allowance of support to a wife while suing her husband under this section is confined to consideration of necessities of the wife on the one hand, and the means of the husband on the other, but to warrant such allowance the court is expected to look into the merits of the action, and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. *Butler v. Butler*, 226 N.C. 594, 39 S.E.2d 745 (1946).

Judge Must Pass on Truth or Falsity of Evidence.—When the issue has been raised as to whether the husband has separated himself from the wife, it is not sufficient that the judge merely examine the evidence or testimony to see whether there is any evidence to support plaintiff's charges or allegations which would operate as a prima facie showing. He must, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

Issue Involving Validity of Marriage.—The effect of this section has been changed by Laws 1919, c. 24, and thereunder it is not now required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue relating to the validity of the marriage. *Barbee v. Barbee*, 187 N.C. 538, 122 S.E. 177 (1924).

Power of Court to Require Disclosure of Information; Effect of Findings.—The court has jurisdiction of the parties and has plenary power and authority to require the disclosure of any information within their knowledge or available to them bearing upon a temporary allowance. It is not necessary that the parties agree as to what the husband's income is. The findings of the court will not be disturbed if based on competent evidence. *Harrell v. Harrell*, 256 N.C. 96, 123 S.E.2d 220 (1961).

Finding of Facts.—On motion for alimony pendente lite and counsel fees made in an action instituted by the wife against her husband under the provisions of this section, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice would be to do so. *Holloway v. Holloway*, 214 N.C. 662, 200 S.E. 436 (1939); *Ipock v. Ipock*, 233 N.C. 387, 64 S.E.2d 283 (1951). See *Vincent v. Vincent*, 193 N.C. 492, 137 S.E. 427 (1927).

Where the complaint alleges facts sufficient to entitle plaintiff to alimony pendente lite under this section, it is not error for the court to grant plaintiff's motion therefor and refuse to find the facts upon which the order is based, since it will be presumed that the court found the facts as alleged in the complaint for the purposes of the hearing. *Southard v. Southard*, 208 N.C. 392, 180 S.E. 665 (1935).

Plaintiff was entitled to an order for subsistence pendente lite where the facts found by the judge showed that the defendant abandoned his wife, without any fault or provocation on her part, and without providing for her any maintenance and support. *Bailey v. Bailey*, 243 N.C. 412, 90 S.E.2d 696 (1956).

The discretion given to the trial judge is so wide that he is not required to make formal findings of fact upon a motion for alimony pendente lite unless the charge of adultery is made against the wife. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

On motion for alimony pendente lite made in an action by the wife against the husband pursuant to this section, the judge is not required to find the facts as a basis for an award of alimony except when the adultery of the wife is pleaded in bar. *Creech v. Creech*, 256 N.C. 356, 123 S.E.2d 793 (1962); *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

And the preceding rule applies where the motion for alimony pendente lite is denied. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

In passing on a motion for alimony pendente lite the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Same—Presumption on Appeal.—Where, in an action by the wife under this section, she has duly moved the court for alimony pendente lite and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandoned him, and that he had not abandoned her, and the record on appeal does not disclose any findings of fact upon the question but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact. *Byerly v. Byerly*, 194 N.C. 532, 140 S.E. 158 (1927).

Where defendant charges that plaintiff abandoned him, it will be assumed on appeal from the denial of alimony pendente lite that the court found the facts in favor of the husband. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

Same—When Award Based on Capacity to Earn.—To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960).

Same—Ultimate Rights of Parties Not Affected.—When the facts are investigated and findings made as a guide to the court in making temporary allowances, they do not affect the ultimate rights of the parties at the final hearing. *Harris v. Harris*, 258 N.C. 121, 128 S.E.2d 123 (1962).

Either Party May Apply for Modification.—The amounts allowed for reasonable subsistence and counsel fees upon application for alimony pendente lite are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. *Tiedemann v. Tiedemann*, 204 N.C. 682, 169 S.E. 422 (1933).

An order for subsistence pendente lite may be modified at any time before the trial on application of either party. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

B. Counsel Fees.

Allowance of Counsel Fees Authorized.—Laws 1919, c. 24, amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was held to be that it superseded the allowance for alimony and hence no allowance for attorney's fees was permissible. *Allen v. Allen*, 180 N.C. 465, 105 S.E. 11 (1920).

By Laws 1921, c. 123, the section was further amended. And now, while the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by this amendment the court may allow her attorney's fees. *Moore v. Moore*, 185 N.C. 332, 117 S.E. 12 (1923).

The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation. *Harrell v. Harrell*, 253 N.C. 758, 117

S.E.2d 728 (1961); *Harrell v. Harrell*, 256 N.C. 96, 123 S.E.2d 220 (1961); *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

And even though the court denied the wife's motion for alimony pendente lite, the court could properly allow counsel fees to the wife's attorney in order that she could have adequate means to meet her husband at the trial upon substantially even terms. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

Discretion of Court.—When allowable, the amount of attorneys' fees in an action for alimony without divorce is within the sound discretion of the court below and is unappealable except for abuse of that discretion. The statute itself, however, contains some guides to the exercise of that discretion, and practice has developed others. Within the rule of reasonableness the court must consider along with other things the condition and circumstances of the defendant. Generally speaking, in this respect this section runs parallel with § 50-15 regarding allowances for attorneys' fees. *Stadium v. Stadium*, 230 N.C. 318, 52 S.E.2d 899 (1949).

Elements to Be Considered.—There are many elements to be considered in a pendente lite allowance of attorneys' fees for a wife suing for alimony without divorce. The nature and worth of the services, the magnitude of the task imposed, reasonable consideration for the defendant's condition and financial circumstances, and many other considerations are involved. *Stadium v. Stadium*, 230 N.C. 318, 52 S.E.2d 899 (1949).

Adultery Does Not Bar Allowance of Counsel Fees.—A plea of adultery, found by the court to be true, does not preclude the court from allowing the wife reasonable counsel fees for the prosecution or defense of an action for divorce. *Bolin v. Bolin*, 242 N.C. 642, 89 S.E.2d 303 (1955).

Effect of Abandonment of Suit.—The fact that after the institution of an action for alimony without divorce the client abandons the suit instituted in this State and institutes a suit for divorce in another state, and counsel employed here are permitted to withdraw, since no further services could be performed, does not affect such counsel's right to an order allowing them counsel fees out of the property of defendant for the services performed here in good faith. *Stadium v. Stadium*, 230 N.C. 318, 52 S.E.2d 899 (1949).

In an action under this section, for alimony and counsel fees pendente lite and for alimony without divorce, plaintiff, on the day set for hearing of the motion for

alimony and counsel fees pendente lite, filed "certificate and affidavit" stating that there had been a reconciliation between plaintiff and defendant and that plaintiff "withdraws and renounces the complaint" and "takes a voluntary nonsuit . . . and prays the court to dismiss" the action as of nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant, and defendant's attorney filed plaintiff's "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. After the petition was filed and after the court had announced its intention of allowing same, judgment as of nonsuit was tendered and signed by the court. It was held that at the time the petition for counsel fees was filed, the complaint was still a part of the record and the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant was affirmed. *McFeters v. McFeters*, 219 N.C. 731, 14 S.E.2d 833 (1941).

Court May Enter Second Order Allowing Additional Counsel Fees.—The fact that an order allowing counsel fees has been entered in an action under this section does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services. *Stadium v. Stadium*, 230 N.C. 318, 52 S.E.2d 899 (1949).

Under proper circumstances the court, in its sound discretion, may in an action for alimony without divorce enter a second order allowing additional counsel fees. *Yow v. Yow*, 243 N.C. 79, 89 S.E.2d 867 (1955).

Amount of Additional Counsel Fees Held Not Unreasonable.—On an appeal from an order allowing additional counsel fees under this section, the amount was held not so unreasonable as to constitute an abuse of discretion. *Stadium v. Stadium*, 230 N.C. 318, 52 S.E.2d 899 (1949).

VI. THE ORDER AND ENFORCEMENT THEREOF.

A. In General.

No Final Judgment under Section.—A final judgment cannot be entered under this section, as the necessity of such provisions for the wife and children will cease if the parties resume the marriage relation, and cannot properly be continued if the husband procures a divorce for the fault of the wife. *Skittletharpe v. Skittletharpe*, 130 N.C. 72, 40 S.E. 851 (1902); *Hooper*

v. Hooper, 164 N.C. 1, 80 S.E. 64 (1913); Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918).

An order for the payment of alimony is res judicata between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed conditions of parties. Barber v. Barber, 217 N.C. 422, 8 S.E.2d 204 (1940).

An order entered under this section is not a final determination and does not affect the final rights of the parties. Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

Finding of Facts by Judge Unnecessary.—In a wife's application for alimony without divorce, it is not required that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite, § 50-15, although it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. Price v. Price, 188 N.C. 640, 125 S.E. 264 (1924); Vincent v. Vincent, 193 N.C. 492, 137 S.E. 426 (1927).

Presumption.—When the judge, after hearing the evidence upon a motion for temporary alimony in an action instituted under this section, either makes an award of alimony or declines to make one, it is presumed that he found the facts from the evidence presented to him according to his convictions about the matter and that he resolved the crucial issues in favor of the party who prevailed on the motion. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

Judgment Constitutes Judicial Separation for Purpose of § 50-6.—A judgment in an action instituted under this section decreeing that the husband has willfully abandoned the wife and awarding her support and maintenance constitutes a judicial separation which, two years thereafter, will permit the husband to obtain an absolute divorce. Rouse v. Rouse, 258 N.C. 520, 128 S.E.2d 865 (1963).

Final Order Terminates Order for Subsistence Pendente Lite.—Ordinarily, a final order for alimony without divorce terminates an order for subsistence pendente lite. Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962).

But Relief Ordered at Previous Hearing May Be Continued as Permanent Alimony.—When the court on the final hearing finds facts based on the defendant's admissions and his testimony given at the hearing, the court may determine that the relief sought by plaintiff and ordered at a previous hearing should be continued as permanent

alimony, subject to the further orders of the court. Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962).

A judgment for subsistence survives a judgment of absolute divorce obtained by defendant. Simmons v. Simmons, 223 N.C. 841, 28 S.E.2d 489 (1944).

Divorce Decree Does Not Affect Prior Order for Alimony.—A decree of absolute divorce on the ground of separation as provided in § 50-6 will not affect a prior order for alimony without divorce rendered under this section. Howell v. Howell, 206 N.C. 672, 174 S.E. 921 (1934).

A judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

A decree of absolute divorce will neither impair husband's liability for alimony under a former judgment for permanent alimony under this section nor affect the power of the court to enforce it by contempt proceedings or otherwise. Wilson v. Wilson, 260 N.C. 347, 132 S.E.2d 695 (1963).

Action for Divorce Is Not Defeated by Order for Support.—An order for support, either pendente lite or under this section, without more, would not perforce defeat an action for divorce under § 50-6. Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943).

Modification or Vacation of Order.—Where, within the exercise of his sound discretion, the superior court judge, having jurisdiction has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of this section, the order of allowance may be thereafter modified or vacated as the statute provides upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).

The allowance is subject to modification from time to time. Harrell v. Harrell, 256 N.C. 96, 123 S.E.2d 220 (1961).

A change of condition and circumstances must be established before an order for the support of children and permanent alimony can be modified. Rock v. Rock, 260 N.C. 223, 132 S.E.2d 342 (1963).

But an order for subsistence pendente lite may be modified at any time before trial on application of either party without a finding of a material change of condition. Snuggs v. Snuggs, 260 N.C. 533, 133 S.E.2d 174 (1963).

An order awarding the custody of mi-

nor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered pursuant to this section, awarding the custody of the children to the wife did not preclude another judge of the superior court from awarding custody of the children to the husband in the wife's later action for absolute divorce under § 50-6. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871 (1963).

Amendment of Prior Orders.—The court may reopen and amend prior orders awarding subsistence to wife and children. *Wright v. Wright*, 216 N.C. 693, 6 S.E.2d 555 (1940).

Amount Due under Prior Orders May Be Determined upon Motion.—The wife may have the amount of alimony due under prior orders determined by the court upon motion in the cause. *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940).

An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the original controversy, especially judgments allowing alimony with or without divorce, and where the defendant makes a general appearance in the original action for subsistence without divorce in which judgment is duly rendered for plaintiff, the court acquires jurisdiction over defendant by the proper service of notice of plaintiff's subsequent petition to recover past due installments, and defendant may not challenge the court's jurisdiction to hear plaintiff's motion and petition for such recovery by special appearance. *Barber v. Barber*, 216 N.C. 232, 4 S.E.2d 447 (1939).

A money judgment for arrears of alimony, not by its terms conditional and on which execution was directed to issue, was not subject to modification or recall under this section; and hence was entitled to full faith and credit. *Barber v. Barber*, 323 U.S. 77, 65 Sup. Ct. 137, 89 L. Ed. 114 (1944).

Effect of Consent Judgment.—Where the parties by reason of this section entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate, and the husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment, it was held

that plaintiff's rights were remitted to the prior judgment. *Turner v. Turner*, 205 N.C. 197, 170 S.E. 646 (1933).

Infant's Guardian May Subsequently Attack Consent Judgment.—Where the court in proceedings under this section approves a consent judgment, providing for the support and subsistence of the defendant's wife and child, the validity of such consent judgment may be later attacked by the child's authorized guardians on the ground of irregularity and that it is not binding on the minor. In *re Reynolds*, 206 N.C. 276, 173 S.E. 789 (1934).

B. Amount of Allowance.

Discretion of Judge.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in her proceedings against her husband under the provisions of this section is within the sound discretion of the judge hearing the same and having jurisdiction thereof. *Cram v. Cram*, 116 N.C. 288, 21 S.E. 197 (1895); *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922); *Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947); *Barwick v. Barwick*, 228 N.C. 109, 44 S.E.2d 597 (1947), citing *Oldham v. Oldham*, 225 N.C. 476, 35 S.E.2d 332 (1945).

The amount of the allowance is a matter for the trial judge. *Deal v. Deal*, 259 N.C. 489, 131 S.E.2d 24 (1963).

The amount of alimony to be allowed pursuant to the provisions of this section is within the sound discretion of the trial court and its order will not be disturbed unless there has been an abuse of discretion. *Harris v. Harris*, 258 N.C. 121, 128 S.E.2d 123 (1962).

The amount of alimony allowable pendente lite is a matter of sound judicial discretion having regard to the condition and circumstances of the parties and the current earnings of the husband. *Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964).

The amount the defendant is required to pay for the support of his child and for reasonable subsistence of the plaintiff pendente lite and for compensation to her counsel, is determinable by the judge in the exercise of his sound discretion, and in the absence of an abuse of discretion, his decision is not reviewable. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

Limitation in § 50-14 Does Not Apply.—The limitation to one third of the net annual income from the husband's estate, provided by § 50-14, which applies when the court adjudges the parties divorced from bed and board, does not apply when the wife institutes the proper proceeding

for alimony pendente lite under § 50-13, nor when she applies for a reasonable subsistence under this section. *Hodges v. Hodges*, 82 N.C. 122 (1880); *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

The limitation imposed by § 50-14 is not applicable when plaintiff seeks alimony pendente lite or without divorce, but the limitation there expressed ought not to be completely ignored when the court is called upon to make an award as provided by this section. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960).

Except when the allowance is made following a decree of divorce a mensa et thoro, the court, in making the allowance, is not confined to a one-third part of the defendant's net annual income. *Harris v. Harris*, 258 N.C. 121, 128 S.E.2d 123 (1962).

But § 50-14, may be considered in an action under this section, in determining the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees, based on the defendant's means and condition in life. *Kiser v. Kiser*, 203 N.C. 428, 166 S.E. 304 (1932).

Election to Seek Alimony Rather Than Damages for Breach of Contract to Support.—When a wife, in an action for alimony without divorce, elects to seek alimony rather than damages for the breach of the contract to support her, she is only entitled to such an award as would be proper if no contract had been signed. If there has been a partial performance, she must account for the net benefits, if any, which she may have received. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960).

Amount of Award Not Dependent on Earnings of Husband.—The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961); *Harrell v. Harrell*, 256 N.C. 96, 123 S.E.2d 220 (1961).

Nor on Wife's Ability to Support Herself.—The duty of support resting on the husband does not depend on the adequacy or inadequacy of the wife's means or on

the ability or inability of the wife to support herself by her own labor or out of her own separate property. The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960); *Mercer v. Mercer*, 253 N.C. 164, 116 S.E.2d 443 (1960).

But the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960).

C. Enforcement.

Technical Alimony and Alimony without Divorce Distinguished.—Technical alimony is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of this section, where a divorce is not contemplated, and where, in accordance with this section, the order allowing her such subsistence may secure the same out of the husband's estate. *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

While as to technical alimony the ordinary rule is that the title to the property designated to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of this section, and the words used in the beginning of this section, "alimony without divorce," will not be construed to give the words "reasonable subsistence" for the wife, the meaning of technical alimony. *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

Wife may compel performance by judicial decree where husband separates himself from his wife and fails to support her. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

A husband cannot, by merely providing support for his wife until he gets beyond the jurisdiction of the court, deprive his wife of the right of compelling the husband by judicial decree to support her. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Limit of Court's Authority.—When a

court awards alimony pendente lite, it has authority "to cause the husband to secure so much of his estate" as may be necessary to comply with its order. Such order as may be necessary for the protection of the wife is the limit of the court's authority. It cannot penalize defendant unless and until he refuses to comply with the court's direction. *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962).

Corpus of Husband's Estate May Be Assigned to Secure Allowance.—The court is authorized to assign the corpus of the husband's property to secure the allowance, and therefore it is immaterial to defendant whether the home place is taken and rents and profits therefrom used to provide a suitable residence for the wife and children or whether they are granted the right of occupancy of the home place, and it being found that such arrangement is most feasible and appropriate, the order will not be disturbed. *Wright v. Wright*, 216 N.C. 693, 6 S.E.2d 555 (1940).

The husband's "estate," from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of this section, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918); *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

Defeasible Fee in Part of Husband's Land.—Where the judge, in the proceedings of the wife for an allowance of reasonable subsistence, has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee cannot prejudice him, and his exception on that ground cannot be sustained. *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

Receiver May Collect Income from Husband's Realty to Pay Alimony.—In a wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959).

Non-Income-Producing Realty May Be Sold and Proceeds Invested.—A judge of the superior court has the power to order the sale of a husband's non-income-producing real estate for the purpose of in-

vesting the proceeds derived from such sale in legal investments as provided in article 6 of chapter 53, so as to produce an income sufficient to enable the receiver appointed to enforce payment of alimony decreed to pay the expenses of the receivership and alimony awarded the plaintiff wife. *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959).

Husband's duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945).

Husband's Interest in Estate by Entireties Chargeable.—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of this section, and for her counsel fees by Laws 1921, c. 123, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue, § 50-17, to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee simple title for the purpose of paying the allowance is erroneous. *Holton v. Holton*, 186 N.C. 355, 119 S.E. 751 (1923); *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

But Sale of Such Estate May Not Be Ordered.—The court does not have the power to order the sale of land held as tenants by the entireties to procure funds to pay alimony to the wife or to pay her counsel fees. *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

The court may allow plaintiff possession of the home owned by the parties as tenants by the entireties in fixing alimony pendente lite under this section. *Sellers v. Sellers*, 240 N.C. 475, 82 S.E.2d 330 (1954).

Attachment Will Lie.—An attachment against the husband's land will lie in favor of the wife abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. *Walton v. Walton*, 178 N.C. 73, 100 S.E. 176 (1919).

A proper order for reasonable subsistence and counsel fees pendente lite may be enforced against a nonresident or absconding husband by attachment against his property without notice, and in such case may also appoint a receiver to collect the income from the husband's property. *Perkins v. Perkins*, 232 N.C. 91, 59 S.E.2d 356 (1950).

Writ of Possession. — To enforce an order allowing alimony and counsel fees pursuant to the provisions of this section, the court may issue a writ of possession pursuant to the provisions of § 50-17, giving the wife possession of property held by her and her husband as tenants by the entireties, in order that she may apply the rents and profits therefrom, as they shall accrue and become personalty, to the payment of alimony and counsel fees as fixed by the court. *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

Priority of Wife's Claim.—The wife's inchoate right to alimony makes her a creditor of her husband, and is enforceable by attachment, in case of her abandonment, which puts everyone on notice of her claim and her priority over other creditors of her husband. *Walton v. Walton*, 178 N.C. 73, 100 S.E. 176 (1919).

Where the wife has obtained an order for support from her husband, which has been declared a lien on his property under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. In this case it was questioned whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction. *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921).

An order was entered in a divorce cause to the effect that if a deed of trust on property held by the husband and wife by the entireties were foreclosed, the husband's share of the surplus should be secured for the payment of the alimony awarded. The deed of trust was foreclosed and the trustee voluntarily paid in the office of the clerk the surplus realized in the sale. In an action on account instituted by a creditor of the husband prior to the sale, a warrant of attachment was issued and the husband's share in the surplus attached on the date it was put in the hands of the clerk. It was held that there having been no attachment of the funds in the divorce

action, nor the surplus placed in custodia legis in that action, and the orders issued therein not constituting a lien in futuro upon such funds, the lien of the attaching creditor is superior to the rights of the wife therein. *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

Homestead and Personal Property Exemptions.—The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922). See also *Wright v. Wright*, 216 N.C. 693, 6 S.E.2d 555 (1940).

Contempt in Failure to Comply with Consent Judgment. — Under a consent judgment, entered in an action by a husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the husband to the wife and that it should be more than a simple judgment for debt and as binding upon plaintiff as if rendered under this section, and, upon proper cause shown, should subject him to such penalties as the court may require in case of contempt of its orders, the court may commit the plaintiff upon his failure to make the payments required. *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E.2d 576 (1942).

Although a judgment may be entered by consent, based on a written agreement, if such judgment orders and decrees that the husband shall pay certain sums as alimony for the support of his wife, a willful refusal to make the payments as directed therein will subject the husband to a proper proceeding to attachment for contempt. *Stancil v. Stancil*, 255 N.C. 507, 121 S.E.2d 882 (1961).

Findings Required to Support Judgment for Contempt. — In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay, under the provisions of this section, a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt. *Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940).

Evidence of Willful Noncompliance with Order.—The mere fact that a defendant

ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. *Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940).

Imprisonment.—A willful failure of the husband to comply with the court's order to pay to the wife the amount fixed by order of the court, having due regard to the situation of the parties, the ability of the husband to pay, and the needs of the wife is a contempt, and can be punished as such by imprisonment and is not within the constitutional inhibition against imprisonment for debt. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Habeas Corpus after Commitment for Contempt.—See *In re Adams*, 218 N.C. 379, 11 S.E.2d 163 (1940).

Husband Held in Contempt.—In *Little v. Little*, 203 N.C. 694, 166 S.E. 809 (1932), the defendant was held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under this section.

VII. CUSTODY AND SUPPORT OF CHILDREN.

Section Creates Additional Method of Determining Custody.—The 1953 amendment of this section, granting jurisdiction to determine custody in an action for alimony without divorce, creates an additional method whereby the matter of custody may be determined. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

Prior to 1953, custody of children could not be determined in a proceeding under this section. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

The amendment of 1953 provided for determination of custody of children in lieu of habeas corpus. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Which Is Incidental to Action for Alimony without Divorce.—A controversy concerning child custody and support accompanies, is collaterally connected with, and is incidental to, an action for divorce or for alimony without divorce, but may not be determined under § 50-13 and this section when it is the only cause of action alleged, except in those special and unusual circumstances provided for in the second paragraph of § 50-13. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

An action for custody of and support for children of a marriage may not be maintained under this section in the ab-

sence of a claim, upon proper allegations, of alimony by the wife. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

The amendments of 1953 and 1955 mean that when a wife has instituted an action upon proper allegations for alimony without divorce, she may in the original complaint, or either party may by motion in the cause, seek and thereby obtain a determination of the custody of the children of the marriage and an order for the support of such children, even if it be determined that the wife is not entitled to alimony. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Custody Jurisdiction Is Concurrent.—If an action for divorce from bed and board is equivalent to an action for alimony without divorce, it would seem that the custody jurisdiction conferred in both actions would be concurrent in the absence of specific language to the contrary in the statute. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

But Court First Obtaining Jurisdiction Retains Cause.—The first paragraph of the 1955 amendment, c. 1189, applies only to the support and maintenance of a child or children whose custody was adjudicated under a proceeding instituted pursuant to the provisions of this section as amended. Therefore, the court first obtaining jurisdiction of the parties would retain the cause. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

A decree of absolute divorce does not oust the jurisdiction of the court in a prior action under this section over the children of the marriage or affect the recovery of alimony pendente lite accruing prior to the date of the entry of the decree for absolute divorce, and an order entered in the court rendering the decree for absolute divorce respecting the custody of the children of the marriage is erroneous. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

If an action for absolute divorce is instituted and the custody of children born of the marriage is prayed for therein, the wife is not estopped from bringing an action under this section during the pendency of such action; however, she could not have the custody of the children born of the marriage adjudicated in the second action. Jurisdiction of the matters relating to custody having been invoked theretofore in the action for divorce, the court in which the divorce action was pending would have exclusive jurisdiction over the question of custody. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

Factors to Be Considered.—In provid-

ing for the support of minor children the ability of the father to pay, as well as the needs of the children, must be taken into consideration by the court. *Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964).

Award of Custody and Child Support after Denial of Actions for Divorce and Alimony.—After plaintiff's suit for divorce from bed and board and defendant's cross action for alimony without divorce had both been denied, the superior court judge had jurisdiction and power to enter the

portion of the judgment awarding custody of the minor son of the parties to defendant and providing for his maintenance and support. *Bunn v. Bunn*, 258 N.C. 445, 128 S.E.2d 792 (1963).

Decrees Subject to Further Orders of Court.—All decrees with respect to custody and support of minor children are subject to the further orders of the court. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E.2d 857 (1962).

§ 50-17. Alimony in real estate, writ of possession issued.—In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (1868-9, c. 123, s. 1; Code, s. 1293; Rev., s. 1568; C. S., s. 1668.)

Cross Reference.—See note to § 50-16.

Title to Specific Property Remains in Husband.—Where alimony is allotted to the wife in specific property of the hus-

band, the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. *Taylor v. Taylor*, 93 N.C. 418 (1885).

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.—In any action instituted and prosecuted under this chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.

Upon request of the defendant or attorney for the defendant, the court may order the plaintiff to pay necessary travel expenses from defendant's home to the site of the court in order that the defendant may appear in person to defend said action. (1959, c. 1058.)

Editor's Note. — For note concerning residence requirement for servicemen, see 40 N.C.L. Rev. 343 (1962).

This section is an expression of policy by the General Assembly that a serviceman stationed on a military reservation in the State is capable of establishing his domicile

in North Carolina. The statute removes the barriers which might prevent a serviceman so situated from establishing a legal residence in this State where he actually has the present intention of changing his domicile to this State. *Martin v. Martin*, 253 N.C. 704, 118 S.E.2d 29 (1961).

Chapter 51.

Marriage.

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ARTICLE 1.

General Provisions.

§ 51-1. **Requisites of marriage; solemnization.**—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. No justice of the peace who holds the office of register of deeds shall, while holding said office, perform any marriage ceremony. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839; 1965, c. 152.)

Local Modification.—Bertie: 1951, c. 852.

Cross References.—As to statutes concerning married women, see § 52-1 et seq. As to divorce and alimony, see § 50-1 et seq.

Editor's Note.—The 1965 amendment added the second proviso.

For article on common-law marriage in North Carolina, see 16 N.C.L. Rev. 259.

History of Marriage Laws.—See State

v. Bray, 35 N.C. 289 (1852); State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890); State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897).

There is no such thing as marriage simply by consent in this State. State v. Samuel, 19 N.C. 177 (1836); State v. Patterson, 24 N.C. 346 (1842); State v. Bray, 35 N.C. 289 (1852); Cooke v. Cooke, 61 N.C. 583 (1868); State v. Parker, 106 N.C. 711,

11 S.E. 517 (1890); *State v. Melton*, 120 N.C. 591, 26 S.E. 933 (1897); *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897).

Essentials of Section Must Be Followed.

—While consent is essential to marriage in this State, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897).

Legislature May Dispense with Formality.—The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the legislature to dispense with any particular formality as it was to prescribe such. *State v. Whitford*, 86 N.C. 636 (1882), citing *State v. Harris*, 63 N.C. 1 (1868).

When Marriage Complete.—Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. *State v. Patterson*, 24 N.C. 346 (1842).

A marriage procured by force or fraud is void ab initio, and may be treated as null by every court in which its validity may be incidentally drawn in question. *Scroggins v. Scroggins*, 14 N.C. 535 (1832).

Sham Marriage a Nullity.—A marriage pretendedly celebrated before an unauthorized person is a nullity and not capable of being legalized by consent. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897).

Indian Custom Not Valid Marriage.—There is but one law of marriage for all the residents of this State. Hence cohabitation between an Indian man and woman according to the customs of their tribe, by which the parties are at liberty to dissolve

the connection at pleasure, does not constitute a marriage. *State v. Ta-cha-na-tah*, 64 N.C. 614 (1870).

Marriage during Seduction Proceedings Valid.—A marriage contracted while one is under arrest for seduction is not contracted under duress. *State v. Davis*, 79 N.C. 603 (1878).

Elder in Colored Church as Ordained Minister.—An elder in the “colored Methodist Church” was held “an ordained minister” of a religious denomination within the meaning of the statute, and authorized to celebrate the rites of matrimony. *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890).

Personating Minister Not Criminal.—A private citizen who personates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law. *State v. Brown*, 119 N.C. 825, 25 S.E. 820 (1896).

Evidence of Marriage.—It is sufficient evidence of a marriage that it was solemnized by one in the known enjoyment of the office of justice of the peace, and acting as such. His commission need not be produced. *State v. Robbins*, 28 N.C. 23, 44 Am. Dec. 64 (1845).

Validation by Retroactive Legislation.—It is competent for the legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the nonobservance of some solemnity required by statute. It is otherwise where such marriage is a nullity. *Cooke v. Cooke*, 61 N.C. 583 (1868).

Cited in Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

§ 51-2. Capacity to marry.—All unmarried persons of eighteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that persons over sixteen years of age and under eighteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of any such person or signed by the person standing in loco parentis to such male or female, and the fact of the filing of such written consent shall be set out in said special license: Provided, that when the special license is procured by fraud and misrepresentation, the parent or person standing in loco parentis of the male or female shall be a proper party plaintiff in an action to annul said marriage. When an unmarried female between the ages of twelve and sixteen is pregnant or has given birth to a child and such unmarried female and the putative father of her child, either born or unborn, shall agree to marry and consent in writing to such marriage is given by one of the parents of the female, or by that person standing in loco parentis to such female, or by the guardian of the person of such female, or by the director of public welfare of the county of residence of either party, such written consent shall be sufficient authorization for the register of deeds to issue a special license

to marry. All couples resident of the State of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the State, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with the marriage license in his office; the fee for the filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (R. C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C. S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186.)

Cross References.—As to penalty for marrying female under sixteen, see § 14-319. As to what marriages may be declared void on application of either party, see § 50-4. As to requirement that persons married outside the State file with register of deeds a certificate showing compliance with §§ 51-9 to 51-14 on their return, see § 51-14.

Editor's Note.—For comment on the 1923 amendment, see 1 N.C.L. Rev. 295. For comment on the 1947 amendment, see 25 N.C.L. Rev. 414. As to annulment under the 1939 amendment, see 17 N.C.L. Rev. 353.

Effect of Lack of Special License.—The marriage of a female between the ages of fourteen and sixteen (now between sixteen and eighteen) without the written consent of her parent and without the special license required by this section is not void but voidable. *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929).

Male of Marriageable Age Indictable for Seduction.—A male at the marriageable age of eighteen years is indictable for seduction. *State v. Creed*, 171 N. C. 837, 88 S.E. 511 (1916).

§ 51-3. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or between a white person and person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of one year shall be voidable: Provided, that no child shall have been born to the parties within ten (10) lunar months of the date of separation. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367.)

Cross References.—As to suits to nullify marriages which were entered into contrary to the provisions of this section, see § 50-4. As to penal provisions for miscegenation, see §§ 14-181, 14-182. As to penal provisions for bigamy, see § 14-183. As to

penal provisions for incest, see §§ 14-178, 14-179. As to penalty for marrying female under sixteen, see § 14-319.

Editor's Note.—For comment on the 1947 amendment, see 25 N.C.L. Rev. 414. For comment on the 1949 amendment,

see 27 N.C.L. Rev. 453. For comment on the 1953 amendment, see 31 N.C.L. Rev. 412 (1953).

Power of Legislature.—The competency of the General Assembly to impose, implies the right to remove, the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. *Baity v. Cranfill*, 91 N.C. 293, 49 Am. Rep. 641 (1884).

Constitutionality. — The prohibition of the marriage of white and colored persons is held not to be repugnant to the Constitution of the United States, or legislation under it. *State v. Hairston*, 63 N.C. 451 (1869).

Section Expresses Public Policy against Interracial Marriages.—The general public policy of the State prevails in this section and inhibits the intermarriage of white and colored persons. *Woodard v. Blue*, 103 N.C. 109, 9 S.E. 492 (1889).

What Marriages Void Ab Initio.—Constructing this section and § 50-4 together, it is held that the only marriages that are void ab initio are those where one of the parties was a white person and the other a negro or an Indian or of negro or Indian descent to the third generation, inclusive, or bigamous marriages. And any other marriage needs to be "declared void." *Watters v. Watters*, 168 N.C. 411, 84 S.E. 703 (1915). See also *Parks v. Parks*, 218 N.C. 245, 10 S.E.2d 807 (1940).

What "Negro Descent" Includes. — In order to have a marriage annulled on the ground that it is "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown that the ancestor of the generation stated must have been of pure negro blood. *Ferrall v. Ferrall*, 153 N.C. 174, 69 S.E. 60 (1910).

Every person who has one-eighth negro blood in his veins is within the prohibited degree within the meaning of the Constitution and this section. *State v. Miller*, 224 N.C. 228, 29 S.E.2d 751 (1944).

Cohabitation Following Interracial Marriage Is Fornication.—A white person and a person of color cannot intermarry in North Carolina, and if an invalid marriage is contracted between persons of the two races and the parties cohabit together, they are guilty of fornication. *State v. Hairston*, 63 N.C. 451 (1869); *State v. Reinhardt*, 63 N.C. 547 (1869).

The marriage of a party under the minimum age required by statute is voidable and not void. Such marriage may be ratified by the subsequent conduct of the parties. *Koonce v. Wallace*, 52 N.C. 194

(1859); *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890); *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929); *Parks v. Parks*, 218 N.C. 245, 10 S.E.2d 807 (1940).

Although this section provides that all marriages "between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, . . . shall be void," it is well established that such marriages are voidable rather than void. This was the rule of the common law. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

A marriage which is not void ab initio, but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

Bigamous Marriages Are Void.—Where a wife attempts to marry again when no valid divorce a vinculo has been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. *Pridgen v. Pridgen*, 203 N.C. 533, 166 S.E. 591 (1932).

The fact that a presumption which had arisen at the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband be, in fact, alive. *Ward v. Bailey*, 118 N.C. 55, 23 S.E. 926 (1896).

Impotency Renders Marriage Voidable.—Impotency in a husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. *Smith v. Morehead*, 59 N.C. 360 (1863).

Marriage of Person Incapable of Understanding Is Not Void Ipso Facto.—Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void ipso facto; but, if and when declared void in a legally constituted action, such marriage is void ab initio. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

When Such Marriage Not Voidable.—A marriage of a person incapable of contracting for want of understanding, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

What Constitutes Mental Capacity.—Knowledge of the provisions of the statutory law relating to the revocation of a will by marriage and relating to the persons who shall succeed to the estate of an intestate is not a prerequisite or necessary element of mental capacity sufficient to contract a valid marriage. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

Proviso as to Death of Party.—The proviso as to the death of a party is broad and comprehensive in its declaration. It applies to marriages contracted before its enactment as well as those contracted thereafter. And it has been applied to an incestuous marriage between an uncle and a niece. *Baity v. Cranfill*, 91 N.C. 293, 49 Am. Rep. 641 (1884).

The intention of the legislature was to confine the power conferred upon the court in § 50-4, to declare void, or in a judicial proceeding to treat as void, except where the intermarriage is between the specified races or involves the offense of bigamy, to cases, whenever the power is exercised, during the lifetime of the parties, or after death, only when there has been no issue born to them. That is, after the death of one of the parties, a marriage must then stand with all its legal consequences, and its validity no longer open to controversy. *Baity v. Cranfill*, 91 N.C. 293, 49 Am. Rep. 641 (1884).

To bring a case within the proviso it must be shown not only that one of the parties is dead but that cohabitation and the birth of issue followed the unlawful marriage. *Ward v. Bailey*, 118 N.C. 53, 23 S.E. 926 (1896).

Second Proviso Does Not Apply When Marriage Not Followed by Birth of Issue.—Where the marriage of a person incapable of contracting for want of understanding was followed by cohabitation but not by birth of issue, the second proviso of this section does not apply. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

Nor Does It Apply to Bigamous Marriage.—The second proviso of this section does not apply to bigamous marriages.

§ 51-4. Prohibited degrees of kinship.—When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood. (1879, c. 78; Code, s. 1811; Rev., s. 2084; C. S., s. 2496.)

Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

Marriage of Persons Nearer of Kin Than First Cousins.—In *Baity v. Cranfill*, 91 N.C. 293 (1884), it was held that the authority conferred upon the court by § 50-4 was so limited by the second proviso of this section as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins," after the husband's death, when their marriage was followed by cohabitation and the birth of issue. *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963).

An annulment decree rendered when children of the marriage are living is contrary to this section and improvidently entered. *Scarboro v. Morgan*, 233 N.C. 449, 64 S.E.2d 422 (1951).

Marriage Valid Where Celebrated Is Valid Here.—The marriage relation, if legally created elsewhere, is recognized as a valid subsisting relation when the parties come into this State from that of their former residence. *Woodard v. Blue*, 103 N.C. 109, 9 S.E. 492 (1889), citing *State v. Ross*, 76 N.C. 242 (1877), holding that a marriage, solemnized in a state whose laws permit such marriage, between a negro and a white person domiciled in such state is valid here.

Attempt to Evade Provisions of Section.—The validity of a foreign marriage is not recognized here when parties having their domicile here, to evade our laws, go to a state which allows such marriage, with intent to return and keep up their domicile. *Woodard v. Blue*, 103 N.C. 109, 9 S.E. 492 (1889), citing *State v. Kennedy*, 76 N.C. 251 (1877), holding that a marriage, in another state whose laws permit such marriage, between a negro and a white person domiciled in this State and who leave it for the purpose of evading its laws and with intent to return, is not valid in this State.

Applied in *Goins v. Trustees Indian Training School*, 169 N.C. 736, 86 S.E. 629 (1915).

Cited in *Chance v. Board of Educ.*, 224 F. Supp. 472 (E.D.N.C. 1963)

§ 51-5. Marriages between slaves validated.—Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the General Assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married. (1866, c. 40, s. 5; Code, s. 1842; Rev., s. 2085; C. S., s. 2497.)

Section Is Valid.—The validity of this section in creating retroactively a legal marriage relation between slaves is upheld in *Cooke v. Cooke*, 61 N.C. 583 (1868); *State v. Harris*, 63 N.C. 1 (1868); *State v. Adams*, 65 N.C. 537 (1871); *State v. Whitford*, 86 N.C. 636 (1882); *Long v. Barnes*, 87 N.C. 329 (1882); *Baity v. Cranfill*, 91 N.C. 293, 49 Am. Rep. 641 (1884). For other cases decided under the statute, see *Woodard v. Blue*, 103 N.C. 109, 9 S.E. 492 (1889); *State v. Melton*, 120 N.C. 591, 26 S.E. 933 (1897); *Bettis v. Avery*, 140 N.C. 184, 52 S.E. 584 (1905).

Declarations as to Paternity.—Where a marriage between slaves was validated by this section, declarations as to the paternity of a child born subsequent to the marriage, made *anti litem motam* by the alleged father and mother, were admissible in evidence without regard to § 49-12, which legitimates children born out of wedlock whose parents subsequently intermarry. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. *Bowman v. Howard*, 182 N.C. 662, 110 S.E. 98 (1921).

ARTICLE 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338.)

Officer or Minister Penalized.—The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of \$200 prescribed by § 51-7. *State v. Robbins*, 28 N.C. 23 (1845); *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890); *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893).

Actual Delivery of License Required.—This section requires an actual delivery, and constructive delivery will not suffice. So performance of the ceremony by a justice after a telephone communication informing him that the license has been mailed subjects him to the penalty prescribed by § 51-7. *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922).

§ 51-7. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within thirty days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C. S., s. 2499; 1953, c. 638, s. 1.)

Marriage Not Affected.—The failure to comply with the requirements as to the license subjects the officer or minister to the penalty under this section, but the marriage is, notwithstanding, good to every

Marriage without License.—The failure to procure a license to marry will not invalidate a marriage otherwise good. *State v. Robbins*, 28 N.C. 23 (1845); *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890); *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893); *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922).

Marriage under Illegal License.—A marriage is not invalid because solemnized under an illegal license. *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893); *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922).

intent and purpose. *State v. Parker*, 106 N.C. 711, 11 S.E. 517 (1890). See § 51-6 and note thereto.

Statute of Limitations.—A summons was issued to recover the penalty against a

justice of the peace, under this section, for performing the marriage ceremony without the delivery of the license therefor to him, within less than a year from the time he had performed it. It was held that the

plea of the statute of limitations, § 1-54, subdivision (2), could not be sustained. *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922).

§ 51-8. License issued by register of deeds.—Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that either party to the proposed marriage may be under eighteen years of age, such register of deeds shall have the authority to require such party to present a certified copy of his or her birth certificate, or a certified copy of his or her birth record in the form of a birth registration card as provided in G.S. 130-102, which shall be filed with the application for a license. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C. S., s. 2500; 1957, c. 506, s. 1.)

Cross Reference.—For decisions relating to this section and § 51-17, see note to § 51-17.

This section and § 51-17 are in *pari ma-*

teria and should be construed together. *Bowles v. Cochran*, 93 N.C. 398 (1885); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911).

§ 51-8.1. Nonresidents required to apply for license forty-eight hours before issuance.—No marriage license shall be issued by any register of deeds for the marriage of any two persons, both of whom are nonresidents of the State of North Carolina, unless application for such license has been on file in the office of the register of deeds issuing the license for at least forty-eight hours. Such application must be made in writing and filed subject to public inspection in the office of the register of deeds to which the application is made and shall give the names of the parties to the marriage, their race, ages, and residence addresses. For receiving and filing such application, the register of deeds shall collect a fee of fifty cents (50¢).

Any register of deeds who knowingly or without reasonable inquiry, personally or by his deputy, violates any of the provisions of this section shall forfeit and pay two hundred dollars (\$200.00) to any parent, guardian, or other person standing in *loco parentis*, who sues for the same.

This section shall only apply to Pamlico County. (1945, cc. 1046, 1103; 1947, cc. 288, 289, 391, 538; 1949, cc. 13, 62, 329; 1951, c. 907, s. 1.)

§ 51-9. Health certificates required of applicants for licenses.—No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by the original report from a laboratory approved by the State Board of Health for making such tests showing that the Wassermann or any other approved test of this nature was made, such tests to have been made within thirty days of the time application for license is made.

Before any laboratory shall make such tests or any serological test required by this section, it shall apply to the North Carolina State Board of Health for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the North Carolina State Board of Health. The North Carolina State Board of Health may, in its discretion, revoke or suspend any certificate of approval issued by it for the operation of such a laboratory; and after notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be not subject to uncontrolled epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484.)

Editor's Note. — For comment on the 1939 law, see 17 N.C.L. Rev. 354.

Defense to Breach of Promise of Marriage.—The fact that at the time of the breach of promise of marriage, a license

for the marriage of the parties could not be lawfully issued under this section is a defense to an action for damages for breach of promise of marriage. *Winders v. Powers*, 217 N.C. 580, 9 S.E.2d 131 (1940).

§ 51-10. Exceptions to § 51-9. — (a) Exceptions to § 51-9, in case of persons who have been infected with a venereal disease, are permissible only under the following conditions:

- (1) When the applicant has completed treatment and is certified by a regularly licensed physician as having been cured or probated, and when said physician has certified that he has informed both the applicant and the proposed marital partner of any possible future infectivity of the applicant,
- (2) When the applicant is found to be in that stage of such disease that is not communicable to the marital partner as certified by a regularly licensed physician, provided that the applicant signs an agreement to take adequate treatment until cured or probated,
- (3) When the applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that the applicant signs an agreement to take adequate treatment until cured or probated,
- (4) When the applicant and the proposed marital partner are both infected with the same disease and have signed an agreement to take treatment until cured or probated.

(b) Exceptions to § 51-9, in case of persons who have active tuberculosis, are permissible only under the following conditions:

- (1) When the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that such applicant (and the proposed marriageable partner if he has active tuberculosis) shows evidence of being under treatment for tuberculosis and both persons are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.
- (2) When there is a living child of the parties and it is necessary to protect the legitimacy of said child and either or both of the parties have active tuberculosis, provided that such party or parties with active tuberculosis show evidence of being under treatment for tuberculosis and both parties are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.
- (3) To validate any type of marriage which took place prior to the illness of either applicant but which marriage was later found to be invalid

because of some technicality and said technicality is not a bar to marriage in North Carolina, provided the marital partner or partners who have active tuberculosis show evidence of being under treatment and sign an agreement to take adequate treatment until cured or protected, and both marital partners are known to the local or county health department. (1939, c. 314, s. 2; 1945, c. 577, s. 2; 1959, c. 351.)

§ 51-11. Who may execute certificate; form; filing copy with Department of Health.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the State of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health director or county physician.

Such certificate form shall be designed by the State Board of Health and shall be obtained by the register of deeds from the State Board of Health upon request.

Every examining physician under the provisions of §§ 51-9 to 51-14 shall make and immediately file with the Department of Health of North Carolina a true copy of such certificate. (1939, c. 314, s. 3; 1957, c. 1357, s. 10.)

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, subject to epileptic attacks, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with State laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641.)

Editor's Note. — For comment on the 1943 amendment, see 21 N.C.L. Rev. 348.

§ 51-13. Penalty for violation.—Any violation of §§ 51-9 to 51-14, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars (\$50.00) or imprisonment for thirty days, or both. (1939, c. 314, s. 3.)

§ 51-14. Compliance with requirement by residents who marry outside of State.—Residents of the State who are married outside of North Carolina, shall, within sixty days after they return to said State, file with the register of deeds of the county in which they live, a certificate showing that they have conformed to the requirements of the examination required by §§ 51-9 to 51-14 for those who are married in the State. (1939, c. 314, s. 2½.)

Effect of Noncompliance. — Failure to file a health certificate as required by law does not invalidate an otherwise legal marriage; but such failure to comply with the statute in this respect, if true, does make

the parties subject to indictment, and, if they are convicted, to the penalty or penalties provided for the violation of this section. *Hall v. Hall*, 250 N.C. 275, 108 S.E.2d 487 (1959).

§ 51-15. Obtaining license by false representation misdemeanor.—If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (1885, c. 346; Rev., s. 3371; C. S., s. 2501.)

Cross Reference. — As to false pretenses generally, see § 14-100 et seq.

§ 51-16. **Form of license.**—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within thirty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this day of, 19...

..... L. M.,
Register of Deeds of County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored," or "Indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the day of, 19.., at the house of P. R., in (here name the town, if any, the township and county), according to law.

..... N. O.

Witness present at the marriage:

S. T., of (here give residence).

(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C. S., s. 2502; 1953, c. 638, s. 2.)

Local Modification.—Bladen: 1941, c. 95.

License Not Issued Until Filled Out.—

A blank marriage license, though signed by the register of deeds, is not issued until filled out and handed to the person who is to be married, or to some one for him, and, if at the time of such issuance the

register has become functus officio, the failure to record it does not render him liable to the penalty imposed by §§ 51-18 and 51-19, for failure to record the substance of each marriage license issued. *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893).

§ 51-17. **Penalty for issuing license unlawfully.**—Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same: Provided, that requiring a party to a proposed marriage to present a certified copy of his or her birth certificate, or a certified copy of his or her birth record

in the form of a birth registration card as provided in G.S. 130-102, in accordance with the provisions of G.S. 51-8, shall be considered a reasonable inquiry into the matter of the age of such party. (R. C., c. 68, s. 13; 1871-2, c. 193, s. 7; Code, s. 1816; 1895, c. 387; 1901, c. 722; Rev., s. 2090; C. S., s. 2503; 1957, c. 506, s. 2.)

- I. In General.
- II. Duties of Register.
- III. Diligence Required.
- IV. Consent of Parent, etc.
- V. Action for Penalty.

I. IN GENERAL.

Editor's Note.—Section 51-8 and this section have generally been construed together as they relate to the same subject. Therefore, the cases decided under both sections have been treated in the note to this section.

Object of Statute.—The statute is a wise and beneficent one, the object being to prevent hasty and improvident marriages. *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911). See also *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

The statute is remedial in its nature. *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

This section and § 51-8 are in *pari materia* and should be construed together. *Bowles v. Cochran*, 93 N.C. 398 (1885); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911); *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

Register Not Indictable.—The issuing of a marriage license by a register of deeds in violation of the section is not an indictable offense, unless the illegal act be done *mala fide*. *State v. Snuggs*, 85 N.C. 541 (1881).

II. DUTIES OF REGISTER.

Duties Are Highly Important.—The duties of the register of deeds in issuing marriage licenses are most important and solemn. He must exercise them carefully and conscientiously, and not as a mere matter of form. *Agent v. Willis*, 124 N.C. 29, 32 S.E. 322 (1899); *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Julian v. Daniels*, 175 N.C. 549, 95 S.E. 907 (1918).

Duties Cannot Be Delegated. — A register of deeds cannot delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. *Cole v. Laws*, 108 N.C. 185, 12 S.E. 985 (1891).

Inquiry by Deputy Will Not Excuse Register.—If a party to a marriage is under the age authorized by law, the register cannot excuse himself from liability because his deputy or agent made proper in-

quiry, if he did not make the inquiry himself. The trust is personal to him. *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893).

Delivery to Third Party Prohibited. — The register is not authorized to permit the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. *Coley v. Lewis*, 91 N.C. 21 (1884).

Where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given, and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it, it was held that the register is liable to the penalty. *Coley v. Lewis*, 91 N.C. 21 (1884).

III. DILIGENCE REQUIRED.

"Reasonable Inquiry". — By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. *Bowles v. Cochran*, 93 N.C. 398 (1885).

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Furr v. Johnson*, 140 N.C. 157, 52 S.E. 664 (1905); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911); *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. *Julian v. Daniels*, 175 N.C. 549, 95 S.E. 907 (1918).

Reasonable Inquiry Precludes Liability. —The register is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. *Williams v. Hodges*, 101 N.C. 300, 7

S.E. 786 (1888); *Cole v. Laws*, 104 N.C. 651, 10 S.E. 172 (1889); *Agent v. Willis*, 124 N.C. 29, 32 S.E. 322 (1899); *Laney v. Mackey*, 144 N.C. 630, 57 S.E. 386 (1907); *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

Examination under Oath Discretionary.

—Section 51-8 does not require that the register shall make inquiry by examination of the applicant under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. *Furr v. Johnson*, 140 N.C. 157, 52 S.E. 664 (1905); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911).

When Sworn Statements Insufficient.

It is not sufficient that the register takes the sworn statements of the parties or their friends not known to him. *Snipes v. Wood*, 179 N.C. 349, 102 S.E. 619 (1920), citing *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

Instances of Reasonable Inquiry.—When a man of good character and reliable applied for a license, and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of the parents, and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. *Bowles v. Cochran*, 93 N.C. 398 (1885).

For other cases where the inquiry was held reasonable, see *Walker v. Adams*, 109 N.C. 481, 13 S.E. 907 (1891); *Harcum v. Marsh*, 130 N.C. 154, 41 S.E. 6 (1902).

Instances of Lack of Reasonable Inquiry.

—When the register issues a license for the marriage of a woman under eighteen years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, it was held that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect. *Cole v. Laws*, 104 N.C. 651, 10 S.E. 172 (1889).

To the same effect are the following cases: *Williams v. Hodges*, 101 N.C. 300, 7 S.E. 786 (1888); *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Morrison v. Teague*, 143 N.C. 186, 55 S.E. 521 (1906); *Laney v. Mackey*, 144 N.C. 630,

57 S.E. 386 (1907); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911); *Julian v. Daniels*, 175 N.C. 549, 95 S.E. 907 (1918); *Snipes v. Wood*, 179 N.C. 349, 102 S.E. 619 (1920).

IV. CONSENT OF PARENT, ETC.

Consent Must Be Written.—A register of deeds is not permitted to issue a marriage license, where one of the parties is under eighteen years of age, until the consent in writing of the person under whose charge he or she is, shall be delivered to the register. The written consent is a condition precedent to the issuance of the license. *Coley v. Lewis*, 91 N.C. 21 (1884).

Section 51-8 fixes the order in importance of those from whom the register should obtain the written consent for the marriage of minors under eighteen years of age. *Littleton v. Haar*, 158 N.C. 566, 74 S.E. 12 (1912); *Owens v. Munden*, 168 N.C. 266, 84 S.E. 257 (1915).

The statute requires the written consent of the father if living and not unable or disqualified in some way to give it. *Littleton v. Haar*, 158 N.C. 566, 74 S.E. 12 (1912).

Thus, when a minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and does not preclude her father from suing the register of deeds for the penalty provided for issuing a license without his consent. *Littleton v. Haar*, 158 N.C. 566, 74 S.E. 12 (1912).

Otherwise the Mother's Consent Is Sufficient.—It was held in *Littleton v. Haar*, 158 N.C. 566, 74 S.E. 12 (1912), that the consent of the persons named in § 51-8 and in the order named should be obtained, the effect of the decision being that if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient. *Owens v. Munden*, 168 N.C. 266, 84 S.E. 257 (1915).

The word "father" used in the statute does not include "stepfather," and the written consent of the mother, the father being dead, authorizes the issuing of the license. *Owens v. Munden*, 168 N.C. 266, 84 S.E. 257 (1915).

V. ACTION FOR PENALTY.

Jurisdiction and Venue.—As to jurisdiction, see *Joyner v. Roberts*, 112 N.C. 111, 16 S.E. 917 (1893); *Dixon v. Haar*, 158 N.C. 341, 74 S.E. 1 (1912).

An action for the penalty under this section should be tried in the county wherein

the cause of action arises. And if brought in the wrong county, it should be removed and not dismissed. *Dixon v. Haar*, 158 N. C. 341, 74 S.E. 1 (1912).

Action Abates upon Register's Death.—Under § 1-74, an action for a penalty, against a register of deeds and the surety on his official bond abates on the death of the officer. *Wallace v. McPherson*, 139 N. C. 297, 51 S.E. 897 (1905).

Allegations in Complaint.—In an action under this section it is essential that the complaint should allege that the register issued the license knowingly or without reasonable inquiry. *Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891).

Burden of Proof.—The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Furr v. Johnson*, 140 N.C. 157, 52 S.E. 664 (1905); *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911).

Presumption as to Time of Issuance.—The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it. *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893).

Evidence.—In a civil suit against a register evidence of nolo contendere pleaded by the husband in a criminal action is not admissible. *Snipes v. Wood*, 179 N.C. 349, 102 S.E. 619 (1920).

Proof of the officer's failure to administer the oath to the applicant for the license is admissible to show a lack of reasonable inquiry. *Laney v. Mackey*, 144 N.C. 630, 57 S.E. 386 (1907).

The testimony of a witness as to the age of the woman depending solely upon her statements to him which he repeated to the register when the license was applied for,

is not substantive evidence of her age. *Joyner v. Harris*, 157 N.C. 295, 72 S.E. 970 (1911).

Reasonable Inquiry as Question of Law.—It is well-settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the court. *Joyner v. Roberts*, 114 N.C. 389, 19 S.E. 645 (1894); *Trolinger v. Boroughs*, 133 N.C. 312, 45 S.E. 662 (1903); *Julian v. Daniels*, 175 N.C. 549, 95 S.E. 907 (1918); *Snipes v. Wood*, 179 N.C. 349, 102 S.E. 619 (1920).

Reasonable Inquiry as Question for Jury.—Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions. *Joyner v. Roberts*, 114 N.C. 389, 19 S.E. 645 (1894); *Harcum v. Marsh*, 130 N.C. 154, 41 S.E. 6 (1902); *Furr v. Johnson*, 140 N.C. 157, 52 S.E. 664 (1905).

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. *Gray v. Lentz*, 173 N.C. 346, 91 S.E. 1024 (1917).

If the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. *Lemmons v. Sigman*, 181 N.C. 238, 106 S.E. 764 (1921).

Instructions.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. *Spencer v. Saunders*, 189 N.C. 183, 126 S.E. 420 (1925).

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of, from the day of, 19., to the day of, 19., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband with his residence; in the third, his age; in the fourth, his race and color; in the

fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least two of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504; 1963, c. 429.)

Editor's Note.—The 1963 amendment substituted "two" for "three" near the end of the next to last sentence.

§ 51-18.1. Correction of errors in names in application or license.—When it shall appear to the register of deeds of any county in this State that the name of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name or names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction. (1953, c. 797; 1959, c. 344.)

§ 51-19. Penalty for failure to record.—Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same. (1871-2, c. 193, s. 10; Code, s. 1819; Rev., s. 2092; C. S., s. 2505.)

Jurisdiction.—Notwithstanding the penalty imposed does not exceed \$200 (and if only one was sought to be recovered a justice of the peace would have jurisdiction), a plaintiff may unite several causes of action for several penalties against same party, in the same complaint, and if the aggregate amount thereof exceeds \$200 the superior court will have jurisdiction. *Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891).

The penalty given by this section is in the alternative, either for the failure to record the substance of the license issued or for failure to record the substance of the return. *Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891).

Prosecution in Name of Person Suing for Penalty.—An action against a register of deeds to recover the penalties imposed for a failure to comply with the provisions of the statute in relation to issuing mar-

riage licenses under this section must be prosecuted in the name of the person who sues therefor, and not in the name of the State. *Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891).

Where Register Functus Officio.—If the filling up and handing the paper previously signed to the party proposing to be married was done, not by the register but by an agent, and at the time the register was functus officio, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. *Maggett v. Roberts*, 112 N.C. 71, 16 S.E. 919 (1893).

A statute relieving the register from the penalty imposed by this section, passed after an action was brought to recover the penalty, but before judgment, was held constitutional. *Bray v. Williams*, 137 N. C. 387, 49 S.E. 887 (1905).

§ 51-20. Marriage license tax.—The board of commissioners of any county may levy a tax of four dollars (\$4.00) on each marriage license issued, which tax shall be collected by the register of deeds of the county in which the license is issued. All such marriage license taxes collected by the register of deeds shall promptly be placed in the county general fund.

The register of deeds of each county shall submit to the board of commissioners on the first Monday in January, April, July, and October of each year a sworn statement or report in detail, showing the names of the persons to whom marriage

licenses have been issued during the preceding three months, and accompany such sworn report or statement with the amount of such taxes collected by him or that should have been collected by him in the preceding three months.

This section shall not be construed to modify in any manner the provisions of § 51-2 or 51-8.1.

Nothing in this section shall prevent any register of deeds whose compensation is derived from fees from retaining such fees as heretofore allowed by law to such register of deeds for issuing said license. (1947, c. 831, s. 1.)

§ 51-21. Issuance of delayed marriage certificates.—In all those cases where a minister or other person authorized by law to perform marriage ceremonies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

- (1) The affidavit of at least two witnesses to the marriage ceremony;
- (2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;
- (3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.
- (4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto.

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law.

The register of deeds shall issue the certificates provided for in this section upon the payment of a fee of one dollar and fifty cents (\$1.50) for each such certificate. (1951, c. 1224; 1955, c. 246.)

Chapter 52.

Powers and Liabilities of Married Persons.

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| <p>Sec.
 52-1. Property of married persons secured.
 52-2. Capacity to contract.
 52-3. Married person may insure spouse's life.
 52-4. Earnings and damages.
 52-5. Torts between husband and wife.
 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.
 52-7. Validation of certificates of notaries public as to contracts or conveyances between husband and wife.</p> | <p>Sec.
 52-8. Validation of contracts between husband and wife where wife is not privately examined.
 52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.
 52-10. Contracts between husband and wife generally; releases.
 52-10.1. Separation agreements; execution by minors.
 52-11. Antenuptial contracts and torts.
 52-12. Postnuptial crimes and torts.</p> |
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§ 52-1. **Property of married persons secured.**—The real and personal property of any married person in this State, acquired before marriage or to which he or she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such married person and may be devised, bequeathed and conveyed by such married person subject to such regulations and limitations as the General Assembly may prescribe. (Const., Art. X, s. 6; Rev., s. 2093; C. S., s. 2506; 1965, c. 878, s. 1.)

Cross References.—As to property of married women, see also N.C. Const., Art. X, § 6. As to conveyances by husband and wife, see § 39-7 et seq. As to contracts of married persons, see § 52-2 and note thereto.

Editor's Note.—Session Laws 1965, c. 878, s. 1, repealed and rewrote chapter 52 of the General Statutes. Where present provisions are similar to prior statutory provisions, the historical citations from the former sections have been added to the new sections. Former § 52-1 applied to married women only.

Annotations to present chapter 52 construing provisions of the former chapter have been retained where it is thought they will be helpful.

History.—For a discussion of the history of this legislation and of many of the earlier cases construing it, see *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905).

For a discussion of the early law regarding married women's contracts, see the note to § 52-2.

Common Law.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's

absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife died to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to anyone. *O'Connor v. Harris*, 81 N.C. 279 (1879).

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. *O'Connor v. Harris*, 81 N.C. 279 (1879).

The legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. *Pippen v. Wesson*, 74 N.C. 437 (1876).

Chapter Abridges Common-Law Rights of Husband.—The provisions of this chapter, insofar as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949).

Section Applies to Property Not Secured by Act of Parties.—This section does not apply to cases where the property is secured to the wife by marriage settlement or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the section is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. *Cooper v. Landis*, 75 N.C. 526 (1876).

Vested Rights Protected.—Where a husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate was vested under the law then in force, no subsequent legislation could deprive him of it without his consent. *Morris v. Morris*, 94 N.C. 613 (1886).

But the real property of the wife, whether acquired before or after marriage, remains her sole and separate property under N.C. Const., Art. X, § 6, and therein the husband has no vested interest. *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); *Kilpatrick v. Kilpatrick*, 176 N.C. 182, 96 S.E. 988 (1918).

Wife May Hold Legal as Well as Equitable Estate.—Since the adoption of the Constitution of 1868, a married woman has or can have the legal as well as the equitable estate. *Sanderlin v. Sanderlin*, 122 N.C. 1, 29 S.E. 55 (1898).

Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891), the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. *Freeman v. Lide*, 176 N.C. 434, 97 S.E. 402 (1918). See also *Pippen v. Wesson*, 74 N.C. 437 (1876).

Disposition of Personality.—There is no restriction whatever upon the right of a married woman to dispose of her personality as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905);

Rea v. Rea, 156 N.C. 529, 72 S.E. 873 (1911).

Contracts Strictly in Personam.—In construing N.C. Const., Art. X, § 6, and the statutes passed on the subject, it has been held that a married woman living with her husband was not enabled to bind herself by contracts strictly in personam, but that the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to charge her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privity examination taken. *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915). See also *Pippen v. Wesson*, 74 N.C. 437 (1876); *Flaum v. Wallace*, 103 N.C. 296, 9 S.E. 567 (1889); *Farthing v. Shields*, 106 N.C. 289, 10 S.E. 998 (1890); *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905). *Sanderlin v. Sanderlin*, 122 N.C. 1, 29 S.E. 55 (1898).

Money from Sale of Wife's Realty.—Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. *Kirkpatrick v. Holmes*, 108 N.C. 206, 12 S.E. 1037 (1891).

Mechanic's Lien on Married Woman's Property.—By construing N.C. Const., Art. X, §§ 6 and 3, in connection with § 44-1, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905).

Presumption as to Property Delivered to Husband.—Under the change made in the law of married women's property rights by this section and the N.C. Const., Art. X, § 6, where a married woman receives checks from her parents as personal gifts to her, which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against

his personal representative. *Etheredge v. Cochran*, 196 N.C. 681, 146 S.E. 711 (1929).

Statute of Limitations.—Since a wife may now maintain an action without the joinder of her husband, when it concerns her separate property, and against her husband when it is between the husband and

wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. *Graves v. Howard*, 159 N.C. 594, 75 S.E. 998 (1912). See § 1-18.

§ 52-2. **Capacity to contract.**—Subject to the provisions of G.S. 52-6, G.S. 39-7 and other regulations and limitations now or hereafter prescribed by the General Assembly, every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried. (1871-2, c. 193, s. 17; Code, s. 1826; Rev. s. 2094; 1911, c. 109; C. S., s. 2507; 1945, c. 73, s. 16; 1965, c. 878, s. 1.)

- I. In General.
- II. Powers Conferred.
- III. Liabilities Incurred.
- IV. Remedies for Breach.

Cross References.

See Editor's Note to § 52-1. As to conveyances by husband and wife, see § 39-7 et seq. For repeal of laws requiring private examination of married women, see § 47-14.1.

I. IN GENERAL.

Editor's Note. — Former § 52-2 applied to married women only.

Chapter 193, s. 17, Laws 1871-2, known as the Marriage Act, was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was required in order to allow her to charge her separate estate. See *Arrington v. Bell*, 94 N.C. 247 (1886). However, a subsequent statute, known as the Martin Act, was passed March 6, 1911 and entirely changed the law. See 13 N.C.L. Rev. 62. The present section, except insofar as it is not limited to married women, is similar to the Martin Act.

Common Law.—At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge, had to refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. *Frazier v. Brownlow*, 38 N.C. 237 (1844); *Knox v. Jordan*, 58 N.C. 175 (1859); *Pippen v. Wesson*, 74 N.C. 437 (1876); *Sanderlin v. Sanderlin*, 122 N.C. 1, 29 S.E. 55 (1898).

The common-law rule continued to be the law in this State until the adoption of the Constitution of 1868. *Pippen v. Wesson*, 74 N.C. 437 (1876).

Legislature Has Power to Remove Restraints.—The restraints upon a married woman's power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the legislature to do so, and indeed the Supreme Court in many instances has indicated to the legislature that justice might be facilitated by more liberal legislation in that regard. *Finger v. Hunter*, 130 N.C. 529, 41 S.E. 890 (1902).

This section operated prospectively and did not apply to contracts made prior to its adoption. *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911).

Section Does Not Apply to Estates in Entirety.—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in *Jones v. Smith*, 149 N.C. 318, 62 S.E. 1092 (1908), as not affecting estates held by husband and wife as tenants by the entirety. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *In re Perry*, 256 N.C. 65, 123 S.E.2d 99 (1961).

Statute providing that earnings and damages from personal injury are wife's property (now § 52-4) should be read in light of this section. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

For note on right of husband to recover medical expenses of wife from tort-feasor, see 37 N.C.L. Rev. 82 (1958).

II. POWERS CONFERRED.

Married Women Made Sui Juris.—The effect of the Martin Act was to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, *sui juris*. *Lipinsky v. Re-*

vell, 167 N.C. 508, 83 S.E. 820 (1914); Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916); Satterwhite v. Gallagher, 173 N.C. 525, 92 S.E. 369 (1917); Dorsey v. Corbett, 190 N.C. 783, 130 S.E. 842 (1925); Tise v. Hicks, 191 N.C. 609, 132 S.E. 560 (1926); Taft v. Covington, 199 N.C. 51, 153 S.E. 597 (1930). See Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937); Etheridge v. Wescott, 244 N.C. 637, 94 S.E.2d 846 (1956).

By virtue of this section, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that the requirements of § 52-6 must be met in contracts between her and her husband. Martin v. Bundy, 212 N.C. 437, 193 S.E. 831 (1937). See §§ 39-7 et seq., 52-6, and notes thereto.

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by § 52-6 must still be observed, a married woman can now make any and all contracts so as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried. Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917); Taft v. Covington, 199 N.C. 51, 153 S.E. 597 (1930). See Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937).

Subject to well-established exceptions, a married woman may contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried. Cruthis v. Steele, 259 N.C. 701, 131 S.E.2d 344 (1963).

This section practically constitutes married women free traders as to all their ordinary dealings. Price v. Charlotte Elec. Ry., 160 N.C. 450, 76 S.E. 502 (1912); Croom v. Goldsboro Lumber Co., 182 N.C. 217, 108 S.E. 735 (1921).

Section 52-6 Not Affected.—This section does not alter the effect of § 52-6, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void. Singleton v. Cherry, 168 N.C. 402, 84 S.E. 698 (1916); Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

Husband and Wife May Form Business Partnership.—This section has been

held to vest the wife with the power to contract with the husband so as to create a business partnership. Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948).

Oral Agreement to Hold Land in Trust for Husband.—A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. Carlisle v. Carlisle, 225 N.C. 462, 35 S.E.2d 418 (1945).

III. LIABILITIES INCURRED.

Liability for Breach of Contract.—When the legislature authorized a married woman to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried, it authorized contracts for breach of which she would be liable as fully as if she had remained unmarried. Everett v. Ballard, 174 N.C. 16, 93 S.E. 385 (1917).

On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

Liability of Wife Where Husband Agent.—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence. Richardson v. Libes, 188 N.C. 112, 123 S.E. 306 (1924).

Where Husband Is Alien.—Under the former law it was held that a married woman whose husband was an alien and never visited or resided in the United States was personally liable on her contracts. Levi v. Marsha, 122 N.C. 656, 29 S.E. 832 (1898).

Liability as Partner or Surety.—Since the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. Bristol Grocery Co. v. Bails, 177 N.C. 298, 98 S.E. 768 (1919).

Liability Where Wife Surety for Husband.—A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. Royal v. Sutherland, 168 N.C. 405, 84 S.E. 708 (1915).

Estoppel.—Since, in this State, the common-law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. *Tripp v. Langston*, 218 N.C. 295, 10 S.E.2d 916 (1940). See also *Builders' Sash & Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921), wherein the question whether the doctrine of title by estoppel applies to a married woman was raised but not decided; *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963).

Husband Still Liable for Funeral Expenses and Necessaries. — The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of *indebitatus assumpsit*. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915).

IV. REMEDIES FOR BREACH.

Specific Performance.—When a married woman makes an executory contract to convey land and the requirements of § 39-7, regarding instruments affecting a married

woman's title, are not complied with, she can only be held in damages, and specific performance may not be enforced. *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915).

Judgment against Wife as Surety for Husband.—In *Royal v. Southerland*, 168 N.C. 405, 81 S.E. 708 (1915), it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916).

Judgment Enforced by Execution. — It was held in *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914), that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916).

Wife May Claim Personal Property Exemption.—Under the provisions of N.C. Const., Art. X, § 1, and of this section, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of § 52-6, and each has consented that such exemption should be allowed to the other therefrom. *Bristol Grocery Co. v. Bails*, 177 N.C. 298, 98 S.E. 768 (1919).

§ 52-3. Married person may insure spouse's life.—Any married person in his or her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of his or her spouse, for his or her sole and separate use, and may dispose of the interest in the same by will. (Rev., s. 2099; C. S., 2512; 1965, c. 878, s. 1.)

Cross References.—See Editor's Note to § 52-1. As to right of husband to insure life for the benefit of wife and children, see N.C. Const., Art. X, § 7.

Editor's Note. — Former § 52-3 related to the capacity of a married woman to draw checks.

§ 52-4. Earnings and damages.—The earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property. (1913, c. 13, s. 1; C. S., s. 2513; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note. — Former § 52-4 related to husband's joinder in conveyance or lease of wife's land.

For comment on this section, see 29 N.C.L. Rev. 178.

Basis of Section. — In the concurring opinion in *Patterson v. Franklin*, 168 N.C. 75, 84 S.E. 18 (1915), Clark, C.J., states that this section was passed as a result of the decision in *Price v. Charlotte Elec. Co.*,

160 N.C. 450, 76 S.E. 502 (1912). To the same effect, see *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 100 S.E. 602 (1919).

Section Read in Light of Constitution and § 52-2.—This section should be read in the light of N.C. Const., Art. X, § 6, which protects a married woman in the sole ownership of her property, and also in connection with § 52-2, which seeks to secure to her the free use of her property. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Husband Deprived of Former Rights. —By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and chooses in action. *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

Husband's Common-Law Right of Action Transferred to Wife. — A married woman is now entitled to recover in tort for all pecuniary loss sustained by her, including nursing and care, and loss from inability to perform labor or to carry on her household duties. This transfers to the wife the husband's common-law right of action to recover for her services and for imposed nursing and care occasioned by the tort of another. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Marital Rights and Duties Unaffected. —The mutual rights and duties growing out of the marital relationship are not affected by this and the following sections. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945).

A married woman is still a feme covert with the rights, privileges and obligations incident to such status under the law. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945), citing *Buford v. Mochy*, 224 N.C. 235, 29 S.E.2d 729 (1944).

This section does not relieve a married woman of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmeet of her husband, when minded so to do. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945), citing *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Overlapping Recovery Denied. — The effect of the legislation is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Spouses May Sue Each Other. —The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

A married woman has the fullest power to bring actions, even against her husband and in all cases whatever. *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); *In re Will of Witherington*, 186 N.C. 153, 119 S.E. 11 (1923). And her right to sue her husband extends to tort actions. *Cro-*

well v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921).

In this jurisdiction a wife may maintain an action against her husband for negligent injury, or if such injury results in death, her personal representative may maintain such action. *King v. Gates*, 231 N.C. 537, 57 S.E.2d 765 (1950).

Nonresident Wife Has Right of Action for Husband's Tort. — The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, and a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941).

Impairment of Capacity to Work and Earn Money. — This section is in accord with the realistic trend of the modern decisions, which recognize the fact that a wife, as an individual, has a personal right to work and earn money, whether she is gainfully employed at the time or engaged merely in the performance of household duties; and where her capacity to work and earn money is impaired by injury, she has suffered a definite, substantial loss. *Johnson v. Lewis*, 251 N.C. 797, 112 S.E.2d 512 (1960).

A person is not deprived of the right to recover damages because of inability to labor or transact business in the future, because of the fact that at the time of the injury he is not engaged in any particular employment. The fact that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity. *Johnson v. Lewis*, 251 N.C. 797, 112 S.E.2d 512 (1960).

Services Rendered to Husband. —For a wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living with him under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to pay. *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541 (1922).

Husband and Wife Employed Together. —Since the passage of the Martin Act and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and dif-

ferent amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921).

Services rendered by a married woman outside the home, and not within the scope of her household or domestic duties, would properly be recoverable on implied assumpsit or quantum meruit in her own name. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945).

Recovery for Loss of Consortium.—It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. *Brown v. Brown*, 124 N.C. 19, 32 S.E. 320 (1899). See also 3 N.C.L. Rev. 100.

When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of consortium. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Action of Wife for Tort to Husband.—In *Hipp v. Dupont*, 182 N.C. 9, 108 S.E. 318 (1921), the court said: "It follows therefore [from the former wording of this section] that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no

reason why she can sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband."

Action against Seducer.—Under the provisions of this section, a married woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. *Hayatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927).

Joinder of Husband.—Since the passage of this section a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 100 S.E. 602 (1919).

While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with. *Shore v. Holt*, 185 N.C. 312, 117 S.E. 165 (1923).

The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor, but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. *Patterson v. Franklin*, 168 N.C. 75, 84 S.E. 18 (1915).

Applied in *Owens v. Kelly*, 240 N.C. 770, 84 S.E.2d 163 (1954); *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963).

§ 52-5. Torts between husband and wife.—A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried. (1951, c. 263; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note.—For comment on this section, see 29 N.C.L. Rev. 395.

Purpose of Section.—This section was intended to change for the future the result reached in *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949); 29 N.C.L. Rev. 359. *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963).

The legislature by statute modified the common law and permitted the wife to sue the husband for injuries tortiously inflicted.

The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

This section permits one spouse to maintain an action against the other for injuries caused by his or her tort. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Thus, Husband May Recover from Wife Medical Expenses He Paid for Daughter

Negligently Injured by Wife.—By virtue of the express provisions of this section, a plaintiff-father was entitled to recover from the defendant-mother the medical expenses expended by him on behalf of his daughter for injuries to her caused by defendant's actionable negligence in the operation of an automobile. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

Plaintiff's action to recover necessary medical expenses expended by him for his infant daughter is within the fair intent and meaning of this section imposing liability for damages sustained to property. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

And Wrongful Death Action May Be Maintained against Husband for Wife's Death.—If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

The legislature did not intend to extend its enactments beyond State borders and create in a spouse a right of action against the other for acts done beyond the borders of North Carolina. *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963).

§ 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.—(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.

(c) Such certifying officer must be a justice of the Supreme Court, a judge of the superior court, a judge of the district court, a clerk, assistant clerk, or deputy clerk of the superior court, or a justice of the peace, or a magistrate, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination is made.

(d) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife.

(e) Any other provisions of this section to the contrary notwithstanding, in all cases where a married woman owning property as an individual joins with her husband in execution of a deed conveying her real property to a third party and said third party reconveys said real property to said wife and her husband as tenants by the entirety and in the deed to the third party the acknowledgment as herein provided was not complied with, but in all other respects the acknowledgment of the execution of said deed and the probate and registration thereof are regular, such conveyances shall not be void but shall be voidable only, and any action, the purpose of which is to have said conveyances set aside or declared invalid shall be commenced within seven (7) years after the recordation of such deed in the office of the register of deeds of the county or counties in which said real property is located. If no such action is or has been brought then the effect of the conveyances shall be to create an estate by the entirety. (1871-2, c. 193, s. 27; Code, s. 1835; Rev., s. 2107; C. S., s. 2515; 1945, c. 73, s. 19; 1947, c. 111; 1951, c. 1006, s. 2; 1955, c. 1082; 1957, c. 1229, s. 1; 1963, c. 909, ss. 1, 4; 1965, c. 878, s. 1.)

- I. In General.
- II. Transactions Included.
- III. The Certificate.
- IV. Effect of Noncompliance.

Cross References.

See Editor's Note to § 52-1. See also § 52-2 and note thereto. As to conveyances by husband and wife, see § 39-7 et seq. As to separation agreements, see § 52-10 and note thereto.

I. IN GENERAL.

Editor's Note.—Former § 52-6 related to contracts and conveyances of a married woman whose husband had abandoned her. The provisions of present § 52-6 are similar to those of former § 52-12.

For note on conveyances between spouses in the creation of estates by the entirety, see 34 N.C.L. Rev. 571 (1956).

Constitutionality. — Former provisions similar to this section were held to be constitutional and valid in *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887); *Long v. Rankin*, 108 N.C. 338, 12 S.E. 987 (1891); *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911); *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Common Law. — All transactions of the wife with her husband in regard to her separate property were held void at common law. *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887). This was because at common law the husband and wife were deemed one person, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. *Sydnor v. Boyd*, 119 N.C. 481, 25 S.E. 92 (1896).

Purpose.—The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887); *Long v. Rankin*, 108 N.C. 338, 12 S.E. 987 (1891); *Stout v. Perry*, 152 N.C. 312, 67 S.E. 757 (1910); *Perry v. Stancil*, 237 N.C. 442, 75 S.E.2d 512 (1953).

This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887).

The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing

what is reasonable and not hurtful to her, and so certify. *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911); *Caldwell v. Blount*, 193 N.C. 560, 137 S.E. 578 (1927).

Strict Construction.—This section is an enabling statute and must be strictly construed. *Caldwell v. Blount*, 193 N.C. 560, 137 S.E. 578 (1927).

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887); *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Section Not Repealed by § 47-14.1. — See *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955).

Legislature Did Not Intend to Reduce Marriage to Commercial Basis. — While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945).

Duty of Support Not a "Debt".—It is the public policy of the State that a husband shall provide support for himself and his family. This duty he may not shirk, contract away, or transfer to another. It is not a "debt" in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment. *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961).

Effect of Fraud by Husband. — Where the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with this section precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the provisions of this section could apply. *Garrett v. Garrett*, 229 N.C. 290, 49 S.E.2d 643 (1948).

Applied in Baker v. Murphrey, 254 N.C. 506, 119 S.E.2d 398 (1961); *Richardson v. Richardson*, 257 N.C. 705, 127 S.E.2d 525 (1962); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E.2d 532 (1964).

II. TRANSACTIONS INCLUDED.

Separation agreements are to be executed in conformity with the requirements of this section governing contracts between husband and wife. This requirement is logical and sound in view of the fact that the right of a married woman to support and main-

tenance is held in this jurisdiction to be a property right. *Bolin v. Bolin*, 246 N.C. 666, 99 S.E.2d 920 (1957).

The right of a married woman to support and maintenance is held in this jurisdiction to be a property right, and the wife may release such right by contract in the manner set out in this section. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E.2d 235 (1962); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Deeds of separation, though not favored by law, are under certain circumstances recognized by this section and § 52-10, when signed in conformity therewith. *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171 (1929). See also *Brown v. Brown*, 205 N.C. 64, 169 S.E. 818 (1933).

Where a separation agreement, duly acknowledged as required by this section, provided that the wife did thereby quitclaim any and all right, title and interest in particularly described property held by the entireties, and she therein agreed to execute a warranty deed conveying such interest, but the deed was not acknowledged in conformity with this section and the parties thereafter resumed the marital relationship, it was held that the deed of separation constituted a conveyance to the husband of all the wife's right, title, and interest in such property, and the resumption of the marital relationship did not affect the executed conveyance. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Deeds of realty are embraced in the term "contracts", used in this section, for a deed is an executory contract until delivered, and after delivery it becomes an executed contract. *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915), distinguishing *Rea v. Rea*, 156 N.C. 529, 72 S.E. 573 (1911). See *Singleton v. Cherry*, 168 N.C. 402, 84 S.E. 698 (1915).

Section Applies to Every Form of Conveyance Except Testamentary Devise.—A married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of this section. Any manner of conveyance — testamentary devises excepted—otherwise than as therein provided is void. *Ingram v. Easley*, 227 N.C. 442, 42 S.E.2d 624 (1947), containing specific examples of transactions that are void for want of compliance with this section.

Parol Transfer for Less than Three Years Is Valid.—A wife can upon a fair consideration give land by parol to her husband for a period less than three years

under this section. *Wells v. Batts*, 112 N.C. 283, 17 S.E. 417 (1893).

An oral contract which undertakes to bind the wife to release her dower interest in the lands of her husband was invalidated by this section. *Luther v. Luther*, 234 N.C. 429, 67 S.E.2d 345 (1951). As to abolition of dower and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

Wife's Interest in Estate by Entireties.—During the continuance of the joint lives of a husband and wife who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by this section; and where the estate has been conveyed to one in trust for the husband, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and the husband may not, by will or otherwise, dispose of her interest thereunder. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955).

A deed by husband and wife conveying lands held by them by entireties to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of this section. *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940).

A conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an estoppel when the requirements of the law are complied with in the execution thereof. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Land Bought with Wife's Money and Conveyed by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband of her personal property, and though thus conveyed at her request creates a resulting trust in the lands in her favor. *Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918).

Wife's Guaranty of Husband's Trade Acceptances.—This section has no application to wife's guaranty of payment of her husband's trade acceptances. *Arcady Farms Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E.2d 413 (1955).

Conveyance from Mother to Daughter and Daughter's Husband.—A mother, for the purpose of dividing her lands between her four children, executed deeds convey-

ing separate tracts to each respectively, and in the deed to her daughter made the conveyance to her daughter and the daughter's husband. It was held that the daughter had no interest in the land prior to the conveyance or right to determine the disposition the parent should make of it by deed or will, and therefore there was no conveyance of any interest in the land by the daughter to her husband, and this section was not applicable. *Edwards v. Batts*, 245 N.C. 693, 97 S.E.2d 101 (1957).

An agreement by husband and wife to pool their respective lands for division among their children is not an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with this section. *Coward v. Coward*, 216 N.C. 506, 5 S.E.2d 537 (1939).

Agreement to Hold in Trust Land Conveyed to Wife by Third Party.—A married woman may enter into a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit or for their joint benefit. Such an agreement would not involve her separate estate; consequently the contract is not required to be executed in the manner set forth in this section. *Bass v. Bass*, 229 N.C. 171, 48 S.E.2d 48 (1948). See *Williams v. Williams*, 231 N.C. 33, 56 S.E.2d 20 (1949).

Conveyance of Wife's Land to Third Party in Trust for Husband.—The law will not permit the salutary object of this section to protect married women to be circumvented by indirection, and a wife may not effectually convey her real estate to a third person to be held in trust by him for the husband or to be conveyed by him to the husband unless the examining or certifying officer incorporates in his certificate his conclusions that the conveyance is not "unreasonable or injurious to the wife." *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948). See *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925); *Garner v. Horner*, 191 N.C. 539, 132 S.E. 290 (1926).

Conveyance to Third Party Who Conveys to Husband.—Where husband and wife conveyed wife's property to a third party, the mere fact that on the following day the property was conveyed to the husband and the consideration recited in each deed was the same was not sufficient to conclusively establish that the third party was a mere means to accomplish an illegal purpose. *Stokes v. Smith*, 246 N.C. 694, 100 S.E.2d 85 (1957).

Appointment of Husband as Agent to Settle Wife's Debts.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of this section is not necessary. *Stout v. Perry*, 152 N.C. 312, 67 S.E. 757 (1910).

Notes for Purchase Price of Wife's Land Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction, to secure notes given in part payment of the purchase price, payable to herself and her husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of this section. *Kilpatrick v. Kilpatrick*, 176 N.C. 182, 96 S. E. 988 (1918).

Contract Creating Business Partnership between Husband and Wife.—Husband and wife may enter into a contract creating a business partnership between them under § 52-2, but where the wife's separate estate is involved as a part of the partnership property, the provisions of this section must be observed. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E.2d 243 (1948).

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformly held that the deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to the deed the certificate of the probate officer as required by statute. *Caldwell v. Blount*, 193 N.C. 560, 137 S.E. 578 (1927).

Must Show Deed Not Unreasonable or Injurious.—A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with this section, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable and injurious to her. *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940).

No deed from a wife to her husband, conveying her land to him, is valid, unless the certifying officer shall state in his certificate his conclusions that the deed is not unreasonable or injurious to her. The statute requires that both conclusions, to wit, that the deed is reasonable and that

it is not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. *Caldwell v. Blount*, 193 N.C. 560, 137 S.E. 578 (1927).

Notwithstanding that a wife is represented by counsel, this section requires the officer before whom she acknowledges a contract of separation or a deed to her husband to include in his certificate "his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife." *Joyner v. Joyner*, 264 N.C. 27, 140 S.E.2d 714 (1965).

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925).

Where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of this section, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Effect of Properly Executed Separation Agreement on Defectively Acknowledged Deed.—A defective acknowledgment of a deed conveying the wife's interest in land to her husband is not cured by a prior deed of separation properly executed. *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940).

Where the agreement for the execution of a quitclaim deed from a wife to her husband is an integral part of their separation agreement, the deed may not be considered a separate and distinct transaction. The wife's obligation to execute the deed was necessarily considered by the justice of the peace before he executed the certificate, required by this section, attached to said separation agreement. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963), distinguishing *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940).

Testimony of Wife and Probate Officer.—Where the defendant alleged that certain of the requirements of this section were observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time was competent in rebuttal of the defendant's evidence, if he introduced any, and immaterial if he did not do so. *Anderson v. Anderson*, 177 N.C. 401, 99 S.E. 106 (1919).

Certificate Conclusively Presumed to Be True.—This section only requires that the officer taking the probate of a deed to lands

from a wife to her husband shall state his conclusions that the contract or deed is not unreasonable or injurious to her, and it will be conclusively presumed that it was upon sufficient evidence; where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud as other judgments may be" so attacked. *Frisbee v. Cole*, 179 N.C. 469, 102 S.E. 890 (1920).

In the acknowledgment and execution of contracts releasing the right to support, the certificate of the officer is made by this section conclusive of the facts therein stated, but may be impeached for fraud as other judgments may be. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E.2d 235 (1962).

Evidence is not admissible to show that the facts stated in the certificate are not true. *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925).

IV. EFFECT OF NONCOMPLIANCE.

Noncompliance Renders Deed Void.—The failure on the part of the probate officer to observe the requirements of the statute renders a deed absolutely void. *Wallin v. Rice*, 170 N.C. 417, 89 S.E. 239 (1915); *Foster v. Williams*, 182 N.C. 632, 109 S.E. 834 (1921); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925); *Barbee v. Bumpass*, 191 N.C. 521, 132 S.E. 275 (1926); *Garner v. Horner*, 191 N.C. 539, 132 S.E. 290 (1926); *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955); *Davis v. Vaughn*, 243 N.C. 486, 91 S.E.2d 165 (1956).

A deed not executed pursuant to the requirements of this section was a nullity. *Walston v. Atlantic Christian College*, 258 N.C. 130, 128 S.E.2d 134 (1962).

An attempted conveyance by a wife to the husband, directly or indirectly, without the private examination and certificate as required by this section, is absolutely void. *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963).

The absence of such conclusions and findings as are required by this section renders any estate or trust attempted to be set up in favor of the husband void. *Pilkington v. West*, 246 N.C. 575, 99 S.E.2d 798 (1957).

A conveyance of her land by a wife to her husband is void if the officer taking the acknowledgment of the wife fails to state in his certificate his conclusions that the conveyance is not unreasonable or in-

injurious to her, as required by this section. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948). See also *Farmers Bank v. McCullers*, 201 N.C. 440, 160 S.E. 494 (1931).

The deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in *Singleton v. Cherry*, 168 N.C. 402, 84 S.E. 698 (1915), by the unanimous opinion of the court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife. *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Oral declarations of a wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with this section. *Shermer v. Dobbins*, 176 N.C. 547, 97 S.E. 510 (1918).

Curative Effect of § 52-8.—Section 52-8 purports to cure the execution of a trust agreement not acknowledged as required by this section. *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963).

Conveyance by Wife to Third Person to Reconvey Estate by Entireties. — Where the parties agree that the wife should convey her separate lands to a third person who should reconvey to the husband and wife for the purpose of creating an estate by the entireties, the deeds executed to effectuate the agreement are void (now voidable) when they contain no finding that the conveyance is not unreasonable or injurious to the wife as required by this section, since the statutory requisites for a conveyance by the wife to the husband may not be circumvented either directly or indirectly. *Brinson v. Kirby*, 251 N.C. 73, 110 S.E.2d 482 (1959).

Contract Void ab Initio. — A contract between husband and wife, which must be executed in the manner and form required by this section, is void ab initio if the statutory requirements are not observed. *Bolin v. Bolin*, 246 N.C. 666, 99 S.E.2d 920 (1957).

Partnership Agreement. — A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, the contract is void and un-

enforceable unless executed in accordance with this section. *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E.2d 418 (1945).

A separation agreement not executed in the manner required by this section and § 52-10 was void ab initio, and where execution of such agreement appeared from pleadings in a husband's action for divorce on the ground of separation, allegations of the wife's answer must be weighed in the light of this fact. *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945); *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

A contract between husband and wife, which does not purport to divest the wife of dower or the husband of curtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in effect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by this section, and, not being so executed, the same is void as to the wife and also as to the husband. *Daughtry v. Daughtry*, 225 N.C. 358, 34 S.E.2d 435 (1945). As to abolition of dower and curtesy and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

The wife may not be punished for contempt when she refuses to abide by an agreement which is not approved as required by this section and is void under the statute of frauds. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Void Trust Agreement Cured by Incorporation into Reciprocal Wills. — Where husband and wife executed a trust agreement; and on the same day executed reciprocal wills devising and bequeathing the property of each respectively to the trustee to be disposed of as provided in the trust agreement, it was held that the wills incorporated the trust agreement by reference so that the trust agreement took effect as a part of each will respectively, even though the trust agreement itself was void because not executed in conformity with this section. *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963).

Defective Paper Good as Color of Title. — A paper-writing void for failure of compliance with this section is good as color of title. *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925).

If a deed not complying with this section is not color of title, it is at least some evidence, under the ancient document rule,

to be submitted to the jury on the question of adverse possession for 20 or 30 years. *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 184 S.E. 804 (1936).

When Husband's Possession under Void Deed Becomes Adverse. — It seems well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. And this is true though the husband holds a deed to the land executed by his wife to him but which is void for failure of the certificate required by this section. The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. *Kornegay v. Price*, 178 N.C. 441, 100 S.E. 883 (1919). See also *Norwood v. Totten*, 166 N.C. 648, 82 S.E. 951 (1914).

Estoppel of Wife or Her Heirs.—Where a husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of this section with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. *Capps v. Massey*, 199 N.C. 196, 154 S.E. 52 (1930).

The land in question was held by tenants in common. The husband of one of

the tenants bought the interest of another tenant, and thereafter the husband and the tenants entered into a parol agreement, and pursuant thereto deeds were exchanged between each of the tenants and the husband to effect a partition, but in the deed to the husband, signed by his wife as one of the tenants, the wife's privy examination was not taken and the certificate of the clerk was not executed as required by this section. Thereafter, the wife, prior to the effective date of the Martin Act (§ 52-2), conveyed the share allotted to her in the partition. It was held that upon the death of the wife, her husband surviving her, her inchoate dower in the share allotted to him was terminated, and even conceding that her joinder in the partition deed to him was inoperative under this section, her heirs would be estopped under the doctrine of estoppel by laches as existing prior to the Martin Act, from setting up any interest in the share allotted to him, since her valid conveyance of the share allotted to her prevented the parties from being placed in statu quo. *Martin v. Bundy*, 212 N.C. 437, 193 S.E. 831 (1937).

Estoppel of Husband or His Heirs. — Where a husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by this section, the void deed did not estop the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce. *Fisher v. Fisher*, 218 N.C. 42, 9 S.E.2d 493 (1940).

§ 52-7. Validation of certificates of notaries public as to contracts or conveyances between husband and wife.—Any contract between husband and wife coming within the provisions of G.S. 52-6, executed prior to the first day of January, 1955, acknowledged before a notary public and containing a certificate of the notary public of his conclusions and findings of fact that such conveyance is not unreasonable or injurious to the wife, is hereby in all respects validated and confirmed, to the same extent as though said certifying officer were one of the officers named in G.S. 52-6. (1955, c. 380; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note. — Former § 52-7 prohibited conveyance or lease of wife's land by

husband without her consent. The provisions of present § 52-7 are almost identical to those of former § 52-12.1.

§ 52-8. Validation of contracts between husband and wife where wife is not privately examined.—Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between October 1, 1954, and June 20, 1963, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been sep-

arate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note. — Former § 52-8 related to the capacity of a married woman to make a will. The provisions of present § 52-8 are similar to those of former § 52-12.2.

This section is a curative statute. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Curative Effect of § 52-8. — See same catchline in note to § 52-6, analysis line IV.

§ 52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.—Whenever it appears that, since the execution of a contract between a husband and wife in which the certificate of acknowledgment thereof fails to comply with the requirements of G.S. 52-6, a valid decree of absolute divorce between said husband and wife has been rendered, no action shall be maintained by her or anyone claiming under her for the recovery of the possession of, or to establish title to any interest in any property described in such contract unless such action is commenced within seven (7) years after such decree of absolute divorce has become final or unless such action is commenced before May 1, 1958, whichever date is later. (1957, c. 1260; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note. — Provisions similar to former § 52-9 are now contained in present

§ 52-3. The provisions of present § 52-9 are almost identical to those of former § 52-12.3.

§ 52-10. Contracts between husband and wife generally; releases.—Contracts between husband and wife not forbidden by G.S. 52-6 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to G.S. 52-6, any married persons, may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C. S., s. 2516; 1959, c. 879, s. 12; 1965, s. 878, s. 1.)

Cross References.—See Editor's Note to § 52-1. See also § 52-6 and note thereto. As to abolition of dower and curtesy and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

Editor's Note. — Provisions similar to former § 52-10 are now contained in present § 52-4. The provisions of present § 52-10 are similar to those of former § 52-13.

Common Law. — At common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity it was always otherwise, and there many of their contracts with each other were recognized and enforced. *George v. High*, 85 N.C. 99 (1881).

Legislature Did Not Intend to Reduce Marriage to Commercial Basis.—While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a com-

mercial basis. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945).

What Contracts Included.—This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the contracts between the husband and the wife and third parties. *Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913).

Section Inapplicable to Right of Wife to Support. — This section relates to the release of an interest in property, but has no bearing whatever on the right of a wife to support. *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961).

Mutual Releases Do Not Bar Wife's Right to Temporary Alimony.—Mutual releases between husband and wife of their interests in each other's separate property do not bar the wife from making application for temporary alimony and attorney's fee in a subsequent suit for divorce. *Bailey v. Bailey*, 127 N.C. 474, 37 S.E. 502 (1900).

A release by a husband of his right of tenancy by the curtesy in his wife's lands

by properly executed contract with his wife is expressly authorized by this section with the added provision that such release may be pleaded in bar of any proceeding to recover the rights released. *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E.2d 680 (1951).

Antenuptial Agreement.—A woman in contemplation of marriage is expressly authorized by this section to release by valid contract her right of dower in the lands of intended husband. *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955).

In the absence of contrary provisions in an antenuptial agreement, or of special statutory provisions, a separation and reconciliation between husband and wife will not affect or extinguish property rights under such an agreement. *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955).

Separation Agreement.—A deed of separation executed by the husband and wife is not against the policy of this State, when properly made in accordance with § 52-6. *Archbell v. Archbell*, 158 N.C. 408, 74 S.E. 327 (1912).

The language of a separation agreement that the husband released "all rights" that he might have "in any es-

tate" of his wife at her death is sufficient to support the conclusion that a release of his right of tenancy by the curtesy was intended. The word "estate" as here used is comprehensive enough to include land. *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E.2d 680 (1951).

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. *George v. High*, 85 N.C. 99 (1881).

Rent Notes Given Wife by Husband Valid.—Where a husband occupied his wife's land for nine years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constitute a valid indebtedness on the part of the husband to his wife. *Battle v. Mayo*, 120 N.C. 413, 9 S.E. 384 (1897).

§ 52-10.1. **Separation agreements; execution by minors.**—Any married couple, both of whom are eighteen years of age or over, is hereby authorized to execute a separation agreement which shall be legal, valid, and binding in all respects as if they were both twenty-one years of age, provided, that if either the husband or the wife, or both, are under the age of twenty-one years, the separation agreement must be acknowledged by the husband before a clerk of the superior court and executed by the wife before a clerk of the superior court in conformity with G.S. 52-6. (1965, c. 803.)

Editor's Note.—The act inserting this section designated it as § 52-13.1 to follow former § 52-13 in article 1 of chapter 52 prior to the repeal and revision of that chapter by Session Laws 1965, c. 878. This

section has been redesignated herein as § 52-10.1, since the provisions of present § 52-10 are similar to those of former § 52-13.

§ 52-11. **Antenuptial contracts and torts.**—The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C. S., s. 2517; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note.—Former § 52-11 was repealed by Session Laws 1943, c. 543. The provisions of present § 52-11 are similar to those of former § 52-14.

Wife May Appoint Husband as Agent.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may

appoint an agent, and compliance with the requirements of § 52-6 is not necessary. *Stout v. Perry*, 152 N.C. 312, 67 S.E. 757 (1910).

Where prior to their marriage the wife incurs liability for negligent injury to the husband the subsequent marriage does not affect her liability. *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840 (1931).

§ 52-12. **Postnuptial crimes and torts.**—No married person shall be liable for damages accruing from any tort committed by his or her spouse, or for any costs or fines incurred in any criminal proceeding against such spouse. (1871-2, c. 193, s. 25; Code, s. 1833; Rev., s. 2105; C. S., s. 2518; 1921, c. 102; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's Note to § 52-1.

Editor's Note. — Provisions similar to former § 52-12 are now contained in present § 52-6. The provisions of present § 52-12 are similar to those of former § 52-15.

Common Law. — At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although husband and wife were living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone, and

if the husband was protected from responsibility the injured party would be without redress." *Roberts v. Lisenbee*, 86 N.C. 136 (1882).

Prior Law. — For cases decided under the former law, see *Roberts v. Lisenbee*, 86 N.C. 136 (1882); *Presnell v. Moore*, 120 N.C. 390, 27 S.E. 27 (1897); *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909); *Young v. Newsome*, 180 N.C. 315, 104 S.E. 660 (1920).

Applied in *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

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§ 52A-1. **Short title.**—This chapter may be cited as the “Uniform Reciprocal Enforcement of Support Act.” (1951, c. 317.)

Cross Reference.—As to special county attorneys and their duties with respect to proceedings under this chapter, see §§ 108-14.01 to 108-14.03.

Editor's Note.—For comment on this chapter, see 29 N.C.L. Rev. 423.

For note on conflict of laws, see 34 N. C.L. Rev. 126 (1955).

History of Uniform Act.—See *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

§ 52A-2. **Purposes.**—The purposes of this chapter are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto. (1951, c. 317.)

§ 52A-3. **Definitions.**—As used in this chapter unless the context requires otherwise.

- (1) “Court” means any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding, and when the context requires, means the court of any other state as defined in a substantially similar reciprocal law.
- (2) “Duty of support” includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise.
- (3) “Initiating state” means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced.
- (4) “Law” includes both common and statute law.
- (5) “Obligee” means any person to whom a duty of support is owed.
- (6) “Obligor” means any person owing a duty of support.
- (7) “Responding state” means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced.
- (8) “State” includes any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted. (1951, c. 317; 1955, c. 699, s. 1; c. 1035, s. 1; 1959, c. 1123, s. 1.)

§ **52A-4. Remedies additional to those now existing.**—The remedies herein provided are in addition to and not in substitution for any other remedies. (1951, c. 317.)

§ **52A-5. Obligor present in State is bound.**—Duties of support arising under the law of this State when applicable under G.S. 52A-8, bind the obligor, present in this State, regardless of the presence or residence of the obligee. (1951, c. 317; 1955, c. 699, s. 2.)

§ **52A-6. Interstate rendition.**—The Governor of this State

- (1) May demand from the governor of any other state the surrender of any person found in such other state who is charged in this State with the crime of failing to provide for the support of any person in this State and
- (2) May surrender on demand by the governor of any other state any person found in this State who is charged in such other state with the crime of failing to provide for the support of a person in such other state.

The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or the other state. (1951, c. 317.)

§ **52A-7. Relief from the above provisions.**—Any obligor contemplated by G.S. 52A-6, who submits to the jurisdiction of the court of such other state and complies with the court's order of support, shall be relieved of extradition for desertion or nonsupport entered in the courts of this State during the period of such compliance: Provided, however, that an obligor may not upon his ex parte petition avail himself of the provisions of this chapter. (1951, c. 317; 1955, c. 699, s. 3.)

§ **52A-8. What duties are applicable.**—Duties of support applicable under this chapter are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown. (1951, c. 317; 1955, c. 699, s. 4.)

§ **52A-8.1. Remedies of a county furnishing support.**—Whenever a county of this State furnishes support to an obligee, it has the same right to invoke the provisions hereof as the obligee to whom the support was furnished for the purpose of securing reimbursement for such support and of obtaining continuing support with the exception that the term obligee as used in this section shall not apply to children owing the duty of support to their parents. (1959, c. 1123, s. 4.)

§ **52A-9. How duties of support are enforced.**—All duties of support are enforceable by action irrespective of relationship between the obligor and obligee. Jurisdiction of all proceedings hereunder shall be vested in any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding. (1951, c. 317; 1955, c. 699, s. 5; c. 1035, s. 2½; 1959, c. 1123, s. 2.)

Jurisdiction of County Recorders' Courts. — Courts established pursuant to the authority given by § 7-218 now have jurisdiction to hear and determine complaints filed pursuant to this chapter. *State v. Lowe*, 254 N.C. 631, 119 S.E.2d 449 (1961).
Jurisdiction of Parties. — The Uniform Reciprocal Enforcement of Support Act

applies only where the obligee is present in the initiating state and the obligor is subject to the jurisdiction of the responding state. *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

In a proceeding under the Uniform Reciprocal Enforcement of Support Act, the court of the initiating state, by approval of the petition and the certification of the documents, enables petitioner to submit herself to the jurisdiction of responding state without the necessity of personal presence or employment of counsel, and the responding state acquires jurisdiction of the respondent through service of summons and notice. *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

Where Obligee Has Removed to a Third State at Time of Hearing.—Where, after filing petition under the Uniform Reciprocal Enforcement of Support Act of the initiating state, the obligee moves to another state and is a resident of such third state at the time of the hearing in North Carolina, the responding state, the North Carolina court has no jurisdiction to make an award for transmittal to the initiating

state for transmittal in turn to the petitioner in the third state, and judgment of nonsuit and dismissal should have been entered in the North Carolina court upon motion. *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

Children as Real Parties in Interest.—Petitioner, who was divorced from defendant in Arkansas, could not maintain an action for support of their children against defendant in North Carolina though action was initiated in Arkansas, since children, the real parties in interest, were not represented by either their guardian or by duly appointed next friend, as required by § 1-64. This result was not affected by a provision of the law of Arkansas that a petition might be brought in behalf of a minor obligee without appointment of guardian or next friend, since the rights of the parties are determinable in the court having jurisdiction of respondent, and the cause here must be so constituted as to conform to North Carolina law. *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

§ 52A-10. Contents of complaint for support.—Actions hereunder shall be commenced by the issuance of summons in the form required for actions for alimony without divorce by the court having jurisdiction. The complaint shall be verified and shall state the name and, so far as known to the plaintiff, the address and circumstances of the defendant and his dependents for whom support is sought and all other pertinent information. The plaintiff may include in or attach to the complaint any information which may help in locating or identifying the defendant including, but without limitation by enumeration, a photograph of the defendant, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, or Social Security number. (1951, c. 317; 1955, c. 699, s. 6.)

§ 52A-10.1. Official to represent plaintiff.—It shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the plaintiff in proceedings under this chapter. (1955, c. 699, s. 6; 1959, c. 1123, s. 3.)

§ 52A-10.2. Complaint by minor.—A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as next friend. (1955, c. 699, s. 6.)

§ 52A-11. Duty of court of this State as initiating state.—If the court of this State acting as initiating state and from the return on the summons and the verified complaint the clerk of the court finds that the defendant is not to be found in this State, that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support, and that a court of the responding state may obtain jurisdiction of the defendant or his property, it shall so certify and shall cause three copies of (i) the complaint, (ii) its certificate, and (iii) this chapter, to be transmitted to the court or other designated agency in the responding state. If the name and address of such court is unknown and the responding state has an information agency, the court of this State shall cause

such copies to be transmitted to the state information agency or other proper official of the responding state, with a request that it forward them to the proper court, and that the court of the responding state acknowledge their receipt to the court of this State. (1951, c. 317; 1955, c. 699, s. 7; c. 1035, s. 2.)

§ 52A-11.1. **Fees and costs.**—A court of this State acting as a responding state may in its discretion direct that any part of all fees and costs incurred in this State, including without limitation by enumeration, fees for filing, service of process, and seizure of property, shall be paid by the county, but when an order of support is entered against a defendant, he shall be taxed with the costs. The clerk of court, when this State is the initiating state, may upon a certification by the county director of public welfare of the indigency of the plaintiff, waive all fees and costs incurred in filing a petition hereunder. (1955, c. 699, s. 7; c. 1035, s. 2; 1961, c. 186.)

§ 52A-12. **Duty of the court of this State as responding state.**—When the court of this State, acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall

- (1) Docket the cause,
- (2) Notify the prosecutor of criminal actions for the state in said court as described in G.S. 52A-10.1,
- (3) Set a time and a place for a hearing, and
- (4) Take such action as is necessary in accordance with the laws of this State to obtain jurisdiction.

The procedure for serving notice and summons on the defendant under this chapter shall be the same as in actions for alimony without divorce as provided by G.S. 50-16. (1951, c. 317; 1955, c. 699, s. 8.)

Responding State Determines Substantive Rights of Parties.—Under this chapter the initiating state has no jurisdiction to make any determination affecting the substantive rights of the parties, and therefore, a conclusion by a court of North Carolina, the responding state, that the

duty of respondent to support the children in question had already been found to exist by a court of competent jurisdiction of the initiating state, was erroneous. *Mahan v. Read*, 240 N.C. 641, 83 S.E.2d 706 (1954).

§ 52A-12.1. **Further duty of responding court.** — If a court of this State, acting as a responding state, is unable to obtain jurisdiction of the defendant or his property, the court shall communicate this fact to the court in the initiating state, and if information is obtained by the court of the defendant's whereabouts in another part of this State, the court shall forward the papers to such other court of this State as may obtain jurisdiction of the defendant. (1955, c. 699, s. 8.)

§ 52A-13. **Order of support.**—If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order. (1951, c. 317.)

§ 52A-14. **Responding state to transmit copies to initiating state.**—The court of this State when acting as a responding state shall cause to be transmitted to the court of the initiating state a copy of all orders of support or for reimbursement therefor. (1951, c. 317.)

§ 52A-15. **Additional powers of court.**—In addition to the foregoing powers, the court of this State when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular:

- (1) To require the defendant to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court

may deem proper to assure payment of any amount required to be paid by the defendant.

- (2) To require the defendant to make payments at specified intervals to the clerk of the court and to report personally to such clerk at such times as may be deemed necessary.
- (3) To punish the defendant who shall violate any order of the court to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court. (1951, c. 317; 1955, c. 699, s. 9.)

§ 52A-16. Additional duties of the court of this State when acting as a responding state.—The court of this State when acting as a responding state shall have the following duties which may be carried out through the clerk of the court:

- (1) Upon the receipt of a payment made by the defendant pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state, and
- (2) Upon request to furnish to the court of the initiating state a certified statement of all payments made by the defendant. (1951, c. 317.)

§ 52A-17. Additional duty of the court of this State when acting as an initiating state.—The court of this State when acting as an initiating state shall have the duty which may be carried out through the clerk of the court to receive and disburse forthwith all payments made by the defendant or transmitted by the court of the responding state. (1951, c. 317.)

§ 52A-18. Evidence of husband and wife.—Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this chapter. Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage. (1951, c. 317.)

§ 52A-19. Rules of evidence.—In any hearing under this law, wherein the defendant has been served with notice and summons as herein provided, the verified complaint of the plaintiff shall be admissible as prima facie evidence of the facts therein stated in any court of this State having jurisdiction to conduct hearings pursuant to this chapter. In those cases where the defendant fails to appear after service of notice and summons, the court may enter a reasonable order for support. Upon proper motion of the defendant, the reasonableness of the order may be reconsidered by the court, and upon a showing by the defendant that the order is not within his financial ability to pay, is beyond his earning capacity, or for other good cause shown, such order shall be subject to modification from time to time. The order fixed by the court shall also be subject to modification from time to time upon motion of the plaintiff. (1951, c. 317; 1955, c. 699, s. 10.)

§ 52A-20. Interpretation of chapter.—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states having a substantially similar act. (1955, c. 699, s. 12.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 15, 1966

I, Thomas Wade Bruton, Attorney General of North Carolina, do hereby certify that the foregoing recompileation 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.

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