THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Legislative Session of 1969

Prepared under the Supervision of the Department of Justice of the State of North Carolina

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

Under the Direction of

D. W. Parrish, Jr., S. G. Alrich and W. M. Willson

Volume 1A

1969 Replacement Volume

The Michie Company, Law Publishers
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Scope of Volume

Statutes:

Full text of Chapters 1 through 1B of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1969 heretofore contained in 1953 Recompiled Volume 1A of the General Statutes of North Carolina and the 1969 Cumulative Supplement thereto.

Annotations:

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

North Carolina Reports volumes 1-275 (p. 341).
North Carolina Court of Appeals Reports volumes 1-5 (p. 227).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-410 (p. 448).
Federal Supplement volumes 1-298 (p. 1200).
United States Reports volumes 1-394 (p. 575).
Supreme Court Reporter volumes 1-89 (p. 2151).
North Carolina Law Review volumes 1-47 (p. 731).
Wake Forest Intramural Law Review volumes 2-5.

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

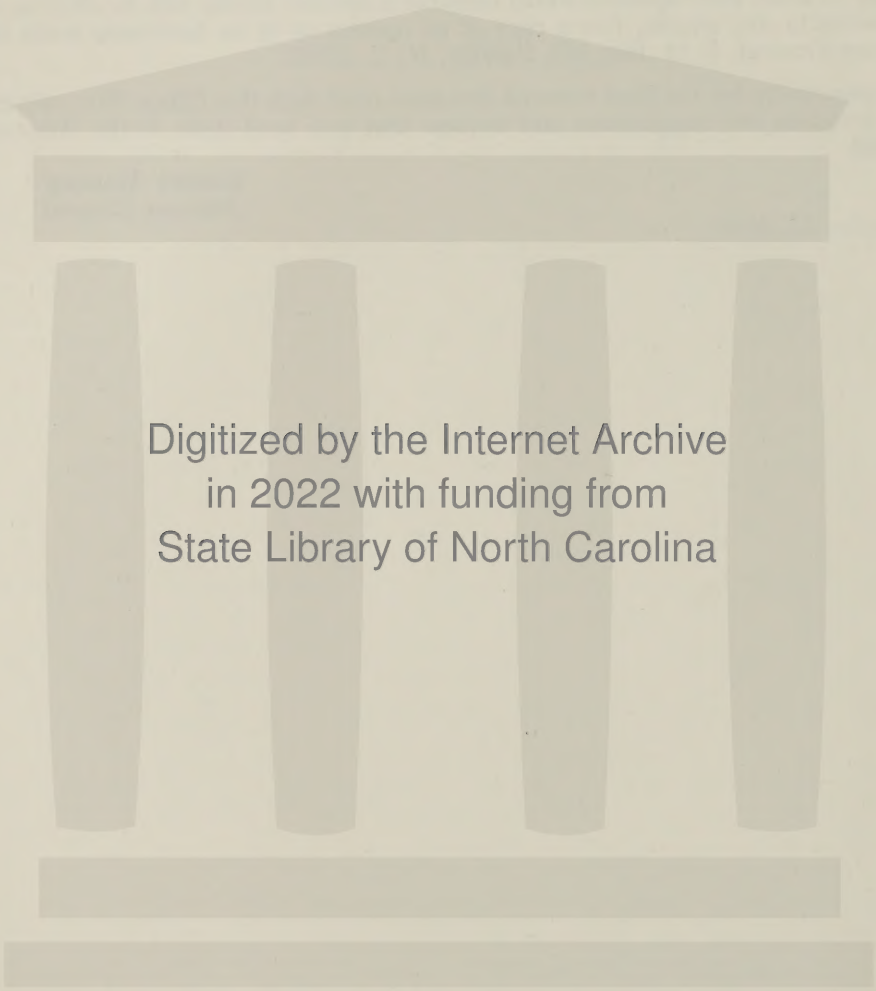
Volume 1A, previously recompiled in 1953, accumulated a substantial supplement including complete revision of the civil procedure code and enactment of the Rules of Civil Procedure. The volume is being reissued to incorporate the amendments in the main text.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N. C. 27602.

Responsibility for the final editorial decisions rests with this Office. We welcome your criticism and suggestions and request that you send them to the Attorney General.

ROBERT MORGAN
Attorney General

December 15, 1969.



Original Preface

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

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

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

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

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

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

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

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

In keeping with the procedure in prior revisions, the General Assembly of 1941 (Public Laws, Chapter 35) authorized the preparation and printing of a Legis-

lative Edition of the proposed code for submission to the General Assembly of 1943.

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

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

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

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

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

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

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

VOLUME AND CHAPTER ARRANGEMENT

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and additional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

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

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

NUMBERING SYSTEM

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

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

LOCAL LAWS

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

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

A great deal of attention has been devoted to the index in a section-by-section analysis, designed (1) to delete inapplicable index references, (2) to correct in-

accurate index references, and (3) to add new index references where sections or portions of sections are found to be indexed inadequately or not at all. At the same time, index lines have been repeated as often as the limitations of space and utility permit, to the end that "Cross References" or "See" references (some of which are absolutely necessary in a code index) may be reduced to a minimum, and where they cannot be entirely eliminated, the inclusive section numbers have been listed along with the Cross Reference.

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

ANNOTATIONS

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

ADDITIONAL FEATURES

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

THE PUBLISHER'S EDITORIAL STAFF

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

THE CODIFICATION STAFF

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

When W. J. Adams, Jr., was named Assistant Attorney General in October,

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

CONTINUOUS REVISION

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

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

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

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

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

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

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

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

SUPPLEMENTS

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

HARRY MCMULLAN,
Attorney General.

August 15, 1943

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SUBCHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS.

ARTICLE 1.

Definitions.

§ 1-1. Remedies.—Remedies in the courts of justice are divided into—

(1) Actions.

(2) Special proceedings. (C. C. P., s. 1; Code, s. 125; Rev., s. 346; C. S., s. 391.)

Admission of Patient to Hospital for Insane. — A proceeding in accordance with the provisions of § 122-36 et seq., in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding this section. In re Cook, 218 N.C. 384, 11 S.E.2d 142 (1940).

§ 1-2. Actions.—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (C. C. P., s. 2; 1868-9, c. 277, s. 2; Code, s. 126; Rev., s. 347; C. S., s. 392.)

An inquisition of lunacy is not a civil action as defined in this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Quoted in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958).

§ 1-3. Special proceedings.—Every other remedy is a special proceeding. (C. C. P., s. 3; Code, s. 127; Rev., s. 348; C. S., s. 393.)

Cross References. — As to special proceedings generally, see § 1-393. As to special proceeding by creditor against personal representative, see § 28-122. As to special proceeding for collection of legacies and distributive shares, see § 28-159. As to special proceeding for partition of real estate, see § 46-1. As to special proceeding in allotment of year's allowance, see § 30-27 et seq.

Tests to Determine Special Proceedings. — Any proceedings which prior to the Code of Civil Procedure might have been commenced by petition, or motion on notice, such for instance as proceedings for dower, partition and year's allowance, are special proceedings under this section. Tate v. Powe, 64 N.C. 644 (1870); Felton v. Elliott, 66 N.C. 195 (1872).

Under this test, proceedings in bastardy (State v. McIntosh, 64 N.C. 607 (1870)), or a petition by an administrator to sell lands for the payments of debts (Hyman v. Jarnigan, 65 N.C. 96 (1871); Badger v. Jones, 66 N.C. 305 (1872)), classify as special proceedings.

In Woodley v. Gilliam, 64 N.C. 649 (1870), Mr. Justice Rodman expressed the opinion that a better test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. He stated, however, that in practice the results of applying the two tests would almost always coincide, although he thought the one suggested by him the most convenient. And the court held in Sumner v. Miller, 64 N.C. 688 (1870), that proceedings to obtain damages for injuries to land caused by the erection of a mill are special proceedings because made so by the statute creating a statutory remedy.

Under either rule an action to recover the possession of land, as, for example, ejectment, is not a special proceeding. Woodley v. Gilliam, 64 N.C. 649 (1870). Nor is mandamus to try title to an office. State ex rel. Howerton v. Tate, 66 N.C. 231 (1872).

An inquisition of lunacy is not a special proceeding under this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Quoted in N. Jacobi Hdwe. Co. v. Jones Cotton Co., 188 N.C. 442, 124 S.E. 756 (1924).

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958).

§ 1-4. Kinds of actions.—Actions are of two kinds—

(1) Civil.

(2) Criminal. (C. C. P., s. 4; Code, s. 128; Rev., s. 349; C. S., s. 394.)

§ 1-5. Criminal action.—A criminal action is—

(1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof.

(2) An action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property. (Const., art. 4, s. 1; C. C. P., s. 5; Code, s. 129; Rev., s. 350; C. S., s. 395.)

Editor's Note.—This section worked a significant change in the law of the State with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the State were not necessarily criminal suits as distinguished from civil suits—the true test being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the State, it was a civil suit." State v. Pate, 44 N.C. 244 (1853). Hence a warrant to keep the peace was a civil action though brought in the name of the State. See State v. Locust, 63 N.C. 574 (1869). But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the State at the instance of an individual to prevent an apprehended crime against the person or property of the individual; in either case the action being a criminal proceeding. See State v. Oates, 88 N.C. 668 (1883); State v. Lyon, 93 N.C. 575 (1885).

Private Individuals as Prosecutors.—No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. State v. Lupton, 63 N.C. 483 (1869).

Title of Case.—The terms "people of the State" as found in N.C. Const., Art. IV, § 1, and "the State" as used in this section mean substantially the same. Thus a criminal case entitled "People v. A. B., criminal action" or "State v. A. B., indictment" as was used prior to the present Constitution, are either correct forms. Larkins v. Murphy, 68 N.C. 381 (1873).

Remedy against Alleged Unconstitutional Discriminations. — By prosecuting under this section persons doing acts allowed by a statute, a remedy against alleged unconstitutional discrimination of a statute is afforded. Newman v. Watkins, 208 N.C. 675, 182 S.E. 453 (1935).

Adequate Remedy.—Where the alleged acts of the defendant are criminal, the plaintiff is not entitled to equitable relief in the nature of an injunction but is furnished an adequate remedy by this section. Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

An inquisition of lunacy is not a criminal action within the meaning of this section. In re Dunn, 239 N.C. 378, 78 S.E.2d 921 (1954).

Cited in State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

§ 1-6. Civil action.—Every other is a civil action. (C. C. P., s. 6; Code, s. 130; Rev., s. 351; C. S., s. 396.)

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958).

§ 1-7. When court means clerk.—In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. (C. C. P., s. 9; Code, s. 132; Rev., s. 352; C. S., s. 397.)

Clerks Act for Court. — Although the terms "court" and "superior court" as used in this section mean the clerk of the court as indicated, the clerk is given no separate jurisdiction apart from the court itself. Insofar as the civil procedure is concerned, at least, the clerk acts as and for the court in the specified instances. His acts are performed by the court through him and stand as that of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole procedure is in the court and has its sanction. Jones v. Desern, 94 N.C. 32 (1886). See 1 N.C.L. Rev. 15.

Power of Clerk as to Civil Actions.—It was pointed out in Brittain v. Mull, 91 N.C. 498 (1884), that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp Act in 1919 the rule is otherwise. See 1 N.C.L. Rev. 199. So the clerk represents and is the court and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed the

clerk implies the court in cases like this. Tillett v. Aydlett, 90 N.C. 551 (1884).

And as to Special Proceedings.—But in special proceedings the clerk acts for the court in superintending the pleadings, practice, and procedure, and in making all proper orders and judgments therein, unless his action is revised or modified by the judge upon appeal. Jones v. Desern, 94 N.C. 32 (1886); Adams v. Howards, 110 N.C. 15, 14 S.E. 648 (1892).

It has never been doubted that it was competent for the legislature to confer such jurisdiction upon the clerk. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

The words "superior court" as used in N.C. Const., Art. IV, § 22 do not mean the court of the clerk. McAdoo v. Benbow, 63 N.C. 461 (1869).

Since the statute providing that a summary remedy against a railroad for damages caused by construction of the road over the land in favor of persons owning land may be begun either in or out of term by service of petition upon the defendant, it is proper for the judge to appoint commissioners as provided, if begun in term, but where the proceeding is begun in vacation the clerk may act for the court in the manner explained in these annotations. Click v. Western N.C.R.R., 98 N.C. 390, 4 S.E. 183 (1887).

The jurisdiction under § 26-3 is conferred upon the clerk by virtue of this section. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

This section gives the clerk power to enter a judgment for the recovery of money. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

Application of Section.—This section was cited in Pelletier v. Saunders, 67 N.C. 261 (1872), as authority for the proposition that the term "superior court" as used in § 28-81 means clerk of the superior court.

Term Clerk Impliedly Read into Former § 1-461.—In view of this section it was held that when the judgment in garnishment proceedings under former § 1-461 was entered up, the execution was awarded as a matter of course and could be issued by the clerk without application to the judge. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Article 2.

General Provisions.

§ 1-8. Remedies not merged.—Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (C. C. P., s. 7; Code, s. 131; Rev., s. 353; C. S., s. 398.)

Summons Served upon Person in Jail.—In view of this section it was proper to serve a summons and order of arrest upon the defendant while confined in jail upon failure to give appearance bond to answer for a secret criminal assault. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Cited in Scales v. Wachovia Bank & Trust Co., 195 N.C. 772, 143 S.E. 868 (1928).

§ 1-9: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 2 of the Rules of Civil Procedure (§ 1A-1).

§ 1-10. Plaintiff and defendant.—In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (C. C. P., s. 13; Code, s. 134; Rev., s. 355; C. S., s. 400.)

§ 1-11. How party may appear.—A party may appear either in person or by attorney in actions or proceedings in which he is interested. (C. C. P., s. 423; Code, s. 109; Rev., s. 356; C. S., s. 401.)

Cannot Appear in Person and by Counsel at Same Time.—This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be permitted ex gratia to do so. Abernethy v. Burns, 206 N.C. 370, 173 S.E. 899 (1934). See McClamroch v. Colonial Ice Co., 217 N.C. 106, 6 S.E.2d 850 (1940).

This section simply means that a litigant may not appear both in propria persona and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel. Thus, a litigant who elects to employ counsel at any stage of proceedings may not be deprived of his

services for the reason he has theretofore appeared in person and it is error for the court to undertake so to do. New Hanover County v. Sidbury, 225 N.C. 679, 36 S.E.2d 242 (1945).

A party has the right to appear in propria persona or by counsel but this right is alternative. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

In Criminal Case.—A party is entitled to appear in propria persona, and when a defendant insists upon this right notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence. State v. Pritchard, 227 N.C. 168, 41 S.E.2d 287 (1947).

Counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

The constitutional right to counsel does not justify forcing counsel upon an accused who wants none. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

Stated in Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Cited in County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934); In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948).

§ **1-12**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-13. Jurisdiction of clerk.**—The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular term is expressly referred to. (C. C. P., s. 108; Code, s. 251; Rev., s. 358; C. S., s. 403.)

Editor's Note.—This section was passed in 1868 as a part of the Code of Civil Procedure. It was a part of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the civil war, the people were not desirous of a more speedy system of procedure for the reason that in actions for debts the unfortunate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act" which suspended the operation of certain portions of the Code of Civil Procedure temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise provided. The suspension act became chapter 18 of Battle's revisal, was incorporated in the Code of 1883 as chapter 10 of the Code of Civil Procedure, was carried forward in subsequent revisals (See Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887)), and remained in force until 1919 when the legislature passed what is known as the "Crisp Act" restoring the suspended provisions of the Code of Civil Procedure. See Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920); 1 N.C.L. Rev. 199.

The suspension act was chiefly directed at the portions of the Code of Civil Procedure which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and procedure should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. Brittain v. Mull, 91 N.C. 498 (1884); Jones v. Desern, 94 N.C. 32 (1886); Warden v. McKinnon, 94 N.C. 378 (1886).

With the passage of the Crisp Act this section is in full force and effect. See Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920).

Constitutionality of Suspension Act. — The constitutionality of the suspension act was attacked in McAdoo v. Benbow, 63 N.C. 461 (1869), upon the ground that the Constitution required the clerk to hear and decide all questions of practice and procedure, but it was held that the Constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became to be uni-

versally recognized as the law until the Crisp Act of 1919. Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887).

Nature of Clerk's Power.—In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. Brittain v. Mull, 91 N.C. 498 (1884); Maxwell v. Blair, 95 N.C. 317 (1886); Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

As was indicated in McAdoo v. Benbow, 63 N.C. 461 (1869), the jurisdiction is conferred upon the court, and not upon the clerk. He is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and judge, but they both function as officials of the same court exercising but one jurisdiction. Jones v. Desern, 94 N.C. 32 (1886).

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not derivative but the judge hears the matter de novo. Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941).

Regularly, in special proceedings (since the act of 1919 in all proceedings) the pleadings should be made up and perfected by the clerk, acting as and for the court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. Brittain v. Mull, 91 N.C. 498 (1884); Wharton v. Wilkerson, 92 N.C. 407 (1885); Loftin v. Rouse, 94 N.C. 508 (1886).

The court in term, should not do more than to direct the clerk to perfect the pleadings and to allow or disallow amendment according to law. If the clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the judge would become that of the court. It was the duty of the clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above. Loftin v. Rouse, 94 N.C. 508 (1886).

It was not the duty of the judge in term, after the issues were tried—there being no question of law to be decided—to direct the clerk what to do, or to make an order remanding the case to the clerk. The latter ought to have proceeded without an order, and heard and determined the case upon its merits, subject to the right of appeal to the judge. Brittain v. Mull, 94 N.C. 595 (1886).

Power as to Equitable Relief.—The Code of Civil Procedure does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the answer as a defense and then the clerk has power to hear all questions herein permitted. See Bragg v. Lyon, 93 N.C. 151 (1885); Vance v. Vance, 118 N.C. 864, 24 S.E. 768 (1896).

Effect of Failure of Clerk to Decide Questions.—The Supreme Court is not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury, because they have not been decided by the clerk, acting for the court, and, upon appeal, by the judge. It is the duty of the clerk, acting for the court, to decide whatever question may be presented, and to make all proper orders. Brittain v. Mull, 94 N.C. 595 (1886).

Amendments after Joinder of Issues.—Where, in special proceedings, the pleadings are made up before the clerk, and upon joinder of issues are transferred to the court in term, the judge has power to allow amendments, or he may stay the trial and remand the papers to the clerk, in order that he may consider a motion to amend. Loftin v. Rouse, 94 N.C. 508 (1886).

Remanding Order Interlocutory. — An order remanding the papers to the clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right, and cannot be appealed from. Loftin v. Rouse, 94 N.C. 508 (1886).

Application to Special Proceedings.—See the Editor's note to this section. Proceedings to obtain partition, dower and the like are special proceedings, Jones v. Desern, 94 N.C. 32 (1886). So is a proceeding by creditors to compel an administrator to an account and payment of the debts of the estate. Brittain v. Mull, 91 N.C. 498 (1884); Warden v. McKinnon, 94 N.C. 378 (1886).

And the granting of a warrant of attachment was a special proceeding. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ **1-14**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-15. Statute runs from accrual of action.**—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. (C. C. P., s. 17; Code, s. 138; Rev., s. 360; C. S., s. 405; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment deleted the former last sentence, which read "The objection that the action was not commenced within the time limited can only be taken by answer."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Rule 12 of the Rules of Civil Procedure (§ 1A-1) provides how defenses and objections may be raised.

For case law survey as to replies and pleadings of statute of limitations, see 45 N.C.L. Rev. 829 (1967).

Section Not Statute of Presumptions.—Now we have no statute of presumptions. This section prescribes a statute of limitations only. George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

This section 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. In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933).

Necessity of Cause of Action or Claim.—If there is no claim or cause of action the statute will not run. This principle is recognized by this section and there is nothing in § 1-49 which conflicts with it. Miller v. Shoaf, 110 N.C. 319, 14 S.E. 800 (1892).

When the statute starts to run, it continues until stopped by appropriate judicial process. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In general a cause of action accrues as soon as the right to institute and maintain a suit arises. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

A cause of action generally accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Cause of Action for Negligent Injury Ordinarily Accrues When Wrong Committed.—Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong is committed giving rise to the right to suit, even though the damages at that time be nominal and without regard to the time when consequential injuries are discovered or should have been discovered. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Necessity of Pleading Statute.—It is familiar learning that the statute of limitations is not available unless pleaded, Guthrie v. Bacon, 107 N.C. 337, 12 S.E. 204 (1890); Randolph v. Randolph, 107 N.C. 506, 12 S.E. 374 (1890); and this is required by the statute. Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891); King v. Powell, 127 N.C. 10, 37 S.E. 62 (1900). But facts will suffice. Pipes v. North Carolina Mica Mineral & Lumber Co., 132 N.C. 612, 44 S.E. 114 (1903).

It is error for the judge to instruct the jury where the statute of limitations is not pleaded that the plaintiff cannot recover. Pegram v. Stoltz, 67 N.C. 144 (1872).

Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

A statute of limitations is not available as a defense or bar to an action unless pleaded, nor can it be raised, ordinarily, by motion to dismiss. Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Manner of Pleading. — It was unquestionably true under the former system,

where an equitable claim appeared upon the face of the bill to be barred by lapse of time, or the statute of limitations, that it might have been taken advantage of by demurrer, and that it need not be specially pleaded, but the statute now requires it to be pleaded, and no distinction is made in this respect between equitable and legal causes of action. Guthrie v. Bacon, 107 N.C. 337, 12 S.E. 204 (1890).

The statute of limitations cannot be pleaded in a demurrer, but must be taken advantage of only by answer, by express provision of the statute. In Bacon v. Berry, 85 N.C. 124 (1881), the defendant demurred because more than seven years elapsed since the rendition of the judgment when the suit was commenced. The court held that it was, in fact, a plea of the statute of limitations, which must be set up in the answer, it being an objection that can never be taken by demurrer, citing Green v. North Carolina R.R., 73 N.C. 524 (1875). See Kahnweiler v. Anderson, 78 N.C. 133 (1878); King v. Powell, 127 N.C. 10, 37 S.E. 62 (1900). If the facts are admitted, the court may pass on the question of the bar, as in Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915). It was held in Long v. Bank of Yanceyville, 81 N.C. 41 (1879), that even if the statutory bar is apparent on the face of the complaint, it could not be pleaded except by answer, and not by demurrer or motion to dismiss. The same was held in Oldham v. Rieger, 145 N.C. 254, 58 S.E. 1091 (1907), and the reason why such a thing cannot be done is fully stated, in addition to the positive requirement of the statute as the best of reasons, and a demurrer alleging that time had elapsed was in that case characterized as a "speaking demurrer." Nor could the bar of the statute be raised by a motion to dismiss. Oldham v. Rieger, supra; Moody v. Wike, 170 N.C. 541, 87 S.E. 350 (1915).

Under this section limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. Logan v. Griffith, 205 N.C. 580, 172 S.E. 348 (1934).

Statutes of limitation cannot be taken advantage of by demurrer but only by answer. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

The contention that an amendment constituting a new cause of action was filed after the bar of the statute of limitations was complete cannot be raised by demurrer or motion to strike, but can be presented only by answer. Stamey v. Rutherfordton Electric Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

Where petitioner alleged that the petitioner "in apt time and in proper manner, filed her dissent from said will," and the answer "denied" this allegation, the petitioner's allegation was a mere conclusion and respondent's general denial was not affirmative pleading. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Application to Possessory Titles. — The rule does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N.C. 116, 32 S.E. 404 (1899).

Accrual of Cause Illustrated.—The statute of limitations where a party dies pending action begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. Lynn v. Lowe, 88 N.C. 478 (1883).

Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. Falls v. McKnight, 14 N.C. 421 (1832).

The defendant administrator, according to his own admission assuming to act as plaintiff's agent in the collection and application of the rents, cannot plead the statute of limitations unless there was a demand and a refusal, and then only from the time thereof. Shuffler v. Turner, 111 N.C. 297, 16 S.E. 417 (1892).

A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. Hall v. Hood, 208 N.C. 59, 179 S.E. 27 (1935).

Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitations under this section and § 1-52. Lightner v. Raleigh, 206 N.C. 496, 174 S.E. 272 (1934).

Where plaintiff alleged that a truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise

of due care should have known of such defective condition, and failed to warn plaintiff thereof, plaintiff suffered injury and his rights were invaded immediately upon the sale and delivery of the truck-tractor to plaintiff, and a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

In an action instituted to recover damages resulting from dust and dirt injected into plaintiffs' house by a gas furnace and air conditioner purchased from defendant, plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look. It was held that plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs were not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to retain from suing. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

When Statute Begins to Run against Remainderman.—Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of land until after the expiration of the life estate. However, a remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. Walston v. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

When personal services are rendered with understanding that compensation is to be made in will of recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947).

Continuing or Recurring Damages.—When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

"Special Cases" Where Different Limitation Prescribed.—The only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute, G. S. 1-52. This "different limitation" relates only to actions grounded on allegations of fraud or mistake. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of § 1-52 were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

Mere Lack of Knowledge Does Not Postpone Running of Statute.—Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of facts by the tort-feasor, does not postpone the running of the statute. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

A cause of action for malpractice based on the surgeon's negligence in leaving a foreign object in the body at the conclusion of an operation, accrues immediately upon the closing of the incision, and such action may not be maintained more than three years thereafter even though the consequential damage from such negligence is not discovered until sometime after the operation. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Where there is no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in the patient's body at the conclusion of the operation, but to the contrary that the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit is properly entered in an action for malpractice instituted more than three years after the operation, there being no evidence of fraudulent concealment. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

Evidence held to negate fraudulent concealment of cause of action against surgeon for technical assault in performing an operation beyond the scope of the one

authorized. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

Applied in Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953) (con. op.).

Cited in J.G. Dudley Co. v. Commissioner of Internal Revenue, 298 F.2d 750 (1962); McNeill v. Suggs, 199 N.C. 477, 154 S.E. 729 (1930).

§ **1-16**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-17. Disabilities.**—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either—

(1) Within the age of twenty-one years; or
(2) Insane; or
(3) Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

may bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter. (C. C. P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C. S., s. 407.)

Editor's Note.—In 1899 the legislature struck the provisions which made coverture a disability on par with the others enumerated in this section. Weathers v. Borders, 124 N.C. 610, 32 S.E. 881 (1899); Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906). See Lafferty v. Young, 125 N.C. 296, 34 S.E. 444 (1899); Swift v. Dixon, 131 N.C. 42, 42 S.E. 458 (1902).

Detention in Asylum by Defendant's Wrongful Act.—Where plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, defendant will not be allowed to take advantage of his own wrong, and as to defendant, plaintiff was non sui juris for the period during which plaintiff was detained, and the statute of limitations did not run against plaintiff's cause of action during that period. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

A proceeding to set aside a void judgment of foreclosure is not within the application of this section. County of Johnston v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1946).

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889).

Section Relates to True Title.—Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Three-Year Period Enforced. — In case of infancy, even after the expiration of the time of the limitation, an action may be brought within three years after full age. Campbell v. Crater, 95 N.C. 156 (1886), and if not brought within that time the action is barred. Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921) (dis. op.).

Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. Clayton v. Rose, 87 N.C. 106 (1882).

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their rights to recover will be barred. Warlick v. Plonk, 103 N.C. 81, 9 S.E. 190 (1889).

Application to Limitation on Widow's Right to Dissent from Husband's Will.—See note to § 30-1.

Disability Subsequent to Commencement of Running of Statute.—Where the statute of limitations begins to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to the commencement of the running of the statute. Battle v. Battle, 235 N.C. 499, 70 S.E.2d 492 (1952).

Effect of Disability Continuing Through Life.—If the disability continued during

life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. Ellington v. Ellington, 103 N.C. 54, 9 S.E. 208 (1889).

Effect of Guardian Having Right to Sue.—Culp v. Lee, 109 N.C. 675, 14 S.E. 74 (1891), has no application to actions for the recovery of realty when the legal title is in the person under disability. The court held that the distributees having had a general guardian, the executor, having been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897).

The failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

The statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

It is the rule in this State that, except in suits for realty where the legal title is in the award, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring at the time the cause of action accrues. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

If an infant or insane person has no guardian at the time the cause of action accrues, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by this section, whichever shall occur first. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Running of Statute Where No Final Account Filed.—When no final account has been filed, the statute begins to run from the arrival of the ward at age. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Action on Judgment Secured during Infancy.—This section permits one to bring an action on a judgment secured during his infancy by a next friend within the time limited by § 1-47 (1), i.e., ten years after he becomes twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Quoted in Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Stated in Franklin County v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

§ 1-18. Disability of marriage.—In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine. (1899, c. 78, ss. 2, 3; Rev., s. 363; C. S., s. 408.)

Cross References.—As to constitutional provision concerning property of married women, see N. C. Const., Art. X, § 6. As to status of married women in civil actions and with reference to property in general, see § 52-1.

Purpose of Section.—This section is a part of the major stroke of the law to free the married woman from the merged identity fiction which deprived her of a legal existence. Other sections are § 52-1 et seq. See 2 N.C.L. Rev. 181.

Coverture Not Defense Since 1899.—Under the provisions of this section, and § 52-1 et seq., passed in pursuance of N.C. Const., Art. X, § 6, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried. Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923).

Since the passage of this section if the feme covert's right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her. Bond v. Beverly, 152 N.C. 56, 67 S.E. 55 (1910).

Since the passage of this section coverture is not a defense in bar of the running of the statute of limitations. Carter v. Reaves, 167 N.C. 131, 83 S.E. 248 (1914).

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color, the coverture of the plaintiff will not avail her to repel the bar of

the statute of limitations, which has run in favor of the defendant's title. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

Section Contemplates True Owner. — A possession cannot well be adverse, within the meaning of this section, to anyone who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right to be barred by such a possession. It has sole reference to the owner of the title. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Effect of Statute upon Proof. — Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. Holmes v. Carr, 172 N.C. 213, 90 S.E. 152 (1916).

§ 1-19. **Cumulative disabilities.**—When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (C. C. P., ss. 28, 49; Code, ss. 149, 170; Rev., s. 364; C. S., s. 409.)

Editor's Note. — By the phraseology of this section, it is evident that cumulative disabilities will only prevent the running of a statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest the operation. See Holmes v. Carr, 172 N.C. 213, 90 S.E. 152 (1916). See also § 1-20.

Operation of Section Illustrated. — The disability of coverture supervened upon that of infancy, and the statute of limitations is suspended in language too explicit to be capable of any other construction. Clayton v. Rose, 87 N.C. 106 (1882); Epps v. Flowers, 101 N.C. 158, 7 S.E. 680 (1888); Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897); Lafferty v. Young, 125 N.C. 296, 34 S.E. 444 (1899).

This section can have no application when there is a clear running of the statute for the period fixed after the disability is removed, as when an infant attains his majority. Campbell v. Crater, 95 N.C. 156 (1886).

Significance of Length of Time of Disabilities.—The length of time elapsing during cumulative disabilities, so long as the disabilities are continuous, is immaterial. Epps v. Flowers, 101 N.C. 158, 7 S.E. 680 (1888).

§ 1-20. **Disability must exist when right of action accrues.**—No person may avail himself of a disability except as authorized in § 1-19, unless it existed when his right of action accrued. (C. C. P., s. 48; Code, s. 169; Rev., s. 365; C. S., s. 410.)

Running of Statute Cannot Be Stopped. —If the statute of limitations commences to run nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889). See Asbury v. Fair, 111 N.C. 251, 16 S.E. 467 (1892); Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921). Once the statute begins to run nothing stops it. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Principle Applied.—The principle of this section applies where the defendant is out of the State but left after the cause of action accrued. Blue v. Gilchrist, 84 N.C. 239 (1881).

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

§ 1-21. **Defendant out of State; when action begun or judgment enforced.**—If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of

this State. (C. C. P., s. 41; 1881, c. 258, ss. 1, 2; Code, s. 162; Rev., s. 366; C. S., s. 411; 1955, c. 544.)

Editor's Note. — For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 531 (1955).

For case law survey as to the North Carolina "borrowing statute," see 45 N.C.L. Rev. 845 (1967).

Retroactive Effect. — As a general rule statutes of this character apply to actions pending at the time they take effect, provided the actions have not been barred by a previous limitation. See Cox v. Brown, 51 N.C. 100 (1858).

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action, or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

The purpose of this section is to prevent defendants from having the benefit of the statute of limitation while they permit debts against them, past due, to remain unpaid, or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, and thus prevent the person having the right to sue from doing so. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

Nonsuit in Absence of Supporting Evidence.—Where plaintiff resists under this section defendant's plea of the statute of limitations solely on the ground that defendant left the State prior to three years from the accrual of the cause of action, and defendant denies the allegation of nonresidence, in the absence of evidence by plaintiff in support of the allegation of nonresidence, defendant's motion as of nonsuit is properly allowed. Savage v. Currin, 207 N.C. 222, 176 S.E. 569 (1934). See § 1-25 and note thereto.

The words "any person," are employed to designate the person to be affected and embraced by the section, are very comprehensive, and there is nothing in its scope or purpose that excludes nonresidents. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

"The times herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902); Hill v. Lindsay, 210 N.C. 694, 188 S.E. 406 (1936).

Sufficiency of Return to Start Statute.—Where the debtor was a nonresident of this State but was here on visit of a day or two each year such visits would not have effect of putting the statute in motion. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

The "return to the State," specified by this section, as necessary to put the statute in motion, is a return with a view to residence—not a casual appearance in the State, passing through it, or even making a visit here. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Absence of Debtor Before Accrual of Action.—Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

When Running Suspended by Action. — It will be observed that this statutory provision prescribes and embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed: (1) Where the debtor was out of the State at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In it time does not begin to lapse in his favor until he shall return to the State—not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he shall depart from the State for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor-resident or nonresident of the State —departed from and resided out of it, "the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or

the enforcement of such judgment." (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor shall depart from the State, "and remain continually absent for the space of one year or more," the time of his absence shall not be allowed in his favor. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911).

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occasionally visits the State; (2) when such person retains his residence, but is absent from the State continuously for one year or more. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

When a person becomes a nonresident of the State it is not necessary that he should remain continuously out of the State one year to stop the running of the statute, nor would occasional visits to the State put the statute in motion. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

And this without exception of instances where a proceeding in rem will lie against property situated here. No presumption of payment of the debt will be raised within the period allowed for the commencement of the action. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

The legislature intended the proviso added by the 1955 amendment to be a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin, or in this State. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

It Is Not Limitation on Tolling Provisions of Section.—The proviso in this section is not a limitation upon the tolling provisions of the statute but is a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin or in this State. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

The 1955 amendment was designed (1) to clarify the law, and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation on the tolling portion of the statute would accomplish neither of these purposes. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Nonresident May Litigate Here Claim Not Barred Where It Arose.—The courts of this State are open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. This section tolls the statute in such cases where neither the plaintiff nor the defendant is a resident of this State at the time of the institution of the action and never was, as well as in cases where the obligation arose out of the State and the debtor has not resided in the State for a time sufficient to bar the action by the law of this State. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953) (decided prior to addition of proviso in 1955).

But Proviso Bars All Stale Foreign Claims.—Giving the language of the proviso its ordinary meaning, it is a limited borrowing statute which bars all stale foreign claims. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

If the proviso be treated as a limited borrowing statute, no action barred in the state of origin may be litigated here. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Unless They Originally Accrued in Favor of Resident.—This section now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

And Ancillary Administrator Is Not Resident to Whom Wrongful Death Claim Accrues. — The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to this section. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Hence, Wrongful Death Claim Barred Where It Arose Is Barred Here.—Where at the time a wrongful death action was instituted here, it was barred in Pennsylvania where it arose, it is also barred in North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Action Based on Foreign Statute Which Itself Contains Limitation.—When an action is based on a foreign statute which creates a cause or right of action and the statute itself contains a limitation on the time within which the action can be brought, the life of the right of action is limited by that provision and not by the local statutes of limitation. Rios v. Drennan, 209 F. Supp. 927 (1962).

When Limitation Begins to Operate against Foreign Corporation. — An action

against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

When Judgment in Personam Not Rendered.—Where a nonresident defendant of this State has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of this section, may not be rendered against him in personam, in an action for debt; and where so rendered it will be set aside. Bridger v. Mitchell, 187 N.C. 374, 121 S.E. 661 (1924).

Section Not Applicable after Statute Has Run. — This section is not applicable after the statute of limitation has run. Southern Ry. v. Mayes, 113 F. 84 (4th Cir. 1902).

Applicability to Actions in Rem. — This section is applicable to actions in rem as well as actions in personam, no exception being made. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

Applicability to Suits against Bail.—Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892).

Applicable to Enforce Resulting Trust. Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the State, the elapsed time is less than ten years, then, under this section, the cause of action is not barred by the ten-year statute. Miller v. Miller, 200 N.C. 458, 157 S.E. 604 (1931).

Where the defendant is a nonresident of the State the statute of limitations has not run. Lassiter v. Powell, 264 F.2d 186 (4th Cir. 1947).

Effect of Nonresident's Ownership of Property in State.—The fact that a nonresident debtor has property within the State will not affect this section, which suspends the operation of the statute of limitations for the period during which the person, against whom the demand is made, is out of the State. Grist v. Williams, 111 N.C. 53, 15 S.E. 889 (1892).

Nonresident Foreign Corporations. — The statute of limitations does not apply to foreign nonresident corporations. Grist v. Williams, 111 N.C. 53, 15 S.E. 889 (1892); Alpha Mills v. Watertown Steam Engine Co., 116 N.C. 797, 21 S.E. 917 (1895).

But it does apply to nonresident corporations as well as individuals. Grist v. Williams, 111 N.C. 53, 15 S.E. 889 (1892); Alpha Mills v. Watertown Steam Engine Co., 116 N.C. 797, 21 S.E. 917 (1895); Green v. Insurance Co., 139 N.C. 309, 51 S.E. 887 (1905); Volivar v. Richmond Cedar Works, 152 N.C. 34, 67 S.E. 42 (1910); Volivar v. Richmond Cedar Works, 152 N.C. 656, 68 S.E. 200 (1910).

Effect of Corporation Service Statutes.—Sections 58-153 and 58-154, which authorize service of summons against nonresident insurance companies upon the Commissioner of Insurance, in no way abrogate or affect the suspension of the running of the statutes of limitation in such cases. That service can thus be had upon a nonresident corporation may be a reason why the General Assembly should amend this section, so as to set the statute running in such cases, but it has not done so and the courts cannot. Green v. Insurance Co., 139 N.C. 309, 51 S.E. 887 (1905).

Applicable to Operation of § 1-53.—The existence of the conditions enumerated in this section will suspend the operation of § 1-53. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

Cited in Osborne v. Board of Educ. ex rel. State, 207 N.C. 503, 177 S.E. 642 (1935).

§ 1-22. Death before limitation expires; action by or against executor.—If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal

representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement. (C. C. P., s. 43; 1881, c. 80; Code, s. 164; Rev., s. 367; C. S., s. 412.)

I. General Consideration.
II. Death of Creditor.
III. Death of the Debtor.
IV. Filing Claim.

I. GENERAL CONSIDERATION.

Cross References.—As to actions which survive to and against a personal representative, see § 28-172 et seq. As to actions which do not survive, see § 28-175. As to final settlement of personal representative, see § 28-121 and § 28-162 et seq.

Editor's Note. — This section was new with the Code of Civil Procedure. It has remained unchanged since its insertion except that the last sentence was added by the act of 1881, and the proviso at the end of the second sentence by the Consolidated Statutes.

The section has been held to be an enabling and not a disabling statute, and to apply only in those cases where, but for its interposition, a claim would be barred, Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926), intending to enlarge and extend the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. Irvin v. Harris, 184 N.C. 547, 114 S.E. 818 (1922). It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. It was not intended to be a restriction on the statute of limitation so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course but for this section, it would not be barred till a later date. The object in view is that when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred action may be brought "after the expiration of the time limited, and within one year." Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893). See Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890).

Formerly there was no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. Hawkins v. Savage, 75 N.C. 133 (1876); Bruner v. Threadgill, 88 N.C. 361 (1883); Patterson v. Wadsworth, 89 N.C. 407 (1883).

Exception to General Rule. — This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909), citing Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902).

However, it should be observed that it has no application where the bar attached before death. Daniel v. Laughlin, 87 N.C. 433 (1882); Vaughan v. Hines, 87 N.C. 445 (1882); Grady v. Wilson, 115 N.C. 344, 20 S.E. 518 (1894); Parker v. Hardin, 121 N.C. 57, 28 S.E. 20 (1897); Copeland v. Collins, 122 N.C. 619, 30 S.E. 315 (1898); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

And for that reason will not constitute an exception to the rule where such bar had attached at death. Nor will the section apply where the action is not barred within the year fixed by the section.

The general rule is unquestionably that when the statute of limitations once begins to run nothing stops it. But this section has made an exception where a party dies. Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

To What Limitations Applicable.—The section only applies to the limitations prescribed in the Code of Civil Procedure. Hall v. Gibbs, 87 N.C. 4 (1882).

Nothing will defeat the operation of this section except the disabilities mentioned in the statues, fraud or certain other defenses of an equitable nature. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887).

When it is pertinent to the subject it must be taken in connection with § 1-47. Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893).

Applicability in Action to Subject Lands.—The heirs at law can successfully

plead the statute of limitations against the administrator seeking to subject their lands to the payment of deceased's debt as fully as he can against a creditor. Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909).

A personal representative who seeks to subject descended or devised lands to make assets for the payment of debts represents the creditors of the estate and in that capacity is entitled to any benefit or exception which the creditors might have in prosecuting the action against him including the benefits of this section. Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888).

When Section Begins to Run against Insane. — This section commences to run against an insane claimant only from the time of the qualifications of his guardian. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

Whether Notes under Seal. — Where notes matured less than three years prior to the date of death of the maker, an action on the notes was not then barred by the three-year statute of limitation, and the filing of claim and the admission of it, in accordance with this section, would prevent the claim being barred, and any question as to whether the notes were or were not under seal becomes immaterial in this phase of the case. Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

Effect of Order to Add Parties in Supreme Court. — See Gertner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918).

Cited in 13 N.C.L. Rev. 60.

II. DEATH OF CREDITOR.

Brought within Year of Creditor's Death. —Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890).

Construction upon Section.—Although it was held that a statute does not run against a party not in existence or under a disability or against such a person, it may be noted that Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891), does not change the construction placed upon this section that an action must be brought by a representative of a creditor within one year after his death, and against the representative of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894).

Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations, and this notwithstanding what is said in Dunlap v. Hendley, 92 N.C. 115 (1885). Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890).

Dunlap v. Hendley.—It is said in Dunlap v. Hendley, 92 N.C. 115 (1885) that where the creditor died before the statute ran and the administrator brought action within the year after the death of the creditor but after the statute had run, it is questionable whether this section could help the case because the administrator should bring the action within the period of the statute of limitation and while it is running. This position is clearly contradictory to the terms of the section and it was held in Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890), that notwithstanding the language used the action could be brought any time within the year.

When Time Extended. — This section does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from the death of the creditor to the personal representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893). But there was more than one year after the death of the creditor before the ten years expired, and therefore this section has no place. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

Contract as to Limit Permissible. — A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by this section. Thigpen v. East Carolina Ry., 184 N.C. 33, 113 S.E. 562 (1922).

Priniciple Illustrated. — Where the statute had not run at the interstate's death, and the action was brought within one year after the issuing of the letters of administration, the action was not barred under this section notwithstanding that the ordinary statutory period had elapsed between the accrual and the bringing of the action. Robertson v. Dunn, 87 N.C. 191 (1882); Mauney v. Holmes, 87 N.C. 428 (1882).

III. DEATH OF THE DEBTOR.

Section Mandatory. — Actions upon claims against the estate of a decedent must be brought in one year after administration. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902).

Running Arrested against Unrepresented Estate.—Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891), held that the statute of limitation did not run to bar an action by an administrator de bonis non against the representative and bondsmen of a deceased administrator while there was no administrator de bonis non—no one in esse who could bring such action. This would not apply to an action brought by the creditor, or a distributee, or legatee, directly against the representative of the deceased executor, administrator or guardian and their sureties for breach of the bond. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893); Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894).

Flemming v. Flemming Qualified.—It is said in Flemming v. Flemming, 85 N.C. 127 (1881), to be well settled that the death of the debtor after the cause of action has accrued will not suspend the running of the statute to the completion of the prescribed time. This was intended to be the statement of a general principle, resting upon numerous adjudications, and without reference to the modifications made by the words of the act recited, and to which attention was not at the moment of penning the sentence directed, and certainly with no intent to disregard or ignore the express statutory mandate. Mauney v. Holmes, 87 N.C. 428 (1882).

Applicable to Partners.—Notwithstanding that a deceased partner's debt to his firm would have otherwise been barred by statute since his death, yet where no administrator has been appointed, the debt will not be barred until after one year from the appointment of an administrator unless more than ten years has elapsed since his death. Irvin v. Harris, 182 N.C. 656, 109 S.E. 871 (1921).

Principle Illustrated.—It was held that a claim reduced to judgment is barred by the ten-year statute of limitation unless the claim was admitted by administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889).

Where judgment is obtained against an administrator who dies five years later and there was no further administration until thirteen years later when steps were taken to collect the judgment, it was held that the ten-year proviso applied to bar an enforcement. Fisher v. Ballard, 164 N.C. 326, 80 S.E. 239 (1913).

Where the period of limitation for a judgment was ten years, and some two months before it ran the judgment creditor died and no representative qualified until two and a half years later but in the meantime the debtor had died and his representative was not qualified until two years and eleven months after the death of the creditor, and the action was brought four months after the latter representative's qualification, by virtue of this section it was not barred. Dunlap v. Hendley, 92 N.C. 115 (1885).

Proviso Construed. — The proviso is a wise restriction to prevent the inconvenience and often the injustice of collecting stale claims. Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909).

When the letters of administration have been issued before the operative effect of the proviso the provision that such should have been issued within ten years from the death of the intestate is inapplicable. Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909).

There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of the proviso. Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909).

Running Suspended until Qualification of Administrator.—Where a claim is not barred at the time of the debtor's death, the death suspends the running of the statute until the qualification of an administrator, Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

And Creditor Has One Year Thereafter to Bring Suit.—The creditor has one year from the date of the appointment of the administrator within which to bring suit. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

IV. FILING CLAIM.

Not Retroactive. — The last sentence of this section applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. Whitehurst v. Dey, 90 N.C. 542 (1884).

Purpose of Filing Claim.—If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased.

Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

The purpose of the creditor then is, by filing his claim with the administrator, to avoid the running of the statute against his debt, and to fix the debt by the admission of the personal representative—the very reverse of presenting the claim for instant payment. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898) (dis. op.).

The word "filed" has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is subserved by tying together or bundling papers and labeling them or cataloguing them on rolls or lists for future use. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898) (dis. op.).

The filing of claim is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling them to leave with the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the statute of limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered, "filed," somewhere, in some way, by the personal representatives. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898) (dis. op.).

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

Sufficiency of Filing.—Where an administrator, knowing that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, claim on the judgment has been filed and admitted by the administrator within this section. Rodman v. Stillman, 220 N.C. 361, 17 S.E.2d 336 (1941).

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a filing of the claim within the meaning of this section, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar. Ashley Horne Corp. v. Creech, 205 N.C. 55, 169 S.E. 794 (1933).

Section Illustrated.—The exhibition by the sheriff within one year of the date of administration to the administrator, of an execution issued in favor of the county against the intestate, which the administrator admits is correct and does not pay for want of assets—is a sufficient "filing" required by this section, so as to render unnecessary an action to prevent the bar of statute of limitations. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898).

In Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898), it is said that it is a sufficient "filing," when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. The creditor can never compel the administrator to "string" the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Sufficiency of Presentation. — Where the plaintiff never presents his claim, or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. Flemming v. Flemming, 85 N.C. 127 (1881).

Sufficiency of Admission. — A partial payment by the personal representative, without objection, is an unequivocal act from which an admission of the justice of the claim may be inferred. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it. Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

Silence.—If a claim is presented in the form of a bill of particulars, and the representative refuses an explicit admission of denial, the plaintiff has the right to deem its acceptance without remark as arresting the running of the statute. Flemming v. Flemming, 85 N.C. 127 (1881).

Effect of Admission. — The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Claims not barred presented to the administrator in one year after letters granted and admitted by him need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. Turner v. Shuffler, 108 N.C. 642, 13 S.E. 243 (1891).

A distinct acknowledgment and promise made by an executor or administrator and based upon a sufficient consideration imposes a personal liability upon the representative, but does not take away the protection afforded by lapse of time to the estate represented. Fall v. Sherrill, 19 N.C. 371 (1837); Oates v. Lilly, 84 N.C. 643 (1881); Flemming v. Flemming. 85 N.C. 127 (1881).

Application to Heirs. — There is nothing in this section which would seem to indicate a suspension of the statute as to the personal representative only, leaving the heir at law to be protected by the lapse of time. Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

The personal representative represents the deceased, and his admission of the correctness of a claim, unless impeachment for fraud, will estop the heirs. Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

Since the amendment of 1881 the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the claim in controversy in Bevers v. Park, 88 N.C. 456 (1883), was a cause of action accrued prior to the Code of Civil Procedure and this section did not apply to it at all. Hall v. Gibbs, 87 N.C. 4 (1882); Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

Suit by Administrator Sufficient Notice of His Claim.—See Harris v. Davenport, 132 N.C. 697, 44 S.E. 406 (1903).

Not Applicable to Judgments.—Where a judgment had been obtained on a claim, the amendatory act of 1881 can have no application. Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

§ 1-23. Time of stay by injunction or prohibition.—When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (C. C. P., s. 46; Code, s. 167; Rev., s. 368; C. S., s. 413.)

Nature of Operation upon Statute. — This section as its terms clearly impart, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. Gatewood v. Fry, 183 N.C. 415, 111 S.E. 712 (1922).

Effect of Irregularity in Granting.—Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent the suspension of the statute of limitations, under this section, during the pendency of the injunction. Walton v. Pearson, 85 N.C. 34 (1881).

Evidence Sufficient to Overrule Motion to Nonsuit.—Where plaintiff showed that shortly after the defendant's steamship collided with bridge, proceedings were instituted in the United States district court, in which it was ordered that all suits arising out of the collision be stayed, and immediately after plaintiff's claim was dismissed in that court for want of jurisdiction, it instituted present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. State Highway & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 226 N.C. 371, 38 S.E.2d 214 (1946).

Cited in High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

§ 1-24. Time during controversy on probate of will or granting letters.—In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (C. C. P., s. 47; Code, s. 168; Rev., s. 369; C. S., s. 414.)

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915).

It does not apply to the heirs at law or devisees to nullify the protection given everyone in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the property is in another. Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915).

Effect Where No Representative during Contest. — This section applies only where there is no administrator or collector during the contest. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

This section has no application where an administrator has been appointed. Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965).

Cited in Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889); Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

§ 1-25: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-26. New promise must be in writing.—No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (C. C. P., s. 51; Code, s. 172; Rev., s. 371; C. S., s. 416.)

I. General Consideration.
II. Acknowledgment or New Promise.
III. Part Payment.
IV. Request Not to Sue.

I. GENERAL CONSIDERATION.

Cross Reference. — As to contracts requiring writing, see § 22-1 et seq.

See 13 N.C.L. Rev. 57 for comment on this section.

Editor's Note.—For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Effect upon Prior Law. — This section does not change the character or quality of the acknowledgment or new promise therefore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918); Peoples Bank & Trust Co. v. Tar River Lumber Co., 221 N.C. 89, 19 S.E.2d 138 (1942).

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. McDonald v. Dickson, 87 N.C. 404 (1882).

The section is mandatory. Fleming v. Staton, 74 N.C. 203 (1876).

Retroactive Effect.—This section has no application where the cause of action had accrued upon the new as well as the old cause. Farson v. Bowden, 74 N.C. 43 (1876).

Section as Rule of Evidence.—This section is merely a rule of evidence enacted to prevent fraud and perjury. Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

Applicability to Judgments. — A judgment is not a contract within the meaning of this section. This is true because a cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

II. ACKNOWLEDGMENT OR NEW PROMISE.

The English Statute.—The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

Confined to Contracts. — The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and are not applicable to judgments. McDonald v. Dickson, 87 N.C. 404 (1882).

A new promise to pay fixes a new date from which the statute of limitations runs, but such promise, to be binding, must be in writing as required by this section. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Elements Necessary to Valid Promise.—In Greenleaf v. Norfolk S.R.R., 91 N.C. 33 (1884), the Supreme Court declared that the promise must be (1) in writing, (2) extend to the whole debt, (but see Pope v. Andrews, 90 N.C. 401 (1884)) and must (3) be to pay money and not in something else of value. The promise to pay the debt, too, must be (4) unconditional. Greenleaf v. Norfolk S.R.R., 91 N.C. 33 (1884); Edwin Bates & Co. v. E.B. Herren & Co., 95 N.C. 388 (1886); Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893); Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896); Bryant v. Kellum, 209 N.C. 112, 182 S.E. 708 (1935).

The promise must be (5) identical and (6) between the original parties—by the

same man; and, further, when the original contract is made with another one, and the promise relied on to repel the statute is made with another, who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on; this new promise must be in writing. Fleming v. Staton, 74 N.C. 203 (1876); Pool v. Bledsoe, 85 N.C. 1 (1881).

It has been held, that the promise must be made to the creditor himself (Parker v. Shuford, 76 N.C. 219 (1877), and Farson v. Bowden, 76 N.C. 425 (1877)) or to an attorney or agent for the creditor (Kirby v. Mills, 78 N.C. 124 (1878); Hussey v. Kirkman, 95 N.C. 63 (1886)), and must be express (Cooper v. Jones, 128 N.C. 40, 38 S.E. 28 (1901)), clear and positive (Hussey v. Kirkman, 95 N.C. 63 (1886)), to repel the statute.

The new promise must be distinct and specific, and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient. Faison v. Bowden, 76 N.C. 425 (1877); Riggs v. Roberts, 85 N.C. 152 (1881). This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

In Riggs v. Roberts, 85 N.C. 152 (1881), the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words alone would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once. Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893).

In other words there must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. This principle runs through all the decisions of the Supreme Court on this subject. Simonton v. Clark, 65 N.C. 525 (1871); Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896).

A written acknowledgment, or a new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations, under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained," would be. Long v. Oxford, 104 N.C. 408, 10 S.E. 525 (1889).

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter acknowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repel the statutory bar. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

Must Be within Statutory Limit Itself.— The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualified by and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918). See Smith v. Leeper, 32 N.C. 86 (1849); McRae v. Leary, 46 N.C. 91 (1853); Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

The Writing. — As to expression of opinion in charge on sufficiency of writing, see note to § 1-180.

A new promise to pay, if not in writing, cannot defeat the operation of the statute of limitation. Raby v. Stuman, 127 N.C. 463, 37 S.E. 476 (1900).

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same in writing or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918). And it is proper to exclude parol evidence that a new promise was made (Christmas v. Haywood, 119 N.C. 130, 25 S.E. 861

(1896)), although prior to the section the law was otherwise. Faison v. Bowden, 74 N.C. 43 (1876).

It was said in Flemming v. Flemming, 85 N.C. 127 (1881), that the oral assertion of a claim to an administrator who remains silent, even if the silence should be construed an admission, is ineffectual because not in writing. See § 1-22.

And so is security given for debts barred by the statute, at least to the extent of the property conveyed. Taylor v. Hunt, 118 N.C. 168, 24 S.E. 359 (1896). But an unaccepted offer to discharge a bond by a conveyance of land (Riggs v. Roberts, 85 N.C. 152 (1881), or an unaccepted offer to pay a debt by a conveyance of land are not such recognition of subsisting liabilities as in law will imply a promise to pay. Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896); nor is a promissory note barred by the statute of limitations revived by an offer to pay in Confederate currency or bank bills. Simonton v. Clark, 65 N.C. 525 (1871).

The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute, has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was, "the new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied." McBride v. Gray, 44 N.C. 420 (1853); Faison v. Bowden, 72 N.C. 405 (1875); Riggs v. Roberts, 85 N.C. 152 (1881). Since the statute, the words used are as applicable to this case: "The promise must be unconditional." Greenleaf v. Norfolk S.R.R., 91 N.C. 33 (1884). It must be "certain in its terms." Long v. Oxford, 104 N.C. 408, 10 S.E. 525 (1889); Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893).

Same—Illustrations. — A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921). The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893), but a writing "I am going to pay it as soon as I can" is conditioned upon ability to pay and is therefore insufficient. Cooper v. Jones, 128 N.C. 40, 38 S.E. 28 (1901).

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she has borrowed from her at various times, and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and a new promise, to repel the bar of the statute of limitations. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918).

Where a suit had already been commenced to recover an amount alleged to be due upon account, and the defendant set up the statutory bar as a defense, but wrote a letter to the plaintiff's attorney stating that, if he would take five hundred dollars in satisfaction, judgment might go against him at court, the letter is an admission and assumption of the debt to the specified amount ($500), and operates to remove the bar to the recovery of the time. Pope v. Andrews, 90 N.C. 401 (1884). But see Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896).

Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future it was held, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

Acknowledgment as Rebutting Presumption of Satisfaction. — Before the adoption of the Code, proof of a promise or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. Brown v. Becknall, 58 N.C. 423 (1860); Ray v. Pearce, 84 N.C. 485 (1881); Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489, 6 L. Ed. 142 (1824). And now the bar of the present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. Hill v. Hilliard & Co., 103 N.C. 34, 9 S.E. 639 (1889); Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

III. PART PAYMENT.

Editor's Note. — It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I and 9 Geo. IV did nothing more than recognize the common-law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely recognizes the right, leaving the application of the principles to the courts as has always been the case. See Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895).

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. See State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887); Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

Payment Tantamount to Writing.—This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. McDonald v. Dickson, 87 N.C. 404 (1882).

Provisions Not Applicable to Judgments. — A partial payment voluntarily made on a judgment does not remove the statutory bar. McDonald v. Dickson, 87 N.C. 404 (1882).

Elements Essential to Take Case Out of Statute.—The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment, (Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907)) for partial payment starts the statute running anew only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness or at least his obligation, to pay the balance. Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895). See Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

Thus when a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907).

Same—Time from Which Statute Starts Anew. — There is no express provision that a partial payment shall prevent the operation of the statute except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. Riggs v. Roberts, 85 N.C. 152 (1881); State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887); Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895); Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907); Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

Same—Credits on Accounts.—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice. Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

The fact that the maker of a note has a claim against the holder which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887).

An account of transaction between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907).

Persons Who May Make—Trustee for Creditors.—Where an assignment for benefit of creditors confers no power on the

trustee, as agent of the debtor, to do any act to waive the statute, or to express a willingness or intention to pay the debt after it becomes otherwise barred, a partial payment made by the trustee on a note of the debtor will not arrest the running or remove the bar of the statute of limitations. Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895).

Burden of Proving Payment.—The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. Riggs v. Roberts, 85 N.C. 152 (1881).

IV. REQUEST NOT TO SUE.

Statement of Rule. — Where delay in bringing suit is caused by a request of the defendant, or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. Joyner v. Massey, 97 N.C. 148, 1 S.E. 702 (1887). This principle is derived from equity as is a new promise or partial payment, and does not depend upon statute. However it is recognized as an exception in the application and instruction of this section. See Barcroft & Co. v. Roberts & Co., 91 N.C. 363 (1884).

So it has been held that notwithstanding this section, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

Principles Controlling Application. — In giving effect to request not to sue and promises not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action (Daniel v. Board of Comm'rs, 74 N.C. 494 (1876); Haymore v. Commissioners of Yadkin, 85 N.C. 268 (1881)), and it is now "settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea." Tomlinson v. Bennett, 145 N.C. 279, 59 S.E. 37 (1907); State ex rel. Oliver v. United States Fid. & Guar. Co., 176 N.C. 598, 97 S.E. 490 (1918).

Same—Request without Agreement Insufficient.—A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. Raby v. Stuman, 127 N.C. 463, 37 S.E. 476 (1900).

It is essential, however, not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. Hill v. Hilliard & Co., 103 N.C. 34, 9 S.E. 639 (1889); Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

A simple admission by an executor of the correctness of a claim against the testator's estate, and a verbal promise to pay the same out of the assets prior to the 1881 amendment of § 1-22, will not arrest the running of the statute of limitations, where there is no proof that the creditor refrained from suing at the request of the executor, or that there was any agreement for indulgence. This case falls within the terms of this section. Whitehurst v. Dey, 90 N.C. 542 (1884).

Necessity for Writing.—"It is true that Smith, C.J. for whose learning we have the highest respect, said in a concurring opinion in Joyner v. Massey, 97 N.C. 148, 1 S.E. 702 (1887), that this statute applied to promises not to plead the statute of limitations, and this is referred to without approval or disapproval by Clark, C.J. in Brown v. Atlantic Coast Line R.R., 147 N.C. 217, 60 S.E. 985, 16 L.R.A. (n.s.) 645 (1908), but the opinion of the majority of the court in Joyner v. Massey was the other way, and it is expressly decided in Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897), that the statute has no application, and that request not to sue and promises not to plead the statute of limitations need not be in writing." State v. United States Fid. & Guar. Co., 176 N.C. 598, 97 S.E. 490 (1918).

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.—(a) After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation or guarantor thereof, which removes the bar of the statute of limitations or causes the statute to begin running anew,

has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same.

(b) Nothing in this section shall be construed as applying to or affecting rights or obligations of partnerships or individual members thereof, due to acts, admissions or acknowledgments of any one partner but rights as between partners shall be governed by G. S. 59-39.1. (C. C. P., s. 50; Code, s. 171; Rev., s. 372, C. S., s. 417; 1953, c. 1076, s. 1.)

Editor's Note. — For comment on 1953 amendment, see 31 N.C.L. Rev. 397 (1953).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

§ 1-28. **Undisclosed partner.**—The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (1893, c. 151; Rev., s. 373; C. S., s. 418.)

§ 1-29. **Cotenants.**—If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (C. C. P., s. 52; Code, s. 173; Rev., s. 374; C. S., s. 419; 1921, c. 106.)

Rule as to Personalty Changed. — This section changes the rule in regard to personalty. It does not affect the law as to real property. Expressio unius exclusio alterius. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

Elements of Tenacy in Common.—Under the law of North Carolina, as in New York, tenancy in common arises whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy. Powell v. Malone, 22 F. Supp. 300 (M.D.N.C. 1938).

§ 1-30. **Applicable to actions by State.**—The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (C. C. P., s. 38; Code, s. 159; Rev., s. 375; C. S., s. 420.)

This section abrogated the common-law maxim "nullum tempus occurrit regi" protecting public property from the negligence of public officers. Furman v. Timberlake, 93 N.C. 66 (1885).

The maxim no longer obtains in this State, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provides otherwise. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898); Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916); Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

When Statute Does Not Apply.—Notwithstanding the inclusive provisions of this section, it has been uniformly held that no statute of limitations runs against the State, unless it is expressly provided therein. City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943).

Hence, where an act authorizing the collection of arrearages of taxes for past years does not prescribe any limitation, the ten-year statute of limitations does not apply, and the unpaid taxes for any year can be recovered. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898).

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942).

Cited in City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

§ 1-31. **Action upon a mutual, open and current account.**—In an action brought to recover a balance due upon a mutual, open and current account,

where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (C. C. P., s. 39; Code, s. 160; Rev., s. 376; C. S., s. 421; 1951, c. 837, s. 1.)

Cross Reference.—As to book accounts as evidence of last settlement between parties in action for less than sixty dollars, see § 8-42.

Accounts to Which Applicable. — In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings, kept by one with the knowledge and concurrence of the other. Hussey v. Burgwyn, 51 N.C. 385 (1859).

The mere existence of disconnected and opposing demands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. Green v. Caldcleugh, 18 N.C. 320 (1835).

There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. The understanding of the plaintiff alone would not be sufficient. Green v. Caldcleugh, 18 N.C. 320 (1835).

The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of this section, but is an account current, and as to all items purchased within three years from the last cash payment the three-year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. Richlands Supply Co. v. Banks, 205 N.C. 343, 171 S.E. 358 (1933).

Same — Mutuality by Implication.— Mutuality of accounts may be the result of direct agreement, or it may be inferred from the dealings of the parties—if established, it renders unavailable the defense of the statute of limitations to both parties. Stancell v. Burgwyn, 124 N.C. 69, 32 S.E. 378 (1899).

A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. Green v. Caldcleugh, 18 N.C. 320 (1835); Hussey v. Burgwyn, 51 N.C. 385 (1859); Robertson v. Pickerell, 77 N.C. 302 (1877); E. Mauney & Son v. Coit, 86 N.C. 464 (1882); Stokes v. Taylor, 104 N.C. 394, 10 S.E. 566 (1889).

Same — Extension of Credit. — To constitute a mutual account it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. Hollingsworth v. Allen, 176 N.C. 629, 97 S.E. 625 (1918).

Same — Running Account All on One Side.—Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date; but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. Robertson v. Pickerell, 77 N.C. 302 (1877).

Same—Draft Not Referring to Account. —The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account, or any debt whatever. Hussey v. Burgwyn, 51 N.C. 385 (1859).

When Statute Not Applicable. — This section does not apply to an ordinary store account, though open and continued where the credit is all on one side and the only items of discharge consist in payments on account. In such case limitations will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner. Brock v. Franck, 194 N.C. 346, 139 S.E. 696 (1927).

An indefinite promise to pay intermittently from time to time for such services as may be rendered by one party to another is not a mutual, open, and current account with reciprocal demands between the parties within the purview of this section. Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929).

Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an action against the administrator of the de-

ceased promissor for the value of such services, it was held that a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929).

Where plaintiff instituted action against administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for such services and that he entered thereon from time to time credits for rent for decedent's land, the facts are insufficient to establish mutual, open, and current accounts, and the statute of limitations began to run against plaintiff's claims from the date of each item. Tew v. Hinson, 215 N.C. 456, 2 S.E.2d 376 (1939).

Effects of Conflicting Evidence as to Item.—When there is conflicting evidence as to whether the item sued on was to be related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. McKinnie Bros. Co. v. Wester, 188 N.C. 514, 125 S.E. 1 (1924).

Conflicting evidence as to whether last item entered was proper in mutual, open and current account was for the jury. Hammond v. Williams, 215 N.C. 657, 3 S.E.2d 437 (1939).

§ 1-32. Not applicable to bank bills.—The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this State. (C. C. P., s. 53; 1874-5, c. 170; Code, s. 174; Rev., s. 377; C. S., s. 422.)

§ 1-33. Actions against bank directors or stockholders.—The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this State, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (C. C. P., s. 54; Code, s. 175; Rev., s. 378; C. S., s. 423.)

When Statute Begins to Run.—It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on. Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

§ 1-34. Aliens in time of war.—When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (C. C. P., s. 44; Code, s. 165; Rev., s. 379; C. S., s. 424.)

As to right of alien enemy to sue in the courts of this State, see Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851 (1918).

ARTICLE 4.

Limitations, Real Property.

§ 1-35. Title against State.—The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same—

(1) When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

(2) When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this

possession having been ascertained and identified under known and visible lines or boundaries. (R. C., c. 65, s. 2; C. C. P., s. 18; Code, s. 139; Rev., s. 380; C. S., s. 425.)

Cross References. — As to validity of such possession against claimants under the State, see § 1-37. As to statutes of limitation with reference to titles of the State, see § 146-91.

Law Prior to Section.—Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this State had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the State should be presumed—a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himelf with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, id certum est quod certum reddi protest. FitzRandolph v. Norman, 4 N.C. 564 (1817); Candler v. Lunsford, 20 N.C. 542 (1839); Price v. Jackson, 91 N.C. 11 (1884).

Same—Nature of Presumption. — The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural presumptions as to facts, but upon a statutory or arbitrary rule established by the legislature, or by the courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of all the circumstances in evidence. Melvin v. Waddell, 75 N.C. 361 (1876).

Effect of Section upon Prior Law.—But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the State. Price v. Jackson, 91 N.C. 11 (1884).

The State is deemed to have surrendered its right where it permits an adverse occupation of land under colorable title without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. Walker v. Moses, 113 N.C. 527, 18 S.E. 339 (1893).

Section Not Retroactive.—The right of action which accrued prior to the adoption of the Code of Civil Procedure is not governed by its provisions. Johnson v. Parker, 79 N.C. 475 (1878).

Extent and Limitation of Application.—This section may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same, nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, on personal actions after the State has parted with the title to the lands, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title to him; nor will she sue for the issues or profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be thirty or twenty-one years. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity, but only that the one in possession of the lands claims the exclusive right thereto. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and

notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Title Limited to Land Actually Occupied. —An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

The reason for the rule restricting one who holds adversely without color of title to the amount of land actually occupied by him was well stated as follows: But the question is, what is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, prima facie, and is so deemed in realty, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation de facto? To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession, contrary to the fact. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Burden of Proof. — The party asserting title by adverse possession must carry the burden of proof on that issue. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Description Must Be Fitted to Land's Surface.—Those having the burden of proof must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Adverse Possession against Municipality. — Under the law of this State, as it formerly prevailed, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under decisions applicable to the question, Crump v. Mims, 64 N.C. 767 (1870); State v. Long, 94 N.C. 896 (1886); Moore v. Meroney, 154 N.C. 158, 69 S.E. 838 (1910); but the principle was embodied in statute law in 1868, now §§ 1-30 and 1-37. Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

Application to Rents, Profits, etc. — It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title; nor will she sue for issues or profits. The loss of rents and profits is incidental to the loss of land. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, § 1-52, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only to actions for the recovery of land or some interest therein. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Application to Personal Actions.—The limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Essential Characteristics of Possession. —In order to put the statute of limitations in motion against the true owner of land, it is necessary that there should be an actual, open, visible occupation of the land by another, begun and continued under a claim of right. The assertion of a mere claim of title, as for instance the payment of taxes thereon, is not sufficient. Malloy v. Bruden, 86 N.C. 251 (1882).

A party may show, as against the State, possession under known and visible boundaries for thirty years. Mobley v. Griffin, 104 N.C. 113, 10 S.E. 142 (1889).

Sufficiency of Possession.—The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the legislature to ratify the apparent title. Hedrick v. Gobble, 61 N.C. 348 (1867).

Possession is insufficient to constitute the basis of adverse possession against the State or a private individual where the plaintiff merely shows that the agent

of plaintiff's grantor raked and hauled straw one or two years and plaintiff's father cultivated an acre or two of the land one year. Prevatt v. Harrelson, 132 N.C. 251, 43 S.E. 800 (1903).

The evidence was held sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious, and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936).

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this section and § 1-42. Peterson v. Sucro, 101 F.2d 282 (4th Cir. 1939).

Same—Lappage.—The rule, that in controversies between titles of different dates which lap, actual possession of the lappage is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. Hedrick v. Gobble, 61 N.C. 348 (1867).

Necessity of Continuity.—Thirty years' adverse possession is necessary only to bar the State, and this need not be a continuous occupancy, nor need there be any connection between the tenants. Fitz-Randolph v. Norman, 4 N.C. 564 (1817); Candler v. Lunsford, 20 N.C. 542 (1839); Reed v. Earnhart, 32 N.C. 516 (1849); Davis v. McArthur, 78 N.C. 357 (1878); Cowles v. Hall, 90 N.C. 330 (1884); Mallett v. Simpson, 94 N.C. 37 (1886); Bryan v. Spivey, 109 N.C. 57, 13 S.E. 766 (1891); Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894); Walden v. Ray, 121 N.C. 237, 28 S.E. 293 (1897); May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

Necessity of Privity of Possession.—A plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them. Melvin v. Waddell, 75 N.C. 361 (1876). This case was decided under the law prior to this section. See page 366 of the opinion and the authorities cited.—Ed. note.

In case of a reliance upon thirty years' adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. Price v. Jackson, 91 N.C. 11 (1884). This decision is in keeping with the express terms of the section.—Ed. note.

Connection of Occupation with Boundaries.—Where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land. May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

Possession Short of Period as Evidence of Grant.—If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that in fact no grant ever issued. Melvin v. Waddell, 75 N.C. 361 (1876).

Nature of Possession Is Question for Jury.—Conceding the evidence establishes 30 years' possession, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was held up to known and visible lines and boundaries, as required by this section. McKay v. Bullard, 207 N.C. 628, 178 S.E. 95 (1935).

Effect of Running of Statute against State.—When a title is shown out of the State by adverse possession, § 1-38 applies where one thereafter acquires title under a sheriff's deed and holds possession thereunder for seven years. Walker v. Moses, 113 N.C. 527, 18 S.E. 339 (1893).

Burden of Showing Good Title—Against State.—Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for twenty-one years under subdivision (2). Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

Effect upon Running Where Grant Made.—Where an occupant is seated on the interference when the overlapping

grant is issued, and is claiming colorable title adversely to the State under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

If, on the contrary, the occupant of the lappage, wishes to use his adversary's grant to show that the title is out of the State in order to establish it in himself, by virtue of § 1-38, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

Effect of Patent to Part Possession.— The constructive possession of one claiming under color of title for twenty-one years — the period necessary to give title against the State—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

The listing and paying of taxes on the locus in quo claimed by defendant would be competent in evidence to show that their possession was adverse and in the character of owner. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Use of Land for Grazing. — One cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during the statutory period, even without his consent, since his possession is not exclusive. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952); Ware v. Knight, 199 N.C. 251, 154 S.E. 35 (1930); Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir. 1939).

§ 1-36. Title presumed out of State.—In all actions involving the title to real property title is conclusively deemed to be out of the State unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C. S., s. 426.)

Section Not Retroactive.—This section, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. Riddle v. Riddle, 176 N.C. 485, 97 S.E. 382 (1918); Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Purpose of Section. — To remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State the legislature enacted this section. It provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); McDonald v. McCrummen, 235 N.C. 550, 70 S.E.2d 703 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

Where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. Gilchrist v. Middleton, 107 N.C. 663, 12 S.E. 85 (1890); Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

This rule also applies where the question of title to land depends upon the true divisional lines between the parties to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which taken together, cover the locus in quo, and either one may then establish title to any part thereof by adverse possession for twenty years. Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916).

Within Legislative Power. — This section affects the remedy—mode of procedure — and is within the power of the General Assembly to pass. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Plaintiff Must Rely upon Strength of Own Title.—In actions involving title to real property, the State not being a party, title is conclusively presumed out of the State without presumption in favor of

either party, and plaintiff must rely upon the strength of his own title. Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946).

May Show Title Out of State.—Under this section neither party is required to show title out of the State though either may do so. Dill-Cramer-Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928), citing Pennell v. Brookshire, 193 N.C. 73, 136 S.E. 257 (1927). See Ward v. Smith, 223 N.C. 141, 25 S.E.2d 463 (1943).

Sources of Title Available.—And where the plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916).

It is not necessary to prove that the sovereign has parted with its title when it is not a party to the action. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

No Presumption in Favor of One Party or the Other.—Under this section, in all actions involving title to real property title is conclusively presumed to be out of the State unless it be a party to the action, but there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957); Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961).

In an action to recover lands by twenty years' adverse possession under § 1-40, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

And it is error to instruct the jury that the burden of proof is on the plaintiff to show title out of State in addition to sufficient adverse possession to ripen the title in himself. Dill-Cramer-Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928).

Applied in Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953); Berry v. Coppersmith, 212 N.C. 50, 193 S.E. 3 (1937).

Quoted in Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936).

Stated in Ramsey v. Ramsey, 224 N.C. 110, 29 S.E.2d 340 (1944).

Cited in Shingleton v. North Carolina Wildlife Resources Comm'n, 248 N.C. 89, 102 S.E.2d 402 (1958); Ware v. Knight, 199 N.C. 251, 154 S.E. 35 (1930); Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944).

§ 1-37. Such possession valid against claimants under State.—All such possession as is described in § 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be good and legal bar against the entry or suit of any person, under the right or claim of the State. (C. C. P., s. 19; Code, s. 140; Rev., s. 381; C. S., s. 427.)

Sufficiency of Possession as Affecting Application.—This section does not apply where the proof of possession is insufficient under § 1-35. Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

Application against Municipality.—Prior to the enactment of § 1-45, title to lands by adverse possession could be acquired against a state or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under North Carolina statutes, this section and § 1-30, as construed by the decisions, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952).

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds

under foreclosure shall also constitute color of title. (C. C. P., s. 20; Code, s. 141; Rev., s. 382; C. S., s. 428; 1963, c. 1132.)

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Cross References. — As to title presumed out of State, see § 1-36. As to adverse possession of twenty years, see § 1-40.

Editor's Note.—For article on "Adverse Possession—Color of Title," see 16 N.C.L. Rev. 149. For note on intent as a requisite in mistaken boundary cases, see 33 N.C.L. Rev. 632. For note in tax foreclosure deed to property held by tenants in common as color of title, see 36 N.C.L. Rev. 526 (1958).

Definition.—Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964).

Possession of real property to be adverse must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943).

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. Carswell v. Creswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Such adverse possession as will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, and exclusive during the whole statutory period, and under a claim of title to the land occupied. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

In other words, the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. Snowden v. Bill, 159 N.C. 497, 75 S.E. 721 (1912).

There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. Barfield v. Hill, 163 N.C. 262, 79 S.E. 677 (1913); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Color of title is defined in Smith v. Proctor, 139 N.C. 314, 51 S.E. 889 (1905), as "a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." A deed to which the required privy examination of a married woman was not taken was color of title. Norwood v. Totten, 166 N.C. 648, 82 S.E. 951 (1914); Barbee v. Bumpass, 191 N.C. 521, 132 S.E. 275 (1926); Booth v. Hariston, 193 N.C. 278, 136 S.E. 879 (1927). In Garner v. Horner, 191 N.C. 540, 132 S.E. 290 (1926), it is held: Failure to comply with § 52-12, renders a deed void, although it 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); Ennis v. Ennis, 195 N.C. 320, 142 S.E. 8 (1928).

Whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, it is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee under this section. Ennis v. Ennis, 195 N.C. 320, 142 S.E. 8 (1928).

An unregistered deed ordinarily is not color of title, except as between the original parties. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

And where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a

common grantee. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

Property Subject to Adverse Possession.—The title to property of the State (see § 1-35), and this included the property of the political subdivision prior to the enactment in 1891 of what is now § 1-45 which changed the rule, may be acquired by adverse possession. But § 1-44 provides that property belonging to public service companies is not generally subject to title by prescription. It is the general rule that the property of private persons is always subject to title by adverse possession. See § 1-42.

Against Whom Adverse Possession May Be Claimed.—Adverse possession and prescription may be had against a trustee and this though the cestui que trust is under a disability and out of the State. Blake v. Allman, 58 N.C. 407 (1860). And where the title is lost by the trustee, the cestui que trust is also concluded. King v. Rhew, 108 N.C. 696, 13 S.E. 174 (1891); Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

Joint tenants and tenants in common may lose their property by adverse possession and what is sufficient against one is sufficient against all. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. Dobbins v. Dobbins, 141 N.C. 210, 53 S.E. 870 (1906).

So where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years' color or under twenty years otherwise (§ 1-40). Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

And where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession under a mortgage from ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury the title being complete in the adverse possessors. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. Roe v. Journigan, 181 N.C. 180, 106 S.E. 690 (1921). See post this note, catchline "Title to Remainder During Life Estate."

Hostile Act Does Not Start Running of Statute against Owner in Possession.—In determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim. Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the statute of limitations to running against an owner in possession and occupancy. The foregoing rule applies to an equitable owner in possession of land, and so long as he retains possession, nothing else appearing, the statute of limitations does not run against him. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Effect of Holding Portion of Land under Colorable Title.—Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955).

When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. But where two or more adjoining tracts of land are conveyed in one deed, or in separate deeds, by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Proof of intermittent acts of trespass is not sufficient to overrule a motion to nonsuit upon the issue of adverse possession. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Color of Title Affords No Protection Where Requisites of Adverse Possession Are Not Present.—A deed, which is color of title, does not draw to the grantee-occupant of the land described therein the protection of the statute of limitations where the requisites of adverse possession are not

present. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Instrument as Color of Title to Land Not Conveyed. — The fact that an instrument passes title to a part of the land embraced in its description does not prevent it from being color of title to that part to which it does not convey good title but which is embraced within its description. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Where the title deeds of two rival claimants lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944). See Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950); Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

If the party claiming under the senior title is not in possession of any part of the lappage and his adversary has been in actual possession of a part under a deed which defines his boundaries and is color of title, the law extends his possession to the whole of the lappage, and if he retains the possession for the time required by the statute, seven years, and it is adverse, it will bar the right of entry of the other party and defeat his recovery. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, each deed constitutes color of title as to the lappage under the lines and boundaries called for in the deed, but seven years' use and occupancy of the lappage by respondent or those under whom she claims, ripens title in her even though her deed was executed subsequent to the deed for the adjacent lot, there being no evidence of actual occupation of any part of the lappage by the owner of the adjacent lot. Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

Generally speaking, a claim of title by adverse possession must be pleaded under North Carolina law. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

But This Applies Only When Adverse Possession Is Set Up as Defense. — The requirement that a claim of title by adverse possession must be pleaded applies only when adverse possession is set up as a defense to an action. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

And Not Where Claim Is Based on Adverse Possession under Color of Title.— The requirement that a claim of adverse possession must be pleaded does not apply when a claim of title is based upon adverse possession under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Plea Raises Issue of Fact upon Which Defendant Has Burden of Proof.—Where plaintiff in an action to quiet title establishes a prima facie case, defendant's plea of title by adverse possession under color for seven years does not justify nonsuit of plaintiff's cause, since the plea of adverse possession raises an issue of fact for the jury upon which defendant has the burden of proof. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Mere Admission of Possession Does Not Amount to Admission of Adverse Possession.—Plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action does not justify nonsuit of plaintiff's cause of action to quiet title, since mere admission of possession, without evidence in respect to the nature or character of such possession, does not amount to an admission of adverse possession in law, even if defendant be given the benefit of presumptions arising from mesne conveyances from such person. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Plea of Statute as Plea in Bar to Preclude Reference. — See note to § 1-189, analysis line II.

Persons in possession pursuant to foreclosure of tax sale certificate conveying only title of life tenant may not maintain that their possession is adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under § 105-410 is not automatic but must be judicially determined in an appropriate proceeding. Eason v. Spence, 232 NC. 579, 61 S.E.2d 717 (1950).

Applied in United States v. Rose, 20 F. Supp. 350 (W.D.N.C. 1937).

B. Character of Possession.

Must Be Actual.—There can be no adverse possession without an actual possession of the locus in quo, Cutler v. Block-

man, 4 N.C. 368 (1816), and no constructive possession will ripen into a good title. Williams v. Wallace, 78 N.C. 354 (1878).

Thus the payment of taxes and the employment of agents in respect to land are insufficient acts to constitute possession. Ruffin v. Overly, 88 N.C. 369 (1883). As was said by the court in considering this section, and this applies with equal force to all the statutes, "the adverse claimant should either possess it in person, or by his slaves, servants or tenants; for feeding of cattle or hogs, or building hogpens, or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all of these are but acts of trespass: Whereas, when a settlement is made upon land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own." Grant v. Winborne, 3 N.C. 56 (1798). See Andrews v. Mulford, 2 N.C. 311 (1796). It has been held that cutting timber and making shingles in a swamp unfit for cultivation continuously for seven years is a good possession. Tredwell v. Reddick, 23 N.C. 56 (1840), cited in Loftin v. Cobb, 46 N.C. 406 (1854).

Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Mere possession does not necessarily amount to adverse possession in law. Barbee v. Edwards, 238 N.C. 215, 77 SE.2d 646 (1953).

Possession Must Be Actual, Open, Visible, Notorious, Continuous and Hostile.—Under either § 1-38 or § 1-40, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous, and hostile to the true owner's title and to all persons, for the full statutory period. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

To convert the shadow of color of title into perfect title, possession must be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass quare clausum fregit. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Sufficiency of Possession.—In actions between individual litigants when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. Ward v. Smith, 223 N.C 141, 25 S.E.2d 463 (1943).

Same—Test for Determining Sufficiency.—As stated above in this note, using the land continuously and openly a sufficient length of time for the only purpose for which it is fit, is all that is required. Thus maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a nonnavigable stream. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912). However cutting trees and feeding hogs upon land susceptible of other uses, is insufficient. Loftin v Cobb, 46 N.C. 406 (1854); Vanderbilt v. Johnson, 141 N.C. 370, 54 S.E. 298 (1906), sets forth sufficient evidence of adverse possession.

Applying the "use of which the land is capable" test the court has decided that the following acts were sufficient: overflowing land under certain circumstances, see LaRoque v. Kennedy, 156 N.C. 360, 72 S.E. 454 (1911); erecting dams and fish traps, Gudger v Kensley, 82 N.C. 482 (1880); operating lime kiln, Moore v. Thompson, 69 N.C. 120 (1873); making turpentine, Gudger v. Kensley, 82 N.C. 482 (1880); cultivation, Burton v. Carruth, 18 N.C. 2 (1834); Wallace v. Maxwell, 32 N.C. 110 (1849); Smith v. Bryan, 44 N.C. 180 (1852); pasturage, Andrews v. Mulford, 2 N.C. 311 (1796); and cutting timber, Staton v. Mullis, 92 N.C. 624 (1885); Wall v. Wall, 142 N.C. 387, 55 S.E. 283 (1906).

The following acts were held insufficient because of lack of continuity or insufficient duration. Cultivation, Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894); State v. Suttle, 115 N.C. 784, 20 S.E. 725 (1894); Hamilton v. Icard, 117 N.C. 477, 23 S.E. 354 (1895); Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903); gold hunting, Ward v. Herrin, 49 N.C. 23 (1856); cutting timber, Barlett v. Simmons, 49 N.C. 295 (1857); Shaffer v. Gaynor, 117 N.C. 15, 23 S.E. 154 (1895); Campbell v. Miller, 165 N.C. 51, 80 S.E. 974 (1914); Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausum fregit for damages. Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964), citing Shaffer v. Gaynor, 117 N.C. 15, 23 S.E. 154 (1895).

Same—Payment of Taxes. — Paying taxes is not enough to constitute an adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient because it is not an actual, open, visible occupation begun and continued under a claim of right. Malloy v. Bruden, 86 N.C. 251 (1882). However it does constitute a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. Austin v. King, 97 N.C. 339, 2 S.E. 678 (1887); Christman v. Hillard, 167 N.C. 4, 82 S.E. 949 (1914).

The listing and payment of taxes would not suffice to support an action in ejectment or trespass, which is the test of possession referred to in §§ 1-38 and 1-40. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

That defendants listed and paid the taxes is evidence of the character of their claim, but it is no evidence of actual possession. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed. Winstead v Woolard, 223 N.C. 814, 28 S.E.2d 507 (1944).

Title to Remaindermen During Life Estate.—Title by adverse possession cannot be had against the remaindermen before the life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. Brown v. Brown, 168 N.C. 4, 84 S.E. 25 (1915). The statutes cannot begin to run against remaindermen until the expiration of the particular estate. Honeycutt v. Brooks, 116 N.C. 788, 21 SE. 558 (1895); Roe v. Journigan, 181 N.C. 180, 106 S.E. 690 (1921).

Where Remaindermen Not Parties. — Plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant and in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law. It was held that while commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant, and plaintiffs were entitled to possession during the continuance of the life estate, which possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

Adjoining Boundaries. — If two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. Currie v. Gilchrist, 147 N.C. 548, 61 S.E. 581 (1908); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916).

Necessity of Being Visible and Notorious.—It was suggested under the definition that the possession must be as notorious as the nature of the property will permit. The illustrations given under the preceding catchline and the rule therein developed are but illustrations of this rule. The possession must always be as actual, as well as notorious, as the nature of the property will permit, but, although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of the adverse character to the ordinary person, if he should make the observation that the ordinary owner would make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. Kennedy v. Maness, 138 N.C. 35, 50 S.E. 450 (1905).

The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some

person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the legislature to ratify the apparent title. Hedrick v. Gobble, 61 N.C. 348 (1867).

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. Berry v. Richmond Cedar Works, 184 N.C. 187, 113 S.E. 772 (1922).

Continuity and Duration.—The duration of the possession to ripen into title is always fixed by the statutes. The ordinary periods are fixed; as against the State by § 1-35, private individuals under color, § 1-38, and without color, § 1-40. Certain limitations and exceptions are imposed upon these sections by §§ 1-44 and 1-45.

Proof that land was cultivated under one claiming title and that timber was cut thereon as needed, unaccompanied by any evidence of the length of time of the occupancy by cultivation, did not establish title by adverse possession without color of title under § 1-40. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

The continuity is largely a matter of interpretation and construction of these sections for none of them expressly indicate the extent to which the possession must be continuous.

In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by "necessary implication." Ruffin v. Overby, 105 N.C. 78, 11 SE. 251 (1890). The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time, continuously subjected the disputed land to the only use of which it was susceptible. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912); Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916). Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. Alexander v. Richmond Cedar Works, 177 N.C. 137, 98 S.E. 312 (1919). It must be just as continuous as the nature of the property will permit provided it is sufficient to meet the requirement as to notoriousness.

So, where the plaintiff showed a sufficient and connected title to the land in controversy in himself, as contemplated by § 1-42, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years. Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

It has been held that the possession by a tenant of defendant's ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

An intervening period of five months, Holdfast v. Shephard, 28 N.C. 361 (1846), and one year, Ward v. Herrin, 49 N.C. 23 (1856); Malloy v. Bruden, 86 N.C. 251 (1882), have been held to be sufficient intervals to defeat title by adverse possession.

A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. Malloy v. Bruden, 85 N.C. 251 (1881).

Continuity of possession being one of the essential elements of adverse possession, in order that title may be ripened thereby, such possession must be shown to have been continuous and uninterrupted for the full statutory period. This for the reason that if the possession of the adverse claimant be broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

Evidence of continuous possession by using the land for the purposes for which it was ordinarily susceptible, even though such acts were seasonal or intermittent, is sufficient. Price v. Tomrich Corp., 3 N.C. App. 402, 165 S.E.2d 22 (1969).

Same—Reasons for Rule as to Continuity.—The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. Malloy v. Bruden, 86 N.C. 251 (1882). But it is not to be understood that the possession is interfered with by the causal entry of a trespasser sufficiently to defeat title. Hayes v. Williamson-Brown Lumber Co., 180 N.C. 252, 104 S.E. 527 (1920).

From the above authorities it would seem that the true rule is that whenever an occupation ceases for a period ever so brief the statute stops running but if the nature of the only use to which the land can be subjected is such or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time.—Ed. note.

The discussion under this catchline is limited to actions against private individuals. The rule regarding the continuity of the possession as against the State is converse to that respecting continuity as against private individuals. See note to § 1-35.

Occasional acts of ownership, no matter how adverse, do not constitute a possession that will mature title. Sessoms v. McDonald, 237 N.C 720, 75 S.E.2d 904 (1953).

Tacking Possessions—Privity.—It is not necessary that the adverse claimant hold the possession for the statutory period provided he can establish a privity in claim, possession, etc., with the prior possessors, which when taken together will constitute the period of time necessary to give title. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905). This privity is necessary where the claimant has not had possession for the statutory period for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902).

This rule of privity applies alike to cases of adverse possession against the State and private individuals, whether with or without color of title, Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902); May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913); although prior to § 1-35 the rule was otherwise as against the State. Price v. Jackson, 91 N.C. 11 (1884); Phipps v. Pierce, 94 N.C. 514 (1886).

It has been held that to constitute privity, the later occupant must enter under a prior one and obtain his possession either by purchase or descent from him. Privity means privity of possession and not privity in blood for a "privity in blood" is one who derives his title by descent and applies to a real title which can descend and not to a mere colorable title. By this is meant, of course, that the possession descends and the heirs must take immediate possession to prevent a gap. Upon such entry the possession of the ancestor may be tacked to that of the heirs as if he possessed the land under color of title, the heirs, by descent so possess it. Trustees of the Univ. v. Blount, 4 N.C. 455 (1816); Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896); Barrett v. Brewer, 153 N.C. 547, 69 S.E. 614 (1910). In a like manner the widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead (Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903)), or dower. Jacobs v. Williams, 173 N.C. 276, 91 S.E. 951 (1917).

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903).

For the reason explained above possession by the legal representative is a continuation of the possession of the deceased. Trustees v. Blount, 4 N.C. 455 (1816).

The possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896).

The same rule applies where a vendee holds possession under articles of purchase and his possession enures to ripen the defective title of the vendor. Rhodes v. Brown, 13 N.C. 195 (1828). This rule was applied as against cotenants of a husband, notwithstanding that the husband, who held entire possession and while so holding deeded the property to his wife, was later decreed a tenant in common, the wife not being a party to the proceedings. Gill v. Porter, 176 N.C. 451, 97 S.E. 381 (1918).

It should be observed in this connection that the possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years' possession under color of title as required by this section. Morrison v. Craven, 120 N.C. 327, 26 S.E. 940 (1897).

In cases where the claimant is holding possession under color of title he cannot tack his possession of the land not covered by his color to the possession of his grantor. This is an application of the rule that possession cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. See Blackstock v. Cole, 51 N.C. 560 (1859); Jen-

nings v. White, 139 N.C. 22, 51 S.E. 799 (1905).

The principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several successive occupants. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

In order to fulfill the requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

Where parties bring action for the recovery of land as heirs at law of their ancestor and judgment is rendered in the action adverse to them, such judgment adjudicates want of title in their ancestor and is binding upon them, and they may not in a subsequent action, in which they assert title by adverse possession, tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under the known and definite boundaries. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

A grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title, may tack his grantor's possession of such land to his own for the purpose of establishing adverse possession for the requisite statutory period. Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

For note on tacking successive adverse possessions of a strip of land not included in a deed, see 31 N.C.L. Rev. 478 (1953).

Where an heir goes into adverse possession of a tract of land, but the ancestor dies before such possession has been held for twenty years, such possession prior to the ancestor's death may not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than twenty years subsequent to the ancestor's death does not ripen title in him. Wilson v. Wilson, 237 N.C. 266, 74 S.E.2d 704 (1953).

Same—Hostile Character.—It may be stated as a general proposition that the possession must be hostile to the true owner. This question becomes especially important where a person standing in a fiduciary relation has possession of the property in such capacity or where a tenant, a licensee, vendor or some other such person gains title in subordination to the true owner. See Rogers v. Mabe, 15 N.C. 180 (1883); Foscue v. Foscue, 37 N.C. 321 (1842); Johnson v. Farlow, 35 N.C. 84 (1851). Such person cannot hold possession adversely until he commits some act sufficient to apprise the true owner of the fact that he is holding adversely to his interest under a claim of ownership.

Whenever the possessor holds in subordination to the true owner whether in such capacity as named above or by having recognized a superior title in another, his possession will not ripen into title. Gwyn v. Stokes, 9 N.C. 235 (1822).

Thus there is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to show such possession to have been continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

An adverse possession by one tenant in common is indicated by a hostile attitude apparent to the court or jury, from which it may be seen by some act done that the intent to hold alone is manifested to the cotenants, as if they attempt to assert their claim, as to enter, or to demand an account of rents, etc., which is resisted by the occupant, his possession becomes adverse, and the statute begins to run. Tharpe v. Holcomb, 126 N.C. 365, 35 S.E. 608 (1900).

Burden of Proof—Presumptions.—When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. Monk v. Wil-

mington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907). See § 1-42.

Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Conflicting evidence as to the character of extent of the possession under color of title by adverse possession raises the issue for the determination of the jury. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

II. NOTE TO SECTION 1-38.

Cross Reference.—See note to § 1-39.

Generally.—When title to land is out of the State, seven years' adverse possession under color of title is sufficient to ripen title in ordinary cases. Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir. 1939).

Title is deemed to be out of the State where the State is not a party to the action. Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941).

Relation to § 1-56.—This section and § 1-40 apply to actions for the recovery of real estate to the exclusion of § 1-56. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-40 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Effect of Disability.—Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. Clayton v. Rose, 87 N.C. 106 (1882).

But a married woman who acquired no title by another junior grant issued to her cannot use her disability to defeat the right of the plaintiffs. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Connection with Grant as Requisite to Pleading Section.—The plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. Blair v. Miller, 13 N.C. 407 (1830); Isler v. Dewey, 84 N.C. 345 (1881); Christenbury v. King, 85 N.C. 229 (1881); Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889).

Boundaries.—In an action to quiet title the fact that, as a result of the impounding of water some of the boundaries have been submerged and could not be located did not destroy the value of the testimony as to their location at the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and to the acts of possession occurring on that land. Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941).

Methods of Proving Title.—Plaintiffs, in order to recover, had the burden of proving their title to the disputed area by any one of the various methods set out in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889); Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and filed notes. A map made by a surveyor of the premises sued for and of other tracts, adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Contentions of All Parties Should Be Shown on One Map.—It is highly desirable in the trial of a lawsuit involving the location of disputed boundary lines to have one map showing thereon the contentions of all the parties. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Proof Where Allegations as to Title and Trespass Are Denied.—In an action for the recovery of land and for trespass thereon, where the allegations of plaintiffs as to their title and the trespass of the defendant are denied, it was then incumbent upon plaintiffs to establish both the issue of ownership and the issue of trespass. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass.

Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Section Is Proper Plea in Bar to Action in Ejectment. — Generally, when pleaded, this section is a proper plea in bar to an action in ejectment. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Evidence Required in Action of Ejectment.—In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. That is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical lands in controversy. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Adverse possession, to ripen into title after seven years, must be under color, otherwise a period of twenty years is required under § 1-40. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

Where adverse possession is under color of title seven years holding can secure a fee. Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967).

The possession has to be under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Twenty-Year Limitation Applies to Holding without Color.—Where defendant in a qua timet suit defends on grounds other than adverse possession, the statutory period of holding is twenty years where without color of title. Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967).

Color of Title Defined. — Color of title is a paper writing which purports to convey land but fails to do so. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

Sufficiency of Paper to Constitute Color. —There can be no color of title without some paper-writing attempting to convey title, but which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, semble, that under the act of 1891 it must not be so plainly and obviously defective that a man of ordinary capacity could be misled by it. This is true notwithstanding the holding in Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898); Neal v. Nelson, 177 N.C. 394, 23 S.E. 428 (1919).

An instrument is nonetheless color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941).

If the instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Bond for Title as Color.—Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within this section. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

"After payment of the purchase money, a bond for title is 'color of title' to support adverse possession even against the vendor. Avent v. Arrington, 105 N.C. 377, 10 S.E. 991 (1890)." Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Same—Deed for Partition as Color.—A deed by the heirs of a deceased owner of land for partition thereof is not color of title within this section. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is color of title within this section, where the third person had no interest in the land outside of the deed. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse posses-

sion, under § 1-40, whether a certain deed of a commissioner in a partition proceeding constituted color of title so as to complete the title of the heirs by adverse possession under this section is immaterial. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903).

Where land devised to testator's children with remainder to testator's grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the deed executed by the commissioner, being similar to a deed from a stranger, constituted color of title. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941).

Same—Unregistered Deed.—An unregistered deed is not color of title as against judgment creditors of the grantor. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, where the grantee in the unregistered deed conveys by registered deed, and mesne conveyances from him are duly registered, such registered deeds are color of title, under this section, and where the land is held by actual possession successively by the grantees in such chain of title continuously for over seven years prior to the filing of a judgment against the grantor in the unrestricted deed, the grantor in the unregistered deed is divested of title by adverse possession prior to the filing of the judgment, and the judgment does not constitute a lien against the land. Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937).

Same—Valid Deed.—A valid deed is not color of title. When one gives a deed for lands 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. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

Same—Voidable Deed.—A voidable deed is sufficient color although it is a distinct and separate source of title from the one under which entry was first made. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

Same—Void Deed.—A void deed constitutes color of title. Bond v. Beverly, 152 N.C. 56, 67 S.E. 55 (1910).

A wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, under this section, will ripen the fee-simple title in him. Potts v. Payne, 200 N.C. 246, 156 S.E. 499 (1931).

Same—Fraudulent Deed.—A fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner who has right of action to recover possession and is under no disability. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Deed Made in Defective Partition Proceedings.—Where in a partition proceeding to sell land less than the whole number of tenants in common have been made parties, a deed made pursuant to an order of court to the purchaser is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Where a sale is made pursuant to court order in a partition proceeding and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. Yow v. Armstrong, 260 N.C. 287, 132 S.E.2d 620 (1963).

Same—Deed by Mortgagor in Possession.—A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. Parker v. Banks, 79 N.C. 480 (1878).

Same—Sheriff's Deed after Judgment against Nonresident.—A sheriff's deed at an execution sale under a judgment obtained against the nonresident owner by his wife to recover for maintenance and necessaries furnished by her to their minor children, in which action attachment was levied on the land, is at least color of title under this section, the judgment not being void. Campbell v. Campbell, 221 N.C. 257, 20 S.E.2d 53 (1942).

Same—Deed after Husband Abandons Wife.—After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against him, is adverse to the husband, and her possession for the period required by this section, will bar him. Campbell v. Campbell, 221 N.C. 257, 20 S.E.2d 53 (1942).

The evidence tended to show that plaintiff, the owner of the locus in quo, left the State and abandoned his wife and children, that thereafter a tax lien on the locus in

quo was foreclosed and deed was made by the commissioner to plaintiff's attorney, who, by direction of plaintiff, executed a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quitclaim deed and the other children executed deed to the youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead and that she had title. Defendants claim title as grantee from the purchaser at the foreclosure sale of the deed of trust. It was held that the tax deed and the deeds of the wife and the other children to the youngest child constituted color of title, and defendant's evidence that the youngest child went into possession under such color of title and remained in possession for a period in excess of 7 years is sufficient to take the case to the jury upon defendants' contention that they had acquired title to the locus in quo by adverse possession under this section, and the verdict of the jury under correct instructions from the court is determinative of the question. Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941).

Same—Deed of Person Non Compos.— The deed of a person non compos is color of title, and possession under it for seven years ripens into title against those not under disability. Ellington v. Ellington, 103 N.C. 54, 9 S.E. 208 (1889).

Same — Commissioner's Deed in Tax Foreclosure Proceedings. — Commissioner's deed in tax foreclosure proceedings instituted against one tenant in common is color of title as against the cotenants who were not parties to the foreclosure. Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Same—Decree in Condemnation.—A decree in condemnation was color of title, and the adverse possession of the United States of America under this decree of condemnation under known and visible boundaries for a period of seven years as required by this section was sufficient to cure any defects in the title conveyed by the decree of condemnation. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Same — Description of Property Involved.—A deed offered as color of title is such only for the land designated and described in it. Davidson v. Arledge, 88 N.C. 326 (1883); Smith v. Fite, 92 N.C. 319 (1885); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902); Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

And the description in the deed must by proof be made to fit the land it covers. Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965). See the headnote to Smith v. Fite, 92 N.C. 319 (1885), quoted or stated in each of the foregoing cases: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession."

Therefore, a deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title. Dickens v. Barnes, 79 N.C. 490 (1878); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Fincannon v. Sudderth, 144 N.C. 587, 57 S.E. 337 (1907); Katz v. Daughtrey, 198 N.C. 393, 151 S.E. 879 (1930); Thomas v. Hipp, 223 N.C. 515, 27 S.E.2d 528 (1943); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

A deed cannot be color of title to land in general, but must attach to some particular tract. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

When a party introduces a deed in evidence which he intends to use as color of title, he must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Same—Deed from Purchase of Land at Mortgage Foreclosure Sale. — A deed obtained from the purchase of land at a mort-

gage foreclosure sale constitutes color of title, even though the foreclosure sale was defective or void. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Color of Title Does Not Relate Back to Time of Entry.—Though a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry. Justice v. Mitchell, 237 N.C. 364, 78 S.E.2d 122 (1953).

Where the only color of title set up in the complaint is a deed executed less than seven years before the institution of the action, the complaint does not state a cause of action for the acquisition of title by adverse possession under color of title. Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953).

Description in Deed Enlarged in Subsequent Deeds in Chain of Title.—Where the description in the deed from the common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where the parties claim under deeds from a common source calling for a road as the dividing line between the tracts, but subsequent deeds in the chain of title of respondents describe the land by specific description without reference to the road, respondents are entitled to claim the land encompassed in the description in the intermediate deeds as under color of title, and when they offer evidence of adverse possession under their deeds, an instruction limiting their claim to the road as it existed at the time of the execution of the deeds from the common source, is error. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Color of title is not sufficient to make a prima facie case of title. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

But Must Be Strengthened by Possession.—The color must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

Character of Possession under Section.—Chief Justice Ruffin in Green v. Harman, 15 N.C. 158 (1833), said: "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should." Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916).

Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey so that grantee and those claiming under her who immediately went into possession and remained in exclusive possession thereof for "12 or 15 years" acquired title by their adverse possession under color, if not by their deed. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. Berry v. Coppersmith, 212 N.C. 50, 193 S.E. 3 (1937).

The possession of one under color is sufficient notice of his claim of title to the lands. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Stewart v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913).

If the character of the possession is insufficient to ripen a perfect title, the question of color of title does not arise. Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921).

Possession must be adverse; that is, title must be claimed against all the world. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962).

Possession Must Be Such as to Make Adverse Claimant Liable to Action of Ejectment.—In order to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. Justice v.

Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

And So Notorious as to Put True Owner on Notice of Adverse Claim. The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. Cothran v. Akers Motor Lines, Inc., 257 N.C. 782, 127 S.E.2d 578 (1962).

Possession by the grantee of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant. The seven-year statute of limitation prescribed by this section does not begin to run against the remaindermen until the life tenant dies. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

The grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor, and where one of the remaindermen is then under the disability of infancy the grantee cannot acquire title by adverse possession against him under color of the deed until after the lapse of seven years from the removal of the disability. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Evidence of adverse possession held sufficient to be submitted to the jury under claim of title by seven years adverse possession under color. Newkirk v. Porter 240 N.C. 296, 82 S.E.2d 74 (1954).

Charging § 1-40.—Where, in an action for the recovery of land, defendant relied on this section and § 1-40, and the evidence justified a finding in his favor under this section, but there was no evidence to support a verdict under § 1-40, the error in refusing to charge that defendant could not hold under § 1-40 was not reversible, since it could not be inferred that the verdict was based on a finding of adverse possession for twenty years merely because the court refused to charge there was no evidence of adverse possession for twenty years. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Conflict Making Jury Question.—Where the defendant in ejectment claims the locus in quo by sufficient evidence of adverse possession with and without "color," as against plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury. Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926).

Compulsory Reference. — An action in ejectment in which defendants plead the twenty and the seven-year statutes of limitation is not subject to compulsory reference pursuant to § 1-189. Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951).

Effect on Lien of Judgment Creditor.—Adverse possession against a judgment debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. Moses v. Major, 201 N.C. 613, 160 S.E. 890 (1931).

Applied in Layden v. Layden, 228 N.C. 5, 44 S.E.2d 340 (1947); Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948); Grady v. Parker, 230 N.C. 166, 52 S.E.2d 273 (1949).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952); Wilson v. Chandler, 235 N. C. 373, 70 S.E.2d 179 (1952); Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 253 N.C. 444, 121 S.E.2d 893 (1961); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Dill-Cramer-Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928); Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936); McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941); Parham v. Henley, 224 N.C. 405, 30 S.E.2d 372 (1944); Perry v. Alford, 225 N.C. 146, 33 S.E.2d 665 (1945); Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946); Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Vensus Lodge No. 62, F. & A.M. v. Acme Benevolent Ass'n, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950).

§ 1-39. Seizing within twenty years necessary.—No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action,

unless he was under the disabilities prescribed by law. (C. C. P., s. 22; Code, s. 143; Rev., s. 383; C. S., s. 429.)

Section Not Retroactive.—This salutary provision did not extend to actions already commenced or rights of action already accrued at the ratification of the Code. Covington v. Stewart, 77 N.C. 148 (1877).

Legal Title Prima Facie Evidence of Possession.—If a plaintiff establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Johnston v. Pate, 83 N.C. 110 (1880); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Same—Section Construed with § 1-42.—In cases where there is no tenancy in common this section must be construed with § 1-42, for this section is explained in § 1-42 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

This section and § 1-42 are construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

This section and § 1-42 are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Same—Effect of Plea of Section by Adversary.—The pleading by a defendant of this section does not shift upon the plaintiff the burden of showing that he has been in the possession within twenty years before the commencement of the action, but the presumption created by § 1-42 can only be rebutted by proof on the part of the defendant that the defendant had been in adverse possession of the premises for twenty years. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Same—Character of Defendants' Possession as Affecting Application.—This section does not apply when the plaintiffs have shown legal title and it appears that the defendants' possession has not been for twenty continuous years. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907). See Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921) where it was held that the other entry must be openly and notoriously adverse or some act must be done to clearly indicate that it has become adverse, and that the occupation of the mother-in-law's land after her death, where original entry was in subordination to her title, is insufficient. See also Rutledge v. A.T. Griffin Mfg. Co., 183 N.C. 430, 111 S.E. 774 (1922).

Same—Where Previously Gained by Adverse Possession.—Where plaintiffs acquired the title by adverse possession of the land under color for more than thirty years, it follows that they had at least constructive seizin or possession within twenty years before this suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession and it is not incumbent on them to show an actual seizin or possession of the premises in question for twenty years before the commencement of the action. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Stewart v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913).

Notwithstanding that a judgment was rendered against a party in an action to recover lands, if he subsequently enter, inclose and use the lands for the statutory period, he will acquire a new estate by disseizin and acquiescence and will be presumed to have been in possession within the past twenty years. Moore v. Curtis, 169 N.C. 74, 85 S.E. 132 (1915).

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, § 1-38. Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

Evidence Sufficient under Section.—The evidence in Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904), was sufficient to sustain a finding under this section that the defendant held adversely to the plaintiff.

State statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right

or to protect interests of its Indian wards. United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938).

Failure to Allege Seizin Not Ground for Demurrer.—In an action for possession of land failure to affirmatively allege that plaintiff had been seized or possessed of the premises within twenty years prior to the institution of the action is not ground for demurrer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Applied in Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961).

Cited in Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928); Reid v. Reid, 206 N.C. 1, 173 S.E. 10 (1934); Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951).

§ 1-40. Twenty years adverse possession.—No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (C. C. P., s. 23; Code, s. 144; Rev., s. 384; C. S., s. 430.)

Cross Reference.—As to adverse possession for seven years under color of title, see § 1-38.

Editor's Note.—The first part of the annotations under § 1-38 are devoted to a treatment of the general principles of adverse possession and that treatment is just as pertinent to this section as to § 1-38.

Proof out of State as Prerequisite to Pleading Section.—Prior to the passage of § 1-36, in 1917, before one could establish title to property under this section, title must have been proved to be out of the State.—Ed. note.

Thus, where adjoining owners were litigating with respect to their boundaries and each introduced a grant from the State to their lands respectively, which taken together, covered the locus in quo, title was shown out of the State and either party could establish title to any part thereof by adverse possession for twenty years under this section. Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916).

But since the passage of § 1-36 the title is conclusively presumed to be out of the State and such proof is not now necessary except in the cause specified.—Ed. note.

Effect of Section upon Prior Law. — The possession for twenty years which raised a presumption of title, as the law has been heretofore administered, has now the force and effect of giving an actual title in fee by the provisions of this section. Covington v. Stewart, 77 N.C. 148 (1877).

Section Prescribes Maximum Required. — It is error to charge that the adverse claimant must maintain open and continuous possession without break for thirty years before the bringing of his action as only twenty years' adverse possession is required to give a title in fee to the possessor, as against all persons not under disability, except the State, see § 1-35. Walden v. Ray, 121 N.C. 237, 28 S.E. 293 (1897).

Section 1-38 Immaterial When This Section Applicable.—Where title by adverse possession can be established under this section, the question of whether a color of title is sufficient under § 1-38 is immaterial. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903).

Even if there is a deed, with metes and bounds, the adverse possession of twenty years would bar the defendant under the statute of limitations. May v. Atlantic Coast Line R.R., 151 N.C. 388, 66 S.E. 310 (1909), distinguishing Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

Section Applicable to Exclusion of § 1-56. — This section and § 1-38 apply to actions for the recovery of real estate to the exclusion of § 1-56. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Applicability of General Rule Where United States Is Nominal Party. — The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, however gross, does not apply where United States is a mere nominal party so as to preclude adverse possessor from asserting an adverse claim against Indians, who are the real parties in interest. United States v. Rose, 20 F. Supp. 350 (W.D.N.C. 1937).

Presumption of Deed to Possession. — There is no error in a judge charging that where title is out of the State and the evidence shows possession for 20 years the jury might presume a deed to the possessor from any person having title. This is settled law. Melvin v. Waddell, 75 N.C. 361 (1876).

Deed as Evidence of Possession.—Deed of sheriff to grantor of plaintiff in ejectment is no evidence of possession. Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

Elements of Possession Necessary.—See general note under § 1-38.

Section Applies to State and Its Agencies.—The General Assembly intended that this section and § 1-38 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

The plaintiffs' unregistered deed does not prevent their setting up adverse possession for twenty years. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Tenants in Common — Possession of One Possession of All.—The possession of one tenant in common is presumed to be the possession of all. Tharpe v. Holcomb, 126 N.C. 365, 35 S.E. 608 (1900); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. Parham v. Henley, 224 N.C. 405, 30 S.E.2d 372 (1944).

Where plaintiff and defendants were tenants in common, the possession of the defendants, not having been adverse for twenty years, was the possession of the plaintiff. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

To ripen title under a deed from a tenant in common twenty years' adverse possession is necessary and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. Bradford v. Bank of Warsaw, 182 N.C. 235, 108 S.E. 750 (1921).

Adverse possession, even under color of title, will not ripen title as against a tenant in common short of twenty years. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and claiming the land as his own, from which actual ouster would be presumed. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

In the absence of an actual ouster, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Morehead v. Harris, 262 N.C. 330 137 S.E.2d 174 (1964).

One may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion claimed for twenty years under known and visible lines and boundaries but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner. Wallin v. Rice, 232 N.C. 371, 61 S.E.2d 82 (1950); Scott v. Lewis, 246 N.C. 298; 98 S.E.2d 294 (1957).

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession, under this section, the user not being under color of title. Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946).

There can be no constructive possession by one holding land adversely unless he holds under color of title. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Adverse Possessor Cannot Enlarge Rights beyond Limits of Actual Possession.—An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Where the plaintiffs rely upon adverse possession alone without color of title, title acquired under such circumstances is confined to the lands actually occupied. An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several occupants. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

A grantee cannot tack adverse possession of predecessor in title as to land not embraced within the description in his deed, and therefore where he has been in possession for less than twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. Ramsey v. Ramsey, 229 N.C. 270, 49 S.E.2d 476 (1948); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

The adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. International Paper Co. v. Jacobs, 258 N.C. 439, 128 S.E.2d 818 (1963).

Where there Was No Hiatus or Interruption in Possession.—To establish possession for the requisite twenty years, it is permissible to tie the possession of an ancestor to that of the heir when there was no hiatus or interruption in the possession. International Paper Co. v. Jacobs, 258 N.C. 439, 128 S.E.2d 818 (1963).

Deed Held Inoperative to Fix "Known and Visible Lines and Boundaries".—The deed relied on by plaintiffs being inoperative as color of title, the description therein was equally inoperative to fix "known and visible lines and boundaries" as the basis for a claim of adverse possession for twenty years. Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

Effect of Appointment of Receiver. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under this section. Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958).

Recovery of Right-of-Way Not Used for Railroad Purposes.—The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover for that part of the right-of-way no longer used for railroad purposes until the expiration of twenty years. Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950).

In an action to establish a resulting trust instituted shortly after the guardian's death upon evidence that the lands were conveyed to the guardian personally but were paid for with guardianship funds, it is error to enter nonsuit upon the plea of laches and the statutes of limitation upon evidence that the guardian remained in possession for over forty years and devised same to plaintiffs by will when defendants offer evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there is no evidence of disavowal of the trust or adversary holding during the life of the guardian. Cassada v. Cassada, 230 N.C. 607, 55 S.E.2d 77 (1949).

Evidence of Possession Sufficient to Sustain Charge. — Where the plaintiff introduced evidence to show that he had open and continuous adverse possession of the lands under known and visible metes and bounds for more than twenty years, it is sufficient under this section to sustain a charge of the court to the jury as to his title by adverse possession. Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916).

Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taxing the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Priority over Judgment Lien.—Where a judgment debtor has lost title to lands by adverse possession, prior to the acquisition and registration of the judgment, the judgment creditor under § 1-234, is not entitled to execution on the locus in quo, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Effect of Exclusive Dominion after Dedication to Public. — Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of this section, by twenty years' adverse possession. Gault v. Town of

Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931).

Burden of Proof. — See note under § 1-42.

Question for Jury.—Where there is evidence that title to the lands had been acquired under twenty years' adverse possession this question should be submitted to the jury. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

Evidence of plaintiff's testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the claims of all other persons held sufficient to be submitted to the jury under this section. Reid v. Reid, 206 N.C. 1, 173 S.E. 10 (1934); Caskey v. West, 210 N.C. 240, 186 S.E. 324 (1936); Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936).

Where it is alleged that defendant's predecessor in title went into possession of the locus in quo pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than twenty years, the allegations are sufficient to raise the issue of title by adverse possession in the tenant in common, and it is error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. Martin v. Bundy, 212 N.C. 437, 193 S.E. 831 (1937).

Mines and Mineral Rights. — Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for twenty years. Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941).

Mere prospecting does not constitute possession of mine and mineral rights. Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941).

Where plaintiffs' evidence tended to show that they worked the fertilizer minerals at various places on the locus in quo for over twenty years but did not otherwise locate such work, and since plaintiffs do not claim under color of title, there can be no presumption that their possession was to the outer boundaries of their claim, and the evidence is insufficient to show adverse possession of the mining rights under known and visible lines and boundaries. Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941).

In an action to remove cloud on title to the mineral rights in the locus in quo, which had been severed from the title to the surface, and for possession thereof by adverse possession, plaintiffs did not claim under paper title or under color of title. It was held that plaintiffs may not rely upon the weakness of defendant's title but must establish their own title good against the world or good against defendants by estoppel, and there being no question of estoppel involved, plaintiffs must prove title to the mineral rights by adverse possession for a period of twenty years under known and visible lines and boundaries. Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941).

Claim to Timber — Evidence. — As to competency of evidence where question depended upon high and low-water marks, see Rutledge v. A.T. Griffin Mfg. Co., 183 N.C. 430, 111 S.E. 774 (1922).

Where the possession of one cotenant is pursuant to an agreement of all cotenants, his possession for more than twenty years is insufficient to bar his cotenants or their privies. Stallings v. Keeter, 211 N.C. 298, 190 S.E. 473 (1937).

Evidence Sufficient to Take Question of Adverse Possession to Jury.—See Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952), reh. denied, 236 N.C. appx.

Evidence held sufficient to overrule nonsuit in plaintiffs action to establish title to land by adverse possession. Everett v. Sanderson, 238 N.C. 564, 78 S.E.2d 408 (1953).

Evidence Held Insufficient. — Plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least twenty years without color of title. Plaintiff's evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, without evidence tending to describe, identify, or locate the particular land actually occupied. It was held that nonsuit was properly entered. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Evidence offered was insufficient to identify the lines and boundaries of any particular portion in actual possession. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

Applied in Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953); Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

Stated in Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Cited in Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402

(1953); Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1789); Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904); Dill-Cramer Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928); Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1931); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

§ 1-41. Action after entry.—No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter. (C. C. P., s. 24; Code, s. 145; Rev., s. 385; C. S., s. 431.)

Editor's Note. — At common law any person who had a right of possession could assert it by a peaceful entry, without the formality of a legal action, and being so in possession, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry of the wrongdoer was unlawful. See 1 Bouv. Law Dict., title "Entry." This section seems to be a limitation upon the rule in that while an entry may be made, it must be followed by a suit within one year and within the period of limitation (either 20, 7, 30 or 21 years after the statute began running, as this case might be) prescribed by the various sections of the chapter. The effect seems to be that the common-law entry without maintaining a suit within one year thereof is insufficient so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section "and within the time prescribed in this chapter" is but a recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title.

Cited in Clayton v. Cagle, 97 N.C. 300, 1 S.E. 523 (1887).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

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

use is to be carried on or made and (iv) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C. C. P., s. 25; Code, s. 146; Rev., s. 386; C. S., s. 432; 1945, c. 869; 1959, c. 469; 1965, c. 1094.)

Cross References. — As to title against the State, see § 1-35. As to adverse possession of seven years under color of title, see § 1-38. As to adverse possession of twenty years, see § 1-40.

Editor's Note.—For note on the relationship of this section to the acquisition of easements by prescription, see 32 N.C.L. Rev. 483 (1954).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

Necessity of Showing Legal Title.—The statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title," and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920).

Presumption of Subordination. — When the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

When the plaintiff in ejectment shows title to the locus in quo, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, the defendants' occupation is deemed to be under and in subordination to the legal title. Hayes v. Cotton, 201 N.C. 369, 160 S.E. 453 (1931).

Presumption of Possession and Rebuttal. — The presumption that one who proves legal title in himself has been in possession within twenty years is not rebutted by proof that an adverse claimant has been in possession where the claimant holds under a deed from a tenant in common with the devisor of the holder of the legal title. Roscoe v. John L. Roper Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899).

It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed. Kirkman v. Holland, 139 N.C. 185, 51 S.E. 856 (1905).

Same—Where Neither in Possession.— Where the defendants have not shown twenty years' possession, and, the plaintiffs having shown the legal title, the law carries the seizin to the party having the legal title, when neither is in possession. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Title acquired by adverse possession is legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. Purcell v. Williams, 220 N.C. 522, 17 S.E.2d 652 (1941).

Construed with § 1-39. — Where the plaintiff by proving legal title has raised the presumption under this section that he has been in possession within twenty years the presumption operates to satisfy the requirements of § 1-39 so that the plaintiff does not have to prove such possession. The two sections are to be construed together — the defendant must show that he himself has been in possession adversely for twenty years. Johnston v. Pate, 83 N.C. 110 (1880); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

This section and § 1-39 are construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Section 1-39 and this section are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Presumption as to Possession of One Not True Owner.—It was held, in Ruffin v. Overby, 88 N.C. 369 (1883): ". . . every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." And it seems that

the holding is in conflict with this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1868, as it did in Bryan v. Spivey, 109 N.C. 57, 13 S.E. 766 (1891). Thus there is no presumption under the section that the possession of the plaintiffs and those under whom they claim is adverse. Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904).

There is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

But even if Ruffin v. Overby, 88 N.C. 369 (1883), is in conflict with this section, the section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even, if "it appears that such premises have been held and possessed adversely to such legal title." Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904) (dis. op.).

Disability Exception Limited to Persons Having Right of Entry, etc.—Adverse possession relates only to the true title, and the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Application to Claims from Common Source.—Where the parties claimed title from a common source, the plaintiff's deed being the older, but the defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having possession, this section does not apply. Mintz v. Russ, 161 N.C. 538, 77 S.E. 851 (1913).

Burden and Sufficiency of Proof.—The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the greater weight of the evidence, under this section; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error. Ruffin v. Overby, 105 N.C. 78, 11 S.E. 251 (1890); Bryant v. Spivey, 109 N.C. 57, 13 S.E. 766 (1891); Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Steward v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916).

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this section and § 1-35, subdivision (2). Peterson v. Sucro, 101 F.2d 282 (4th Cir. 1939).

The use of the word "satisfied" in a charge upon the sufficiency of evidence under this section did not intensify the proof required to entitle the plaintiffs to their verdict.

The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. The plaintiff's proof need not be more than a bare preponderance; but it must not be less. Fraley v. Fraley, 150 N.C. 501, 64 S.E. 381 (1909); State v. McDonald, 152 N.C. 802, 67 S.E. 762 (1910); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E 862 (1916).

The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto under this section, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff. Virginia-Carolina Power Co. v. Taylor, 194 N.C. 231, 139 S.E. 381 (1927).

Claim of Title under Paper Writing More Than Thirty Years Old.—This section does not declare that one who claims title relying merely on a paper writing more than thirty years old, thereby acquires title to the land described in the instrument nor does it establish title prima facie. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 7 (1962).

Applied in Johnston v. Pate, 83 N.C. 110 (1880).

Quoted in DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959).

Cited in Walker v. Story, 253 N.C. 59, 116 S.E.2d 147 (1960); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

§ 1-42.1. Certain ancient mineral claims extinguished.—(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record title holder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of ten (10) years prior to January 1, 1965, any person, having the legal capacity to own land in this State, who has on September 1, 1965 an unbroken chain of title of record to such surface estate of such area of land for fifty (50) years or more, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded fifty (50) years or more prior to September 1, 1965, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two (2) years after September 1, 1965, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S., 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) All oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.1 (b) and recorded in the local registry in the book provided by G.S. 1-42 within two years from September 1, 1967, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall

publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1967.

The provisions of this subsection shall apply to the following counties: Anson, Buncombe, Durham, Franklin, Guilford, Hoke, Jackson, Montgomery, Person, Richmond, Swain, Transylvania, Union, Wake and Warren. (1965, c. 1072, s. 1; 1967, c. 905.)

Editor's Note.—The 1967 amendment added subsection (d).

§ 1-43. Tenant's possession is landlord's.—When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (C. C. P., s. 26; Code, s. 147; Rev., s. 387; C. S., s. 433.)

Cross Reference.—As to provisions concerning landlord and tenant generally, see § 42-1 et seq.

Section Operates as Estoppel. — The plaintiff can prove title by estoppel, as by showing that the defendant was his tenant (or derived his title through his tenant) when the action was brought. Melvin v. Waddell, 75 N.C. 361 (1876); Conwell v. Mann, 100 N.C. 234, 6 S.E. 782 (1888); Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889); Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920).

Section Fixes Maximum Period.—The presumption which attaches to the possession of a tenant following the termination of tenancy, is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926), citing Melvin v. Waddell, 75 N.C. 361 (1876).

Loyalty Is to Title and Not to Landlord.—The rule that tenant's possession is possession of the landlord, and that tenant under lease may not maintain an action against his landlord involving title during the period of lease without first surrendering the possession he has under the lease, does not apply where after the renting title of landlord has terminated or has been transferred either to third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Where tenant acquired the title of his landlord tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting title thus acquired. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title. —The rule that the possession of the tenant is possession of the landlord, precluding adverse possession by tenant without first surrendering the possession he has under the lease, obtains only when tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title, and does not obtain where tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting, and relying upon that title, as acquired in due course by them. The strength of his title is the foundation of their claim. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Establishment of Tenancy—Question of Fact. — Where the plaintiff in ejectment has shown paper title by mesne conveyances from a State grant of the lands in controversy, and the defendant, claiming under sufficient evidence of adverse possession with and without color, and denies a lease introduced by the plaintiff to the defendant's predecessor in title, it was held reversible error for the court to instruct the jury that defendant's possession is conclusively presumed to be that of a tenant for twenty years under the provisions of this section and exclude evidence of ownership of his predecessor in title during the continuance of the lease and for twenty years thereafter. Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926).

Parol Gift as Rebuttal of Tenancy.—A parol gift of land will not convey title but

it will rebut the idea of tenancy and possession under it will ripen into title if continued for twenty years. Wilson v. Wilson, 121 N.C. 525, 34 S.E. 685 (1897); Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904).

How Tenant May Maintain Action Involving Title.—A tenant under lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. Abbott v. Cromartie, 72 N.C. 292 (1975); Lawrence v. Eller, 169 N.C. 211, 85 S.E. 291 (1915).

Eviction under Legal Process and Reentry.—Although where a tenant has been evicted by legal process and has entered under another claim, etc., the fact may be set up against the landlord and the principle of this section does not apply, if the eviction is the result of a collusion and the tenant then enter under the evictor, his property not having been moved from the premises, the court will not permit a defect of the landlord's title but will apply the principle of this section notwithstanding the eviction. Pate v. Turner, 94 N.C. 47 (1886).

Effect of Failure of Landlord to Prove Title.—Where the plaintiff fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. Benton v. Benton, 95 N.C. 559 (1886).

Competency of Evidence Respecting Tenancy.—Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as tenant is competent. Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896); Shannon v. Lamb, 126 N.C. 38, 35 S.E. 232 (1900); Hatcher v. Hatcher, 127 N.C. 200, 37 S.E. 207 (1900); Bullock v. Bullock, 131 N.C. 29, 42 S.E. 458 (1902).

Application to Tenants in Common.—Where a tenancy in common is shown, the possession of one is the possession of all—and the rule is the same, when one enters to whom a tenant in common has by deed attempted to convey the whole land. Roscoe v. John L. Roper Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899).

The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of the profits, for less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Roscoe v. John L. Roper Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899).

Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession, paid rent to another, prior to the existence of the cotenancy, is not evidence that the defendant entered into possession under the title of such other person. Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926).

A delay by feme covert, tenant in common, for three years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father does not raise a presumption of an actual ouster by her cotenants in common, so as to defeat her title, and under the statute of limitations bar her action. Day v. Howard, 73 N.C. 1 (1875).

Principle stated in McNeill v. Fuller, 121 N.C. 209, 28 S.E. 299 (1897); Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

Quoted in Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

Cited in Pitman v. Hunt, 197 N.C. 574, 150 S.E. 13 (1929); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941).

§ 1-44. No title by possession of right-of-way.—No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (R. C., c. 65, s. 23; C. C. P., s. 29; Code, s. 150; Rev., s. 388; C. S., s. 434.)

Reason for Section.—The provisions of this section are justified upon the ground that the right-of-way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right-of-way is at most a permissive licensee. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Muse v. Seaboard Air Line Ry., 149 N.C. 443, 63 S.E. 102 (1908).

When Section Applies. — This section applies, it would seem, only after the company has acquired and taken possession of a right-of-way and has no application where there is merely an executory con-

tract. The decisions seem to go the length of holding that the section does not apply unless the company has operated the road. See May v. Atlantic Coast Line R.R., 151 N.C. 388, 66 S.E. 310 (1909).

So the grant to a railroad company of an undefined or "floating" right-of-way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company. Willey v. Norfolk S.R.R., 96 N.C. 408, 1 S.E. 446 (1887); Hemphill v. Annis, 119 N.C. 518, 26 S.E. 152 (1896); May v. Atlantic Coast Line R.R., 151 N.C. 388, 66 S.E. 310 (1909).

Before this section can apply the company must have secured or acquired the right-of-way either by condemnation or otherwise and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. Beattie v. Carolina Cent. R.R., 108 N.C. 425, 12 S.E. 913 (1891).

Same — Where Grant Presumed by Charter.—Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies so that although a part of its right-of-way might be used by the owner it has a right of entry whenever it needs the property for its use. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Raleigh & A. Air Line R.R. v. Sturgeon, 120 N.C. 225, 26 S.E. 779 (1897); Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Earnhardt v. Southern Ry., 157 N.C. 358, 72 S.E. 1062 (1911).

Effect of Section.—Under this section the possession by the defendants of the land covered by the right-of-way cannot operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right-of-way. Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

The title of the railroad to the right-of-way once acquired, cannot be lost by occupancy as to any part of it by the lapse of time. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891).

When a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right-of-way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

Same—Effect of Permitting Improvements.—Mere silence while a trespasser is improving real estate as if it was his own, while it may sustain a claim for the value of such improvements when made in good faith, cannot be allowed to transfer the property itself to such trespasser. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886).

Same—Effect upon Power of State, etc., to Change Grade.—This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

Railroad Right-of-Way Acquired by Statutory Presumption.—See Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

The fact that others own the fee in the right-of-way and such ownership is indicated by deed or map appearing in the public registry presents no evidence of probative force that the right-of-way does not belong to the railroad, since it only has an easement which it may exercise to the full extent when in its judgment the necessities of its business so require. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

Section Not Applicable. — An incorporated city or town may obtain title to streets located upon the right-of-way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In re Assessment against Property of Southern Ry., 196 N.C. 756, 147 S.E. 301 (1929).

Applied in Withers v. Long Mfg. Co., 259 N.C. 139, 129 S.E.2d 886 (1963).

Cited in Town of Durham v. Richmond & D.R.R., 104 N.C. 261, 10 S.E. 208 (1889); Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891); Bass v. Roanoke Nav. & Waterpower Co., 111 N.C. 439, 16 S.E. 402 (1892); Loven v. Parson, 127 N.C. 301, 37 S.E. 271 (1900); Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

§ 1-44.1. Presumption of abandonment of railroad right-of-way.—Any railroad which has removed its tracks from a right-of-way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right-of-way after such removal of tracks for a period of seven (7) years after such removal, shall be presumed to have abandoned the railroad right-of-way. (1955, c. 657.)

§ 1-45. No title by possession of public ways.—No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (1891, c. 224; Rev., s. 389; C. S., s. 435.)

Prior Law.—Prior to the enactment of this section title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under what are now §§ 1-30, 1-35, as construed by the decisions of the Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

For cases decided prior to section, see Crump v. Mims, 64 N.C. 767 (1870); State v. Long, 94 N.C. 896 (1886); Moose v. Carson, 104 N.C. 432, 10 S.E. 689 (1889); Turner v. Commonwealth, 127 N.C. 153, 37 S.E. 191 (1900).

Same—Effect of Section upon Title Acquired.—Where an owner has acquired title by adverse possession to a part of a street under the Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this court cannot disturb the title theretofore acquired. Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

Application of Section.—Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. The court, in Moose v. Carson, 104 N.C. 432, 10 S.E. 689 (1889), seems to have overlooked what was decided in State v. Long, 94 N.C. 896 (1886), with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to this section. State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907).

Where a county entered into the possession of a square for the public use before this section, the provisions of this section will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. Gates County v. Hill, 158 N.C. 584, 73 S.E. 804 (1912).

A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user by virtue of this section. Lenoir County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912).

Where there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction the statute of limitations does not now run against the municipality or governing body. Steadman v. Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

This section does not apply to streets, alleys and parks that have been offered for dedication if the offer has not been accepted, or if the offer has been accepted but the streets, alleys or parks have been abandoned. Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

The rule that individuals may not acquire title to any part of a municipal street by encroaching upon or obstructing the same in any way does not apply when the evidence fails to show that the municipality had any title or rights therein. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

Same—Curing Erroneous Charge. — An erroneous charge that the title to an open square, dedicated to and accepted by a

town, would be acquired by seven years' adverse possession, contrary to the provisions of this section, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. Atlantic Coast Line R.R. v. Town of Dunn, 183 N.C. 427, 111 S.E. 724 (1922).

Applies Only to Streets Acquired by Municipality.—The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931).

Possession Prior to Enactment.—When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them had been shown, for thirty-five years prior to the enactment of this section the right of the town to the use of the street was barred by the statute of limitations. Tadlock v. Mizell, 195 N.C. 473, 132 S.E. 713 (1928).

Property Conveyed to Trustees for Municipal Purposes. — Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section does not apply. Carswell v. Carswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Cited in Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.—The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (C. C. P., s. 30; Code, s. 151; Rev., s. 390; C. S., s. 436.)

Statute Affects Remedy Only. — The statute of limitations relates only to remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of scire facias to revive it. Berry v. Corpening, 90 N.C. 395 (1884).

Same—Defenses against Former Statute. —Since the prior law was not an absolute bar to actions, but merely raised a presumption of payment which might be rebutted, the question of changed residence, destitution or insolvency of debtor and other such questions were material in rebutting the presumption raised, but under the present law are immaterial for such purposes since the present statutes totally bar the action. See Campbell v. Brown, 86 N.C. 376 (1882).

Actions for Which No Statutes.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890). Nor is there any statute applicable to the probate of wills. In re Will of Dupree, 163 N.C. 256, 79 S.E. 611 (1913).

Application of Statutes to Trust Relations. — Where a partner receives firm money in winding up the affairs of the partnership in pursuance of an agreement that he so receives such funds, he holds them in trust for the other partners and the statutes do not run. McNair v. Ragland, 7 N.C. 139 (1819).

Suspension of Statutes.—The statute of limitations does not run when there is no one in esse capable of suing. Grant v. Hughes, 94 N.C. 231 (1886).

Effect of Change of Period by Amendment.—A reasonable time for the commencement of an action before the statute changing the period works a bar, Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897), shall be the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years had elapsed before the amending act, then two years more would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. Culbreth v. Downing, 121 N.C. 205, 28 S.E. 294 (1897).

Effect of Failure to Plead Particular Section. — Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was

barred under the provisions of this section, is a sufficient pleading of statute of limitations, although no specific reference is made to the particular sections of the statute applicable. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946).

Burden of Proof. — Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, nonsuit is proper. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946).

Quoted in Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962); Clardy v. Duke University, 299 F.2d 368 (4th Cir. 1962); Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938); Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

§ 1-47. Ten years.—Within ten years an action—

(1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

(1.1) Upon a judgment rendered by a justice of the peace, from its date.

(2) Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

(3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, 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.

(4) For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

(5): Repealed by Session Laws 1959, c. 879, s. 2. (C. C. P., ss. 14, 31; Code, s. 152; Rev., s. 391; C. S., s. 437; 1937, c. 368; 1959, c. 879, s. 2; 1961, c. 115, s. 2; 1969, c. 810, s. 1.)

I. In General.
II. Subdivision (1). Judgments and Decrees.
III. Subdivision (1.1). Judgments Rendered by Justices.
IV. Subdivision (2). Sealed Instruments.
V. Subdivision (3). Mortgage Foreclosure.
VI. Subdivision (4). Redemption of Mortgage.

I. IN GENERAL.

Editor's Note.—The 1969 amendment, effective Jan. 1, 1970, added the last two sentences of subdivision (2).

Session Laws 1969, c. 810, s. 3, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on or after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965). For comment on section, see 11 N.C.L. Rev. 220; 22 N.C.L. Rev. 146.

Law Prior to Section.—It was said of the statute of presumption immediately preceding this section that, "its obvious policy, as said in Ingram v. Smith, 41 N.C. 97 (1849), is to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatically is it a statute of repose, that no saving is

made in it of the rights of infants, femes covert, or persons non compos." Hamlin v. Mebane, 54 N.C. 18 (1853); Hodges v. Council, 86 N.C. 181 (1882); Headen v. Womack, 88 N.C. 468 (1883).

The presumption was not conclusive; it might have been rebutted by any pertinent proof, and such proof was presumed by the appellate court where there was no complaint of the finding of fact by the court. Ex parte Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Though not strictly a statute of limitations, the section was so denominated in a general sense, and hence it was made a part of the chapter denominated in the Revised Code "Limitations." And although it did not create an absolute bar, it did, in a sense, create a conditional bar. Rogers v. Clements, 98 N.C. 180, 3 S.E. 512 (1887).

Same—Effect of Present Section.—This section has taken the place of the former statute of presumptions, Revised Code, c. 65, § 18, in respect to judgments. Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916).

Retroactive Effect.—This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. Gaither v. Sain, 91 N.C. 304 (1884).

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916).

Application Limited to Actions or Suits —Power of Sale.—The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. Cone v. Hyatt, 132 N.C. 810, 44 S.E. 678 (1903); Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. Berry v. Corpening, 90 N.C. 395 (1884).

Same—Leave to Issue Execution.—A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

Sufficiency of Plea of Section.—An answer alleging "that the plaintiff has not brought his action within the time prescribed by law, and the same is barred by the statute of limitations," is a sufficient plea of the statute of limitations. Pemberton v. Simmons, 100 N.C. 316, 6 S.E. 122 (1888).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

Duty to Consider Unsatisfactory Plea. —Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was held to be error. Proctor v. Proctor, 105 N.C. 222, 10 S.E. 1036 (1890).

Effect of Part Payment.—A partial payment voluntarily made does not remove the statutory bar. McDonald v. Dickson, 87 N.C. 404 (1882).

Effect of Making or Adding Parties.— Where this section applies, its provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the superior court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918).

Evidence as to Running.—Evidence as to the running of this statute can have no pertinency where but little more than three years has elapsed. Wilcoxon v. Logan, 91 N.C. 449 (1884).

Applied in Serls v. Gibbs, 205 N.C. 246, 171 S.E. 56 (1933); Town of Farmville v. Paylor, 208 N.C. 106, 179 S.E. 459 (1935); Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937); Allsbrook v. Walston, 212 N.C. 225, 193 S.E. 151 (1937); Bell v. Chadwick, 226 N.C. 598, 39 S.E.2d 743 (1946); Layden v. Layden, 228 N.C. 5, 44 S.E.2d 340 (1947); North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Cited in First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Usry v. Suit, 91 N.C. 406 (1884); Wilcoxon v. Logan, 91 N.C. 449 (1884); Sikes v. Parker, 95 N.C. 232 (1886); Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887); In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933); Furr v. Trull, 205 N.C. 417, 171 S.E. 641 (1933); Davis v. Alexander, 207 N.C. 417, 177 S.E. 417 (1934); Ritter v. Chandler, 214 N.C. 703, 200 S.E. 398 (1939); Ownbey v. Parkway Properties, Inc., 221 N.C. 27, 18 S.E.2d 710 (1942); City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943); Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950).

II. SUBDIVISION (1). JUDGMENTS AND DECREES.

Prior Law.—This statute of presumptions Revised Code, c. 65, § 18, the former law corresponding to this section, which declared that judgments, decrees, etc., should be presumed to be satisfied within ten years, was not conclusive. Ex parte Walker, 107 N.C. 340, 12 S.E. 136 (1890).

A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, which corresponded to this section, because this section is not retroactive. Herman v. Watts, 107 N.C. 646, 12 S.E. 437 (1890).

If there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of a joint vendor cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations, as to the reduced debt assumed by the assignee of the vendee. Ely v. Bush, Lippincott & Co., 89 N.C. 358 (1883).

There is therefore no analogy which makes the decisions under the former precedents applicable to the present law (since the Code of Civil Procedure in 1868) inasmuch as they relate entirely to rules of evidence and not to the removal of a statutory bar where the action is upon a bond or judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

Statute Strictly Construed. — A statute so entirely in derogation of common right as is the statute of limitations, should be strictly construed, and under it a judgment should not be treated as a contract, because it does not come within the necessity of that term. McDonald v. Dickson, 87 N.C. 404 (1882).

Retroactive Effect. — A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure, was subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. Johnston v. Jones, 87 N.C. 393 (1882).

Section Operates as Bar.—This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. McDonald v. Dickson, 85 N.C. 248 (1881).

An action to enforce the lien of a judgment by condemning the land of the judgment debtor to be sold is not an action upon a judgment within the purview of subdivision (1), but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the ten-year period prescribed by § 1-234. Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941).

Significance of Transcribing Justice's Judgment to Superior Court.—A creditor having a judgment in a justice's court may keep his judgment altogether in that court, and rely alone on such process for its enforcement as a justice of the peace may issue; and if he so do, the bar of § 1-49 will apply to it at the end of seven years, unless before that time he sues and obtains a new judgment as he lawfully may do; but if he elect to have a transcript docketed in the superior court, and it is done, then all right of execution in the justice's court is renounced and in lieu thereof, the creditor has the more efficient and far reaching executions and process of the superior court. Broyles v. Young, 81 N.C. 315 (1879).

The transcript of a justice's judgment docketed in the superior court becomes, for the purpose of lien and execution, a superior court judgment and is subsequent to the ten-year limitation notwithstanding § 1-49. Broyles v. Young, 81 N.C. 315 (1879).

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the day of the docketing, and this notwithstanding execution was begun but not completed before the expiration of ten years." Osborne v. Board of Education, 207 N.C. 503, 177 S.E. 642 (1935), citing Hyman v. Jones, 205 N.C. 266, 171 S.E. 103 (1933).

Application to Foreign Judgments.—This section applies to foreign judgments. Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900).

A cause of action on a judgment accrues from the date of its rendition. Rodman v. Stillman, 220 N.C. 361, 17 S.E.2d 336 (1941).

Section Does not Apply to Award by Industrial Commission. — Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, such award is not a judgment of a court within the meaning of subsection (1). Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

When Statute Begins to Run—Judgment in Favor of Infant.—The statute limiting the time to bring an action on a judgment to ten years from the date of its rendition does not begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Section 1-17 permits the plaintiff to bring an action on a judgment secured by a next friend for an infant when the infant was nine years old within the time limited by subsection (1) of this section, i.e., ten years, after he became twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Same—Judgment for Costs. — A judgment for costs is considered part of the first judgment where the costs were first levied against the plaintiff but were later adjudged against the defendant, and there is no bar except from the lapse of ten years under subdivision (1) of this section. Owen v. Paxton, 122 N.C. 770, 30 S.E. 343 (1898).

Same — At Time of Judgment or Confirmation of Sale.—Where an action is instituted to recover the amount due on a note and to foreclose the mortgage securing the same and judgment is rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. McCaskill v. McKinnon, 121 N.C. 192, 28 S.E. 265 (1897).

Same—Judgment for Devastavit against Executor.—When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887).

Same—Alimony Payable Annually.—In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they become due under this section. Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900).

Stopping the Statute.—Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten-year statute of limitations. Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

Effect of Judgment upon Contract or Tort.—A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

Period of Statute—Effect of Admission of Claim by Administrator.—A claim reduced to judgment is barred by the ten-year statute of limitation unless the claim was admitted by the administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889).

Same — Specialties Reduced to Judgments.—Specialties, when reduced to judgments, are merged, and the statute barring judgments will then apply. Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889).

Effect of Issuing Executions during Period.—The statute of limitations may be set up as a defense by an administrator to

a motion for leave to issue execution after ten years from the date of docketing a judgment against his intestate and this although executions have regularly been issued within each successive period of three years after the judgment was docketed. Berry v. Corpening, 90 N.C. 395 (1884).

The words "any state" must be taken to mean the judgment of a court of any state including North Carolina. But it could make no material difference, even if not construed to include this State, since, by § 1-56, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N.C. 248 (1881).

Effect of Payment on Judgment. — A payment on a judgment does not arrest the running of the statute of limitations. McCaskill v. McKinnon, 121 N.C. 192, 28 S.E. 265 (1897).

A partial payment on a judgment does not arrest the running of the statute of limitations. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

Comparison of Effect of Application of § 1-56 with This Section.—It can make no difference whether subdivision (1) of this section or § 1-56 applies. The result will be the same in either case. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

Application to Issuance of Execution.—The issuing of an execution on a decree charging owelty in partition is barred within ten years. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. McDonald v. Dickson, 85 N.C. 248 (1881).

Applied in Hanson v. Yandle, 253 N.C. 532, 70 S.E.2d 565 (1952).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

III. SUBDIVISION (1.1). JUDGMENTS RENDERED BY JUSTICES.

Limitation Is Now Ten Years. — The period now prescribed for the commencement of an action on judgment rendered in a justice's court is ten years from its date. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

IV. SUBDIVISION (2). SEALED INSTRUMENTS.

Section Applicable Only to Principals.—By its express terms, subsection (2) of this section is applicable only to principals. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Notwithstanding Seal.—Affixing a seal to an instrument does not make this section applicable. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

The statute of limitations barring actions against defendants as sureties is § 1-52, notwithstanding the seal appearing after their names. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Section Operates upon Remedy.—This section limits the time within which actions may be brought and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942).

Original Agreement Executed on Independent Consideration.—Where the contract sued upon is an original agreement executed on an independent consideration and the defendant promisor is a principal, the ten-year statute of limitations is controlling. New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

What Plaintiff Must Show.—The burden is upon plaintiffs to prove that the action accrued within the time limited by this section, by showing that the corporate defendant adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the three-year statute, § 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

When Statute Begins to Run—Breach of Warranty. — In an action for breach of a covenant of warranty the statute of limitation begins to run when there is an ouster of the grantee. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same—Breach of Covenant of Seizin.—In an action for damages for breach of covenant of seizin the statute of limitations begins to run upon delivery of the deed. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same—Coupons of Bonds.—The statute of limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. Threadgill v. Commissioners of Anson County, 116 N.C. 616, 21 S.E. 425 (1895).

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946), distinguishing Knight v. Braswell, 70 N.C. 709 (1874).

Same—Guaranty under Seal. — An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. Coleman v. Fuller, 105 N.C. 328, 11 S.E. 175 (1980).

Application to Sureties. — This subdivision is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Section 1-52, subdivision (1) is applicable to sureties and the action against them is limited to three years. Welfare v. Thompson, 83 N.C. 279 (1880); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Barnes v. Crawford, 201 N.C. 434, 160 S.E. 464 (1931); North Carolina Bank & Trust Co. v. Williams, 208 N.C. 243, 180 S.E. 81 (1935); North Carolina Bank & Trust Co. v. Williams, 209 N.C. 806, 185 S.E. 18 (1936).

Guarantor as Principal under Section.— Neither the spirit nor the letter of this section makes a guarantor principal to the original obligation. Coleman v. Fuller, 105 N.C. 328, 11 S.E. 175 (1890) (dis. op.).

Application to Bills, Notes, etc. — The prior law, as does this section, embraced "single bills," as well as promissory notes and other demands therein designated. Rogers v. Clements, 98 N.C. 180, 3 S.E. 512 (1887).

An action on a note under seal against the endorser on the note is ordinarily barred after three years from maturity of the note, by § 1-52, subdivision (1), even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of this section, prescribing a ten-year period "upon a sealed instrument against the principal thereto." Howard v. White, 215 N.C. 130, 1 S.E.2d 356 (1939).

Where the note contained the word "seal" opposite the signature it was held to be conclusive as to the nature of the instrument. Therefore this section controls as to the time within which an action might be brought. Federal Reserve Bank v. Kalin, 81 F.2d 1003 (4th Cir. 1936).

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of ten years. Lee v. Chamblee, 223 N.C. 146, 5 S.E.2d 433 (1943).

Where action was instituted on note under seal on 10 February, 1943 and last payment had been made upon the note on 1 October, 1933, the action was not barred by this section as the statue commenced again to run from the day when the last payment was made. Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945), citing Green v. Greensboro Female College, 83 N.C. 449, 35 Am. Rep. 579 (1880).

Application to Bonds—Former Law.— The corresponding section of the former law was construed to embrace single bonds, though they were not named in terms. Rogers v. Clements, 98 N.C. 180, 3 S.E. 512 (1887).

The presumption of payment of a bond arises after ten years from the time the right of action accrues, and the provisions of § 1-26 do not apply. Hall v. Gibbs, 87 N.C. 4 (1882).

Same—Section Not Retroactive. — A bond for the payment of money executed prior to this section, by the principal and his sureties is exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N.C. 709 (1874).

Conditions Repelling Statute—Setoff.— A setoff in favor of the obligor is not a part payment as to an endorser and does not repel the statute. Woodhouse v. Simmons, 73 N.C. 30 (1875).

Power of Sale in Deed of Trust.—See Merrimon v. Postal Telegraph-Cable Co., 20 N.C. 101, 176 S.E.2d 246 (1934).

Whether Note under Seal as a Question of Law or Fact.—While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute is based upon defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his name as maker, the question of the statute becomes a matter of law, and the court properly refuses to submit an is-

sue as to whether the action was barred. Currin v. Currin, 219 N.C. 815, 15 S.E.2d 279 (1941).

V. SUBDIVISION (3). MORTGAGE FORECLOSURE.

The prior law corresponding to this section created a presumption that after ten years the mortgage was presumed to have been satisfied which might have been rebutted and did not operate to absolutely bar the right. Pemberton v. Simmons, 100 N.C. 316, 6 S.E. 122 (1888).

Only Limitation upon Right to Foreclose.—This section is the only limitation upon the mortgagee's right of action for foreclosure or sale. Parker v. Banks, 79 N.C. 480 (1878).

The institution of suit to foreclose by the mortgagee in possession tolls the operation of this section and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

Prerequisites to Bar. — In order to bar an action for relief under this section two things must concur, namely, the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that period. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

Necessity for Possession. — The mere lapse of time, unaccompanied by any possession, does not obstruct the right to foreclose a mortgage. Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889), decided under prior statute.

The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. Headen v. Womack, 88 N.C. 468 (1883).

Same—Remainderman before Lapse of Life Estate.—The actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the latter cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. Malloy v. Bruden, 86 N.C. 251 (1882); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Character of Possession Necessary.—It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right of possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. Dobbs v. Gullidge, 20 N.C. 197 (1838); Williams v. Wallace, 78 N.C. 354 (1878); London v. Bear, 84 N.C. 266 (1881); Deming v. Gainey, 95 N.C. 528 (1886); Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

Same—Section Applicable to Exclusion of § 1-56. — Where there is no possession by either party, there can be no running of the statute. If it was intended that § 1-56 should apply where there is no possession by either party, it was utterly useless to insert in subdivisions (3) and (4) the provision in regard to possession, as the statute under such a construction of § 1-56, would run whether there was any possession or not, and the period of limitation is the same in both sections. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Since this subdivision is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before § 1-56 has any application. Such a construction would be a complete reversal of the will of the legislature as plainly expressed. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

There are several cases decided under § 1-56 in which the principle of subdivision (3) has been adopted by analogy, and in which it was held that a party who remains in possession of land is not barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. Smith v. McKee, 87 N.C. 389 (1882); Mask v. Tiller, 89 N.C. 423 (1883); Thornburg v. Mastin, 93 N.C. 258 (1885); Norton v. McDevit, 122 N.C. 755, 756, 30 S.E. 24 (1898). Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385, 95 Am. St. Rep. 660 (1903) was explained in

Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

When Holding Becomes Adverse. — When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until condition broken. Woody v. Jones, 113 N.C. 253, 18 S.E. 205 (1893).

Absence from State as Suspending Section.—An action to foreclose a mortgage comes within the purview of § 1-21, and the absence of the mortgagor from the State suspends the running of the statute. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

Where subdivision (3) is pleaded, the absence of the mortgagor from the State for a year or longer as prescribed in § 1-21 will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

Effect upon Debt Secured. — The provisions of subdivision (3) only bar an action to foreclose the mortgage, and do not bar an action to recover the debt secured by the mortgage. Fraser v. Bean, 96 N.C. 327, 2 S.E. 159 (1887).

Effect of Bar of Debt upon Foreclosure. —The fact that a note is barred by the three-year statute, § 1-52, does not prevent the mortgagee from foreclosing his mortgage securing it, this section being applicable. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Where a note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918).

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

Effect of Payment of Interest. — This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933).

Section Not Applicable to Power of Sale.—The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

This section applies to actions for foreclosure of a mortgage or deed of trust and not to foreclosure under a power of sale and to take benefit under such a statute, it must be pleaded. Spain v. Hiens, 214 N.C. 432, 200 S.E. 25 (1938). See 17 N.C.L. Rev. 448.

It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

The theory of the statute is that there has been an abandonment of the right, which will not be presumed unless the party resisting the enforcement of the right has had possession. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Effect of Barring Foreclosure upon Power of Sale.—The court said in Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385 (1903), "It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. Capehart v. Dettrick, 91 N.C. 344 (1884). This because the bar of the statute affects only the remedy and not the right," and upon this point the court was unanimous. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

It was further held in Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385 (1903), that the execution of a power of sale is not within the language of this subdivision, the court saying: "It is not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power of sale; hence no time is fixed by the statute within which he must execute the power." Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

But the General Assembly has changed the law in this particular by providing that the power of sale "shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations," § 45-26 (now § 45-21.12), and this subdivision, bars actions to foreclose a mortgage or deed of trust unless commenced within ten years,

etc. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

Menzel v. Hinton was followed in Cone v. Hyatt, 132 N.C. 810, 44 S.E. 678 (1903), and § 45-26 (now § 45-21.12), which bars a power of sale when foreclosure is barred, was passed to overcome the decisions. Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

The Exercise of a Power of Sale under Mortgage Is Not a Suit.—See Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

Applicability to Consent Judgment Allowing the Equity.—A consent judgment providing that the defendant has an equity to redeem the land upon the payment of a certain sum, on or before a certain day, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under this subdivision ten years' possession of the defendant, after default, bars the plaintiff. Bunn v. Braswell, 139 N.C. 135, 51 S.E. 92 (1905).

Necessity of Pleading Section—Waiving Objection. — When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subdivision an objection that the same was not specially pleaded is waived when, after the conclusion of the evidence and argument, he obtains permission from the court to open the case and offer evidence tending to show that the mortgage had been kept in date of payment, thus rendering the issue appropriate and necessary. Ferrell v. Hinton, 161 N.C. 348, 77 S.E. 224 (1913).

Section Must Be Specifically Pleaded.—In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903).

Power of Grantee to Plead.—The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903).

Section Applicable to Mortgage of Surety.—Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

Applicability to Vendor and Vendee. — While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, this subdivision does not embrace actions arising out of executory contracts for sales of land. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Cancellation of Barred First Mortgage by Second Mortgagee.—A second mortgagee cannot have the first mortgage canceled because it is barred by the statute of limitations. Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

Effect of Part Payment.—Payment on a bond secured by mortgage before it goes out of date, and within ten years before suit brought, will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. Williams v. Kerr, 113 N.C. 306, 18 S.E. 501 (1893).

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

Part payment operating to start the **running of the statute of limitations** anew against the right of action to foreclose a mortgage or deed of trust, is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942).

Sale under Barred Mortgage—Remedy of Mortgagor.—A sale under a mortgage barred by the statute would carry to the purchaser no title. The plaintiff mortgagor being in possession has a full defense to an action for ejectment when brought by the purchaser. Capehart v. Biggs & Co., 77 N.C. 261 (1877); Fox v. Kline, 85 N.C. 173 (1881); Hutaff v. Adrian, 112 N.C. 259, 17 S.E. 78 (1893).

Where a mortgagor in possession has a full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage. Hutaff v. Adrian, 112 N.C. 259, 17 S.E. 78 (1893).

Sale While Suit to Foreclose Pending. —Suit to foreclose a duly registered deed

of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis. While the suit was pending, the assigns of the cestuis sold the property, and upon discovering the transfer, plaintiff had the purchasers made parties. At the time they were made parties the ten-year period prescribed by statute had expired. It was held that the purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that interest which their grantors then had, and could not assert the bar of the statute. Massachusetts Bonding & Ins. Co. v. Knox, 20 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Foreclosure Held Only Remedy in Absence of Signed Note.—Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, in the event of default in payment, foreclosure of the deed of trust is the only action maintainable against her. This section, therefore, prescribes the time within which an action may be brought. Carter v. Bost, 209 N.C. 830, 184 S.E. 817 (1936).

Applied in Woody v. Jones, 113 N.C. 253, 18 S.E. 205 (1893); McCollum v. Smith, 233 N.C. 10, 62 S.E.2d 483 (1950).

VI. SUBDIVISION (4). REDEMPTION OF MORTGAGE.

Applicability to Trust Relation. — The personal representative of a trustee, constituted by a deed in trust, has no right to plead his statute of limitation against his cestui que trust calling for a settlement of the trust. Johnston v. Overman, 55 N.C. 182 (1855).

When Statute Defense to Right to Redeem.—Where the mortgagee is permitted to remain in actual possession of mortgaged land, as mortgagee, for a period of ten years and the mortgage debt has not been paid and no action to foreclose or redeem has been instituted in the meantime, title to the premises will be deemed to be in him, and the ten-year statute of limitations if properly pleaded and relied upon, will be a complete defense to an action to redeem. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

When Statute Begins Running.—Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrues then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. Section 1-42 does not apply. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Bar of Right to Redeem Bars Right to Accounting.—When the right to redeem is barred by this section the right to enforce an accounting is likewise barred. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

Necessity for Possession in Mortgagee.—The mere lapse of time, unaccompanied by possession, does not obstruct the right to redeem. Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889), decided under prior statute.

The statute of limitation does not run against a mortgagor in possession of lands by reason of the legal title being in the mortgagee, not in possession. Cauley v. Sutton, 150 N.C. 327, 64 S.E. 3 (1909).

This section applies only where the mortgagee or trustee is in possession. The opinion of the court in this case rests upon the ground that it does not apply where the mortgagee or trustee has not been in possession, hence such case necessarily is one not therein "provided for" and falls under § 1-56. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904) (dis. op.). It was held in the main opinion that § 1-56 was not applicable.

Same—Holding under Tenant. — Where a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889).

Nature of Possession.—It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of this section. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

The prior statute said nothing about an actual possession being essential to the prescribed effect of the lapse of time. Where there was no actual possession the constructive possession followed the legal title, and where such possession was had for more than ten years after the right to redeem accrued, the statute barred the right of redemption. Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889).

But the possession required by this statute must be actual and not merely constructive. Weathersbee v. Goodwin, 175

N.C. 234, 95 S.E. 491 (1918). Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210 (1923), for the action to enforce the equity of redemption is barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926). See Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889), and the dissenting opinion.

Possession presumed by virtue of § 1-42 is not sufficient to meet the requirements of this section, subdivision (4), for although more than ten years have passed since the cause of action accrued, an action for redemption under this subdivision is not barred unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Cauley v. Sutton, 150 N.C. 327, 64 S.E. 3 (1909); McNair v. Boyd, 163 N.C. 478, 79 S.E. 966 (1913); Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Effect of Intervening Disability.— Where the mortgagee sells the mortgaged land, buys it himself, and enters into adverse possession in the lifetime of the mortgagor, the action is barred as against the infant heirs under this section. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889).

Nor did the prior statute contain a saving clause in favor of persons under disabilities. Houck v. Adams, 98 N.C. 519, 4 S.E. 502 (1887).

Applicability Where Action Not for Redemption. — The question as to whether the bar of this statute applies to recover lands held under a mortgage, the action not being one to redeem, was raised but not decided. Weathersbee v. Goodwin, 175 N.C. 234, 95 S.E. 491 (1918).

Principle Illustrated. — When a mortgagee has been in possession more than thirty years since the execution of the mortgage, the right of redemption is barred. Gray v. Williams, 130 N.C. 53, 40 S.E. 843 (1902).

Where the mortgagee has actual possession, either when the cause of action for redemption accrues or where he thereafter goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. Bernhardt v. Hagamon, 144 N.C. 526, 57 S.E. 222 (1907); Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Edwards v. Tipton, 85 N.C. 479 (1881), is a case illustrating the application of the prior statute.

Applied in Barbee v. Edwards, 238 N.C. 215, 77 S.E. 646 (1953); Jordan v. Chappel, 246 N.C. 620, 99 S.E.2d 778 (1957); Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948).

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

§ 1-49. **Seven years.**—Within seven years an action—

(1): Repealed by Session Laws 1961, c. 115, s. 1.

(2) By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (C. C. P., s. 32; Code, s. 153; Rev., s. 392; C. S., s. 438; 1961, c. 115, s. 1.)

Cross References.—As to requirement of advertisement for claims against estate by executor, administrator, etc., see § 28-47. As to personal notice to creditor by executor, administrator, etc., see § 28-49.

Prior Law.—Under the provisions of the Act of 1715, if the debt was due at the death of the debtor, an action must have been brought within seven years from the death, otherwise both the heir and the executor would have been discharged, and if the action arose after the death, the action must have been brought within seven years after the cause of action arose, or the act would have been a bar, provided the personal representative has paid over the assets. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887).

Revised Code c. 65, § 11, provided that creditors should make their claim within seven years after the death of their debtor, or be forever barred; and according to

every interpretation which has been put upon its terms, it worked a complete bar to every demand, due at the death of the debtor, upon which suit was thereafter delayed for seven years, provided it appeared that in the meantime the estate had been fully administered, so that nothing remained in the hands of the administrator, with which to satisfy the claim. Godley v. Taylor, 14 N.C. 178 (1831); Cooper v. Cherry, 53 N.C. 323 (1861); McKeithan v. McGill, 83 N.C. 517 (1880); Morris v. Syme, 88 N.C. 453 (1883).

Purpose and Effect of Statute. — The present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. Lawrence v. Norfleet, 90 N.C. 533 (1884).

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e. g., the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888). This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not of the heir as such. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

This section applies to an action against a personal, and where necessary, the real representatives to compel the performance of some right of which the debt itself is the foundation. Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

Statute as Absolute Bar.—After the time prescribed in this section, the statute is an absolute bar to creditors. Lawrence v. Norfleet, 90 N.C. 533 (1884); Worthy v. McIntosh, 90 N.C. 536 (1884); Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889) (dis. op.).

Evidence of Laches. — In Strayhorn v. Aycock, 215 N.C. 43, 200 S.E. 912 (1939), plaintiff claimed proceeds of an insurance policy payable to estate of testator and contended that the policy was taken out by him to secure him for funds advanced testator. This action was not instituted until some fourteen years after testator's death. It was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches.

When Construed with § 1-52. — While this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., the Supreme Court must take it in connection with § 1-52, which restricts "within three years an action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections" (which especially referred to contracts under seal, § 1-47, subdivision (2), Joyner v. Massey, 97 N.C. 148, 1 S.E. 702 (1887)), and with § 1-22. Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893).

Section Confined to Creditors — Construed with § 1-56.—The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in ten years under § 1-56. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Same — Application to Action for Possession.—This section does not apply to an action, brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death. Norton v. McDevit, 122 N.C. 755, 30 S.E. 24 (1898).

Same—Application to Suit between Administrators.—Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. Lawrence v. Norfleet, 90 N.C. 533 (1884).

Prerequisite to Running. — The mere lapse of time—seven years—does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Ingram, 104 N.C. 600, 10 S.E. 77 (1889).

When Statute Begins to Run.—It was not intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature, they would not in the same connection have employed the words "next after the qualification of the executor or administrator," as that is an event which must precede the advertisement, and which under the provisions of the law may do so by the space of twenty days. To give the act that construction there would be two events and

leave it doubtful from which the time is to be computed. Cox v. Cox, 84 N.C. 138 (1881).

Suits against an administrator must be brought by creditors of the decedent within seven years next after the qualification of the administrator. Lawrence v. Norfleet, 90 N.C. 533 (1884).

This statute is construed in Cox v. Cox, 84 N.C. 138 (1881), and it is held that while the advertisement is an indispensable prerequisite to the operation, it is incidental, and the time must be computed from the qualification of the representative. Lawrence v. Norfleet, 90 N.C. 533 (1884).

Effect of Failure to Present Claim. — Though the failure to present the claims is declared to be an absolute bar (except against those laboring under disabilities), without any qualification as to the advertisement, this statute does not protect an administrator unless he has paid over the assets, and is absolute and positive in denying the remedy as advertised in conformity to the act. Cooper v. Cherry, 53 N.C. 323 (1861); Cox v. Cox, 84 N.C. 138 (1881).

Significance of Making Advertisement.— The words "and making the advertisement required by law," etc., were used simply to qualify the provisions of the act, and the act should be construed as if it read "within seven years next after the qualification of the executor or administrator, provided he shall have made the advertisement required by law for creditors of the deceased to present their claims," etc. Cox v. Cox, 84 N.C. 138 (1881).

See the dissenting opinion in Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

While the advertisement for creditors to present their claims is an indispensable prerequisite to the operation of this section, yet, as to the time from which the statute begins to run, it is incidental. Lawrence v. Norfleet, 90 N.C. 533 (1884).

Same — Prerequisites to Pleading by Representatives.—The executor or administrator must show that seven years have transpired after his qualification before the commencement of the action, and that he had advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. Cox v. Cox, 84 N.C. 138 (1881).

An executor or administrator who pleads the statute of limitations under this subdivision must show that the seven years have expired next after his qualification before suit brought, and that he has advertised according to law. Without proof of the advertisement, the plea of the statute will not avail him. Cox v. Cox, 84 N.C. 138 (1881).

Same—Necessity for Affirmative Plea.— To enable the personal representative of a deceased person to avail himself of the limitations provided in this subdivision, he must allege in his plea, and prove upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute. Love v. Ingram, 104 N.C. 600, 10 S.E. 77 (1889).

Conditions Preventing the Running. — Nothing will defeat the operation of this subdivision, except the disabilities mentioned in the Code, or such fraud or other matter of equitable nature, as would make it against conscience to rely on the statute. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887).

The death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian. Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887).

Pendency of Suit as Suspension.—If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the court's judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

So much of the ruling in Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), as holds that the realty is protected from liability for the debts of the deceased if the statutory period of seven years has expired, even though the creditor had begun proceedings within the seven years against the personal representative to enforce his claim, but by delays in the court had failed to obtain judgment till after that period is overruled. This decision has been much questioned and has been repeatedly shaken, among other cases, see Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891), and Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888). It may be noted that its supporting case, Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887), which protected the heir at law by the lapse of seven years from the qualification of the personal representatives, even as to causes of action accruing subsequently to the death of the decedent, was overruled in Miller v. Shoaf, 110 N.C. 319, 14 S.E. 800 (1892), thereby establishing the dissenting

opinion of Merrimon, J., in Andres v. Powell as the correct statement of the law. Lee v. McKoy, supra, therefore, overruled the decision in Syme v. Badger, which, after the long and repeated consideration given it, seems to have been founded upon a mistaken line of reasoning. See Smith v. Brown, supra. Since the obtaining of a judgment against the personal representatives prevents the bar of the statute as to the real representatives, there can be no reason why the latter are not equally prohibited from pleading the statute when the action was begun against the personal representatives within seven years, but by delays in the court's judgment was not had against them until after the lapse of seven years.

The ruling in Syme v. Badger would bar a cause of action before the right to sue on it had accrued. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Same — As against Heirs Where Not Parties. — Where proceedings against the administratrix were instituted within the seven years after her qualification and making advertisement though the heirs at law were not made parties to the proceedings till after the lapse of seven years, the proceedings, not being barred as to the personal representative, cannot be barred as to the heirs at law by this section. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Time of Accrual as Affecting Application.—This subdivision contemplates those claims upon which the right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), and Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887) distinguished. Miller v. Shoaf, 110 N.C. 319, 14 S.E. 800 (1892).

Necessity for Full Administration. — Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. Morris v. Syme, 88 N.C. 453 (1883).

Effect of No Assets in Hands of Representatives.—This statute is an absolute bar unless suit is brought within the time specified, whether there be assets or not in the hands of the representative. Lawrence v. Norfleet, 90 N.C. 533 (1884).

What Must Be Pleaded and Proved by Administrator. — Where an administrator had assets and sets up the statute of limitations against a debt of his intestate he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar. Little v. Duncan, 89 N.C. 416 (1883).

The statute was not a bar, at all events; if there were assets in the hands of the administrator, the plea of this section would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same. Little v. Duncan, 89 N.C. 416 (1883).

Heirs as Parties.—In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. Lilly v. Wooley, 94 N.C. 412 (1886), which was cited with approval in Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), and which has been approved since in Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889); Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

§ **1-50. Six years.**—Within six years an action—

(1) Upon the official bond of a public officer.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.

(5) No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an im-

provement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action. (C. C. P., s. 33; Code, s. 154; Rev., s. 393; C. S., s. 439; 1931, c. 169; 1963, c. 1030.)

I. In General.
II. Subdivision (1)—Public Officers.
III. Subdivision (2)—Executors, Guardians, etc.

Cross References.

As to official bonds generally, see § 128-8 et seq. As to right of action on bond of executor, administrator, or collector, see § 28-42. As to action on bond of guardian, see § 33-14.

I. IN GENERAL.

Prior Law.—Formerly there was no statute limiting the time in which actions must be brought on bonds, except a provision in favor of the surety. Humble v. Mebane, 89 N.C. 410 (1883).

The present statute takes the place of § 5, c. 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate. Commissioners of Moore County v. MacRae, 89 N.C. 95 (1883).

Manner of Pleading Section.—This section must be affirmatively pleaded. Humble v. Mebane, 89 N.C. 410 (1883).

Plea of Statute Places Burden on Plaintiff to Show Action Not Barred. — Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Cited in J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

II. SUBDIVISION (1)—PUBLIC OFFICERS.

Application to Bond of Defaulted Clerk.—This section is applicable to an action against the surety on the bond of a defaulted clerk of the superior court. State ex rel. Lee v. Martin, 186 N.C. 127, 118 S.E. 914 (1923).

Application to Action for Tort against Clerk.—In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required, this section does not apply. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Application to Registers of Deeds.—The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years, under this section. Thus the statute commences to run from the time of the failure to register. State ex rel. Daniel v. Grizzard, 117 N.C. 105, 23 S.E. 93 (1895). See State ex rel. Bank of Spruce Pine v. McKinney, 209 N.C. 668, 184 S.E. 506 (1936).

When Statute Begins to Run.—An action upon an official bond may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. Commissioners of Moore County v. MacRae, 89 N.C. 95 (1883).

Ordinarily the statute begins to run from the time of the breach of the bond. Upon the termination of a sinking fund commissioner's term the law required him to account for funds in his hands and his failure to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately. City of Washington v. Bonner, 203 N.C. 250, 165 S.E. 683 (1932).

Ordinarily, the statute of limitations on the bond of a clerk of the superior court begins to run upon default and not upon discovery, and when funds are paid into the clerk's office to the use of a person who is sui juris and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of § 1-52, subdivision (9), have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. State ex rel. Thacker v. Fidelity & Deposit Co., 216 N.C. 135, 4 S.E.2d 324 (1939).

Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins

to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office in view of this section. City of Washington v. Trust Co., 205 N.C. 382, 171 S.E. 438 (1933).

Protection Extends to Surety. — This statute protects both principal and surety upon the bond. Vaughan v. Hines, 87 N.C. 445 (1882).

III. SUBDIVISION (2)—EXECUTORS, GUARDIANS, ETC.

Purpose of Section.—This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

Application and Relation of Various Sections. — This section, subdivision (2), expressly applies to actions on the "official bond," § 1-52, subdivision (6), to sureties only, and § 1-56 so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for fifteen years after the executor filed his final account, the action was barred by either this section or § 1-56. Culp v. Lee, 109 N.C. 675, 14 S.E. 74 (1891).

The statutes of limitation applicable to actions against administrators make a distinction between their fiduciary liabilities and their liabilities upon the administration bond. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889) (dis. op.).

Application to Action for Account. — Where the action is not brought upon the official bond as administrator of the testator of the defendant, but it is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, the defendant is a trustee of an express trust, and the statute of limitations does not apply. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Application to Action for Share.—The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares, Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889); unless the action is on the bond to recover the amount of such share. Vaughan v. Hines, 87 N.C. 445 (1882).

When Applicable to Action for Balance Due.—No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Persons against Whom Section Absolute Bar.—An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years after the filing of the final account, or it will be barred by the statute. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

The creditors must bring their action within the six-year period of limitation. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

It would be a curious legal anomaly if, within six years, the next of kin should bring their action against the executor or administrator (and they must bring it within six years or be barred) and recover, and then more than six years after the auditing of the account a creditor of the deceased should bring action and be allowed to recover, either out of the executor or administrator, or out of the next of kin or heir. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

An action on the bond must be prosecuted within the six years after the filing of the specified account as well by the next of kin as by creditors, in order to escape the statutory obstruction. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

After the time prescribed in this section and § 1-52, subdivision (6), the statute is an absolute bar to the next of kin. Spruill v. Sanderson, 79 N.C. 466 (1878); Vaughan v. Hines, 87 N.C. 445 (1882).

This applies to an action upon a bond to recover distributive shares. Vaughan v. Hines, 87 N.C. 445 (1882).

Extent of Surety's Protection. — This statute protects the surety as well as the principal. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887); Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under § 1-52, subdivision (6). Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the

breach complained of under § 1-52, subdivision (6). Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

Failure of Guardian to Pay Balance Due Ward.—An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account as required under this section, the statute not applying to such action. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933).

Significance of Final Account and Audit.—The final account is the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in § 1-49. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

The bar is unavailable under this section, unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond in favor of the surety. Humble v. Mebane, 89 N.C. 410 (1883).

Same—Effect of Failure to Make Final Settlement.—See Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

A guardian qualified in July, 1872; his ward came of age in September following; the guardian died without having settled his trust or making any of the returns required; in 1887 the ward made a demand upon, and brought suit against the sureties on the bond, it was held that his action was barred. Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

Significance of Demand Irrespective of Final Account.—Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years under § 1-52, subdivision (6). Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

When such final account is filed, and there is no demand and refusal; Quaere, whether the action as to the executor, administrator or guardian himself is barred in six years or ten years. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

Same—As Applied to Suit by Minor.—An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Where there is no final account filed, semble, that the statute begins to run from the arrival of the ward of age, but whether in such cases three years or ten years bar, quaere. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

When Action Brought. — The action must be brought within six years after the auditing and filing of the account. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Suspension of Statute. — Where there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891).

§ **1-51. Five years.**—Within five years—

(1) No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right-of-way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

(2) No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road,

or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (1893, c. 152; 1895, c. 224; 1897, c. 339; Rev., s. 394; C. S., s. 440.)

Local Modification.—Burke: Pub. Loc., 1925, c. 535; Caldwell: Pub. Loc., 1927, c. 119; Haywood: Pub. Loc., 1923, c. 433; McDowell: Pub. Loc., 1925, c. 535; Mitchell, Yancey: Pub. Loc., 1923, c. 433.

I. In General.
II. Subdivision (1)—Right-of-Way.
III. Subdivision (2)—Damages for Construction and Repair.

I. IN GENERAL.

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights-of-way or use and occupancy. Carolina & Northwestern Ry. v. Piedmont Wagon & Mfg. Co., 229 N.C. 695, 51 S.E.2d 301 (1949), discussed in 27 N.C.L. Rev. 579.

Law Prior to Section.—Before this section a railroad could acquire the prescriptive right to pond water on adjacent lands only by subjecting itself to an action for the injury continuously for twenty years. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897); Harrell v. Norfolk & C.R.R., 122 N.C. 822, 29 S.E. 56 (1898).

The former law permitting the plaintiff to bring at his option, an action for permanent damages, in which case the entire damages, "past, present and prospective," could be sued for in one action to which twenty years was the limitation, or, at plaintiff's election, from time to time, actions could be brought for the continuing damages, in which actions the recovery was limited to damages accruing within three years. Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896); Parker v. Norfolk & C.R.R., 119 N.C. 677, 25 S.E. 722 (1896); Ridley v. Seaboard & R.R.R., 124 N.C. 34, 32 S.E. 325 (1899).

Prior to this section, three years was the statutory limitation to actions for recovery of damages to crops. Ridley v. Seaboard & R.R.R., 124 N.C. 34, 32 S.E. 325 (1899).

Constitutionality.—This section is not a violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting any state from denying to any person the equal protection of the laws. Narron v. Wilmington & W.R.R., 122 N.C. 856, 29 S.E. 356 (1898).

Power of Legislature to Change Period. — The legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened, "a reasonable time must be given for the commencement of an action before the statute works a bar." Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897).

Retroactive Effect. — This section does not apply to a suit begun before its passage. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897); Harrell v. Norfolk & C.R.R., 122 N.C. 822, 29 S.E. 56 (1898).

Section Restricted to Railroad Companies.—The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. Cherry v. Canal Co., 140 N.C. 422, 53 S.E. 138 (1906).

The language in Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027 (1902), which is said to have extended this section to include canal companies, is as follows: "While c. 224, Laws 1895, applies only to railroads, yet as the court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730, 32 L.R.A. 708 (1896), we see no reason why it should not apply equally to canals." It will thus be observed that the court here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principle announced and exploited in Ridley v. Seaboard & R.R.R., and as contemplated by the statute in reference to railroads, but did not, and did not intend to extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. Cherry v. Canal Co., 140 N.C. 422, 53 S.E. 138 (1906).

In case of railroads, the period within which actions for continuing trespasses may be brought has been reduced to five years, but there being no such statute in respect of telegraph companies, the common-law period of twenty years is required. Love v. Postal Telegraph-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942),

citing Geer v. Durham Water Co., 127 N.C. 349, 37 S.E. 474 (1900).

When Statute Begins to Run. — The statute begins to run from the date of the first substantial injury. Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896); Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897); Stack v. Railroad, 139 N.C. 366, 51 S.E. 1024 (1905); Staton v. Atlantic Coast Line R.R., 147 N.C. 428, 61 S.E. 455 (1908); Pickett v. Atlantic Coast Line R.R., 153 N.C. 148, 69 S.E. 8 (1910).

The right of action of a remainderman against railroad to recover lands accrues upon the death of the life tenant. Young v. Atlantic Coast Line R.R., 189 N.C. 238, 126 S.E. 600 (1925).

Quoted in Blevins v. Northwest Carolina Util., Inc., 209 N.C. 683, 184 S.E. 517 (1936).

II. SUBDIVISION (1)—RIGHT-OF-WAY.

Section a Statute of Limitation — Affirmatively Plead.—This section in regard to bringing an action against a railroad for damages for a right-of-way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912).

Amount of Damages Recoverable.—The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefinitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof as may be necessary to the easement. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

Allowance of Interest.—It is within the power of the lower court, to allow interest on the amount found since the actual taking by the railroad company of the owner's land for its right-of-way, as a part of the damages. Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912).

This section has no application to an action in ejectment by the owner of the fee to recover that part of the right-of-way no longer used by the railroad company or its lessee for railroad purposes. Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950).

III. SUBDIVISION (2)—DAMAGES FOR CONSTRUCTION AND REPAIR.

Editor's Note. — The act of 1893 was merely a statute of limitation. The act of 1895, professedly an amendment to the act of 1893, provides that all actions for damages caused by the construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

The provision in the act of 1895 incidently provided for a statutory easement, rather by implication than direct terms, in effect is but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896), which was decided a year after the act was passed. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Recovery for Easement and Damages. —Where the railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury without being forced to purchase the easement under this section. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Same — Ditches and Embankments as Permanent Structures. — A ditch is not necessarily a permanent structure. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction. Could not the railroad fulfill its obligations by abating the nuisance and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and in any event must pay for the injury already done. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in

that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as clearly intended by the statute. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. Campbell v. Raleigh & C.R.R., 159 N.C. 586, 75 S.E. 1105 (1912).

Same—Recurrent Injuries—When Action Barred by § 1-52.—In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is held, that for injuries arising from the original and permanent construction of the road, properly maintained, this section applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury. Perry v. Norfolk S.R.R., 171 N.C. 38, 87 S.E. 948 (1916).

Same—Inclusiveness of Section Respecting Damages. — The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the enquiry to the time of trial, which may be assessed by the jury on separate issues as to each. Barclift v. Norfolk S.R.R., 175 N.C. 114, 95 S.E. 39 (1918).

The evident meaning of this section is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897), citing Strickland v. Draughan, 91 N.C. 103 (1884).

Since this section all damages accruing from the construction of a railroad must be sued for within five years and the entire amount of damages must be recovered in one action. This is a very just enactment and protects such corporations from the oppression of being sued again and again ad infinitum on the ground of continuing damages. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897) (dis. op.)

In actions brought in cases for damages to crops and personal injuries, since the passage of this section, only permanent damages, i.e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. Ridley v. Seaboard & R.R.R., 124 N.C. 34, 32 S.E. 325 (1899).

It is true this section uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This section does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong; while the other is the conveyance of a right, as the allowance of permanent damages under this section is in effect the condemnation of land to the use of a statutory easement. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Same — Damages Arising after Construction. — This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. Barclift v. Norfolk S.R.R., 175 N.C. 114, 95 S.E. 39 (1918).

The statute of limitations begins to run in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

This section does not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. Savage v. Norfolk S.R.R., 168 N.C. 241, 84 S.E. 292 (1915).

By this section actions for damages occasioned by the construction of railroads are to be commenced within five years after cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Same—Assessment of Permanent Damages Compulsory.—In the case of Beasley v. Aberdeen & R.R.R., 147 N.C. 362, 61 S.E. 453 (1908), it was held that the assessment of "permanent damages" in a case against a railroad for injuries to land in construction or repair of its roadbed, is made compulsory by this subdivision. Pickett v. Atlantic Coast Line R.R., 153 N.C. 148, 69 S.E. 8 (1910).

The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent" because it proceeds from a permanent cause and will probably continue indefinitely as the natural effect of the same cause. Such is the case where the cause is apparently permanent and the damage necessarily continuing or recurrent. The interest and inconvenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

The confusion liable to arise from the word "permanent" as applied to damages is pointed out in Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897), where the nature of such an easement is discussed. Whether the damage is permanent or not, must appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the damage to his land, but also the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Recovery by Present Owner.—The present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. Louisville & N.R.R. v. Nichols, 187 N.C. 153, 120 S.E. 819 (1924).

Effect of Amendment of Pleadings as to Bar.—An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the land does not add a new cause of action, but relates only to the measure of damages arising from the injury; and this section will not bar the plaintiff by reason of the amendment alone. Pickett v. Atlantic Coast Line R.R., 153 N.C. 148, 69 S.E. 8 (1910).

Applied in Owenby v. Louisville & N.R.R., 165 N.C. 641, 81 S.E. 997 (1914).

§ **1-52. Three years.**—Within three years an action—

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

(2) Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.

(3) For trespass upon real property. When the trespass is a continuing one,

the action shall be commenced within three years from the original trespass, and not thereafter.

(4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

(7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

(8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(10) For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.

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

I. IN GENERAL.

Editor's Note.—For comment on limitations as to claims between spouses, see 44 N.C.L. Rev. 197 (1965).

Opinions of Attorney General. — Mr. John R. Parker, Sampson County Attorney, 9/17/69.

Section Not Retroactive.—A bond for the payment of money executed prior to this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N.C. 709 (1874).

Burden of Proving Section.—When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. Parker v. Harden, 121 N.C. 57, 38 S.E. 30 (1897); Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Upon defendant's plea of the statute of limitations the burden devolved upon plaintiffs to show that their action was not barred but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Upon the plea of this section the burden is on plaintiffs to show that they instituted their action within the prescribed period. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Failure to Sustain Burden. — Where a party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit.

Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Cause of Action Accrues. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Classification Is Based upon Nature of Right, Rather than Remedy.—There is no suggestion of classification in the limitations statutes on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The classification in the limitations statutes is based upon the substantive nature of the cause of action. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

For purposes of limitations the North Carolina court has looked to the nature of the right of the litigant which calls for judicial aid, not to the nature of the remedy to rectify the wrong. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The period prescribed for the commencement of an action whether considered an action for breach of warranty or an action for negligence, is three years from the time the cause of action accrued. Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

When the statute begins to run, it continues until stopped by appropriate judicial process. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Section Applies Though Enforcing Remedy Is Equitable Lien.—The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Equity upon Claim.—The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. Mask v. Tiller, 89 N.C. 423 (1883).

The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959).

The defense of the statute is not barred by the existence of a fiduciary relation between the parties. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Statute Runs between Spouses. — Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Disability.—This statute does not begin running against a person under disability, such as infancy, until the disability is removed; hence it does not begin running until then notwithstanding that the cause may have otherwise accrued prior to that time. Settle v. Settle, 141 N.C. 553, 54 S.E. 445 (1906).

A cause of action accrues to an injured party, so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Disability of Infants.—The rule, except in suits for realty where the legal title is in the ward, is that the statute of limitations runs against an infant as to all rights of action which the guardian might bring and which it was incumbent on him to bring, insofar as may be consistent with the limitations of his office. Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Question of Law and Fact. — While, ordinarily, the bar of the statute of limitations is a mixed question of law and fact, nevertheless, where the party against whom the statute has been pleaded fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Solon Lodge

v. Ionic Lodge, 147 N.C. 310, 101 S.E.2d 8 (1957).

But where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Section Supplemented by § 1-22.—This statute cannot avail as a defense where within six months after the death of the intestate, the plaintiff had qualified as her administrator and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. Harris v. Davenport, 132 N.C. 697, 44 S.E. 406 (1903).

Subdivision (5)—Injury to Person or Rights of Another. — Where plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

Subdivision (5) applies to a cause of action to recover for personal injuries negligently inflicted. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

Where plaintiff has taken a voluntary nonsuit and brings the identical action again, if the former action has not been barred by this section, the second action is in time if brought within one year from the time of the voluntary nonsuit. Van Kempen v. Latham, 201 N.C. 505, 160 S.E. 759 (1931).

When Proper to Decide Application in Appellate Court. — Upon the appeal it is unnecessary to decide whether this section or § 1-56 applies where there is an insufficient finding of fact to sustain a plea of either, and for this reason a new trial must be had. Dayton v. City of Asheville, 185 N.C. 12, 115 S.E. 827 (1923).

Application to Action to Recover Share of Estate.—An action by an administrator to recover his intestate's share of an estate, is governed by § 1-56, which provides that actions not otherwise provided for shall be brought within ten years, and not this section. Hunt v. Wheeler, 116 N.C. 422, 21 S.E. 915 (1895).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of this section and not by § 1-56. Reynolds v. Whitin Mach. Works, 167 F.2d 78 (4th Cir. 1948).

Where the three-year statute of limitations is pleaded in an action to recover for silicosis contracted by plaintiff as the result of alleged negligence of defendant in failing to use reasonable care to provide a reasonably safe place to work, an instruction which fails to limit recovery to those injuries proximately resulting from negligent acts of defendant committed within three years next before the institution of the action, must be held for error. Bame v. Palmer Stone Works, Inc., 232 N.C. 267, 59 S.E.2d 812 (1950).

Section Not Applicable. — Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, this section has no application. Carter v. Bost, 209 N.C. 830, 184 S.E. 817 (1936). See § 1-47, analysis line IV.

This section is not applicable to an action specifically brought under the provisions of § 105-414. Miller v. McConnell, 226 N.C. 28, 36 S.E.2d 722 (1946).

Bar Applies to Remedy.—The bar is applied under this section, not to the mode in which relief is sought, but to the relief itself. Spruill v. Sanderson, 79 N.C. 466 (1878).

An action for malicious prosecution or abuse of process was not barred by this section, where the action was begun two years, eleven months and twenty-one days after the plaintiff was discharged from the State hospital. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

Action for Malpractice. — The period prescribed for the commencement of an action for malpractice based on negligence is three years from the time the cause of action accrues. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

In actions involving the alleged tortious conduct of physicians and surgeons, the cause of action arises when the alleged wrongful act is committed. Clardy v. Duke Univ., 299 F.2d 368 (1962).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year statute of limitations (§ 1-56) and not by the three-year statute of limitations (this section). Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Laches.—Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts

demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Applied in Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953); as to subsection 5, in Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954); Graham v. Taylor Biscuit Co., 161 F. Supp. 435 (M.D.N.C. 1957); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Horne v. Cloninger, 256 N.C. 102, 123 S.E.2d 112 (1961); Snyder v. Wylie, 239 F. Supp. 999 (W.D.N.C. 1965); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967); Cobb v. Clark, 4 N.C. App. 230, 166 S.E.2d 692 (1969); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939); Craver v. Spaugh, 227 N.C. 129, 41 S.E.2d 82 (1947); Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Stated in Chas. R. Shepherd, Inc. v. Clement Bros. Co., 177 F. Supp. 288 (W.D.N.C. 1959).

Cited in United States v. Lance, Inc., 95 F. Supp. 327 (W.D.N.C. 1951); Quevedo v. Deans, 234 N.C. 618, 68 S.E.2d 275 (1951); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Reuning v. Henkel, 138 F. Supp. 492 (W.D.N.C. 1956); Piedmont Nat'l Gas Co. v. Day, 249 N.C. 482, 106 S.E.2d 678 (1959); Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968); Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Bray v. Creekmore, 109 N.C. 49, 13 S.E. 723 (1891); Rhodes v. Tanner, 197 N.C. 458, 149 S.E. 552 (1929); Griffith Profitt Co. v. English, 198 N.C. 66, 150 S.E. 619 (1929); Mebane Graded School Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937); Ritter v. Chandler, 214 N.C. 703, 200 S.E. 398 (1939); Powers v. Planters Nat'l Bank & Trust Co., 219 N.C. 254, 13 S.E.2d 431 (1941); Currin v. Currin, 219 N.C. 815, 15 S.E.2d 279 (1941); Lee v. Johnson, 222 N.C. 161, 22 S.E.2d 230 (1942); Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943); State Highway & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 226 N.C. 371, 38 S.E.2d 214 (1946); Powell v. Malone, 22 F. Supp. 300 (M.D.N.C. 1938).

II. SUBDIVISION (1)—CONTRACTS.

The statute begins to run on the date the promise is broken. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

But a new promise to pay fixes a new date from which the statute runs. Such promise, to be binding, must be in writing as required by § 1-26. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Effect of Exercise of Acceleration Clause in Note.—Where the holder of a note exercises the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause is effective as to a third comaker, even though he is not made a party to the action, and action on the note against the third comaker is barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. Shoenterprise Corp. v. Willingham, 258 N.C. 36, 127 S.E.2d 767 (1962).

Indemnity Bond. — When the promisor in an indemnity bond has a personal, immediate, and pecuniary interest in the transaction in which the third party is the original obligor, the courts will always give effect to the promise as an original and direct promise to pay, and this section is not applicable. New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

Application to Agreement to Arbitrate. —An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute. Sprinkle v. Sprinkle, 159 N.C. 81, 74 S.E. 739 (1912).

Action for Money Had and Received.— An action by a county board of school directors for fines and penalties collected by a city is in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and this subdivision applies. School Directors v. City of Asheville, 128 N.C. 249, 38 S.E. 874 (1901).

Contract to Pay Money. — Where land was conveyed to J. with condition that he pay certain sums to his brothers, and he accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. Rice v. Rice, 115 N.C. 43, 20 S.E. 185 (1894).

Action on New Promise.—Where plaintiff, the payee and holder of a note, alleged

that the debtor advised him not to enter claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note, plaintiff's cause of action is on the new promise and not the original note, and the new promise being made more than three years prior to the institution of the action, plaintiff's cause is barred by the statute of limitations. Westall v. Jackson, 218 N.C. 209, 10 S.E.2d 674 (1940).

Action for Dividends Accrued on Cumulative Preferred Stock. — The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock is based on contract, and the request for an injunctive relief is merely ancillary thereto, and plaintiff's cause of action arises when dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred. Clark v. Henrietta Mills, 219 N.C. 1, 12 S.E.2d 682 (1941).

Guarantee of Prior Indorsement. — The statute of limitations within which to institute an action upon a guarantee of prior indorsement, is three years after the payment of the check. United States v. National City Bank, 28 F. Supp. 144 (S.D.N.Y. 1939).

Action for Damages against Carrier.—Where the demand in writing for damages of a carrier was made within thirty days, and action was brought within three years it was not barred by this section. United States Watch Case Co. v. Southern Express Co., 120 N.C. 351, 27 S.E. 74 (1897).

Action Based on Implied Contract.—An action based on an implied contract is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract, and the limitation applicable to both such actions is three years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Application to Sealed Instruments—In General.—Civil action, to recover on six promissory notes under seal executed December 3, 1929, and maturing one each year for five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or ten-year statute of limitation in § 1-47. Bell v. Chadwick, 226 N.C. 598, 39 S.E.2d 743 (1946).

Same—Sureties.—This section applies to actions upon all sealed instruments, not referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until ten years by § 1-47, subdivision (2), that provision does not refer to sureties. This has been the settled law since Welfare v. Thompson, 83 N.C. 276 (1880), was decided. Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Flippen v. Lindsey, 221 N.C. 30, 18 S.E.2d 824 (1942).

The three-year statute of limitations is applicable to sureties on sealed instruments as well as on instruments not under seal. Lee v. Chamblee, 223 N.C. 146, 25 S.E.2d 433 (1943).

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. Jackson v. Martin, 136 N.C. 196, 48 S.E. 672 (1904).

This section applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years. Barnes v. Crawford, 201 N.C. 434, 160 S.E. 464 (1931).

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety under this section. Davis v. Alexander, 207 N.C. 417, 177 S.E. 417 (1934).

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. Hertford Banking Co. v. Stokes, 224 N.C. 83, 29 S.E.2d 24 (1944).

Statute Bars Remedy of Claim and Delivery.—Where there had been no new promise or payment on the purchase price for over three years prior to the institution of the action, the three-year statute of limitations, under this section, barred the ancillary remedy of claim and delivery. Lester Piano Co. v. Loven, 207 N.C. 96, 176 S. E. 290 (1934).

Parol Evidence Admissible to Show in What Capacity Parties Signed Note.—In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations under

this section. Furr v. Trull, 205 N.C. 417, 171 S.E. 641 (1933).

Effect of Payment after Statute Has Run.—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, and mortgages to another, the bar of the three-year statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient. Nance v. Hulin, 192 N.C. 665, 135 S.E. 774 (1926).

Indemnity or Fidelity Bond. — Where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity for this is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. Hood v. Rhodes, 204 N.C. 158, 167 S.E. 558 (1933).

Breach of Express Trust. — Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. Teachy v. Gurley, 214 N.C. 288, 199 S.E. 83 (1938).

Where a trust is based on an agreement or transaction operating as an express trust, the limitation applicable is the statute of three years set out in this section. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Same—When Statute Begins to Run.—The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations to running, unless and until such repudiation and claim are made known to the beneficiary of the trust so as to require him to assert his rights. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Where it appears that the relation of landlord and tenant has been established between trustee and cestui que trust, evidenced by voluntary payment of rent by the cestui que trust to the trustee, such relation ordinarily suffices to set the statute of limitations to running against the cestui que trust. But where, as in the instant case, the object of the trust is to hold and preserve title for the benefit of an unincorporated association, whose personnel is constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, is not enough to start the statute to running. To set the statute in motion it would be necessary to show that all the members of the unincorporated s-sociation had knowledge, or in law were charged with knowledge, that the trustee was exacting and the association officers were paying rent. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

In the case of an express trust, the statute begins to run when the trustee disavows the trust with the knowledge of the cestui que trust. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Insurance Policy Provision That Action Be Commenced within Specified Time. — Where an agreement contained a contract insuring a carrier from loss by fire and theft, etc., and also a contract of suretyship in regard to claims of third persons under § 62-111, the court held that provisions of the insurance contract that action be commenced within a specified time are not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it does not arise until such payment, and action brought within three years of such payment is not barred either under the contract or by the three-year statute of limitations. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Claims for Services.—In absence of special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944).

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon the oral contract to devise when the action is instituted more than three years after the death of the promisor, and the statute of limitations is pleaded in bar. Dunn v. Brewer, 228 N.C. 43, 44 S.E.2d 353 (1947).

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient,

payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Speights v. Carraway, 247 N.C. 220, 100 S.E.2d 339 (1957).

A cause of action to recover for personal services rendered and funds advanced for the care of intestate in reliance upon intestate's promise to pay for same by willing property to plaintiff does not accrue until the death of intestate without having willed property to plaintiff, and this section can have no application when the action is commenced within three years of intestate's death. Speights v. Carraway, 247 N.C. 220, 100 S.E.2d 339 (1957).

This section bars a claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, and in view of § 1-22, the contention that this section bars the claim for all services rendered more than three years prior to the institution of the action is untenable. Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

Services rendered more than three years prior to the death of the recipient are barred by the statute of limitations in the absence of a contract to pay by testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Daughter's failure to establish an express contract to pay by testamentary provision for her services to her father will not defeat her right to prosecute her claim for services rendered during the three years preceding her father's death. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by this section after three years from the maturity of the note. Wachovia Bank & Trust Co. v. Clifton, 203 N.C. 483, 166 S.E. 334 (1932).

Accrual of Cause.—A cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that a plant was not free from all defects and flaws. Heath v. Moncrief Furnace Co., 200 N.C. 377, 156 S.E. 920 (1931).

Demand Necessary if Fiduciary Relation Exists.—Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. Efird v. Sikes, 206 N.C. 560, 174 S.E. 513 (1934).

Statute Not Suspended by War Measures.—An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads is barred by the statute of limitations after three years from the time of its accrual. Vanderbilt v. Atlantic Coast Line R.R., 188 N.C. 568, 125 S.E. 387 (1924).

Unpaid Subscription to Corporate Stock.—While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. Windsor Redrying Co. v. Gurley, 197 N.C. 56, 147 S.E. 676 (1929).

Same—Construed with Other Sections.—The application of this section with regard to the unpaid balance due a corporation by a subscriber to its capital stock, will be construed in pari materia with §§ 55-65 and 55-70. Windsor Redrying Co. v. Gurley, 197 N.C. 56, 147 S.E. 676 (1929).

Action on Check Given for Taxes.—A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

Evidence of Matter Not Alleged.—Where defendant by answer denies liability on a note on the ground that it is barred by the three-year statute of limitations, evidence that defendant did not

adopt the word "seal" after his name on the note was properly excluded. Roberts v. Grogan, 222 N.C. 30, 21 S.E.2d 829 (1942).

Jury Question. — In an action by a trustor to compel an accounting of the proceeds of sale by a trustee, the question of whether the action was barred under subdivision (1) was properly submitted to the jury under authority of Efird v. Sikes, 206 N.C. 560, 174 S.E. 513 (1934); Garrett v. Stadiem, 220 N.C. 654, 18 S.E.2d 178 (1942).

The right of action by one partner to compel an accounting by the other did not arise and the statute of limitations did not begin to run until the demanding partner had notice of the other partner's termination of the partnership and refusal to account. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

As between partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership and his refusal to account. This is but an application of the rule that the statute of limitations does not commence to run against a trustee until he repudiates his trust. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Sale of House with Defective Furnace.— Defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs occurred when he delivered to them a house with a furnace lacking a draft regulator and, also, having been installed too close to combustible joists. Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

In an action to recover payments made under a contract to sell realty, no question of the statute of limitations arises where the provisions of this section were not pleaded. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

An action ex contractu brought by a municipal corporation to recover the cost of rebuilding a bridge, upon a breach by defendant of his contract with plaintiff to replace it, is an action to enforce private, corporate, or proprietary rights of the municipal corporation, and as such the three-year statute of limitations may be interposed as a defense by defendant. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Accrual of Action Based Upon Breach of Warranty of Fitness and Safety of Tobacco Curer. — See Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Applied in Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959); Matthieu v. Piedmont Nat'l Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967); Hall v. Hood, 208 N.C. 59, 179 S.E. 27 (1935); Howard v. White, 215 N.C. 130, 1 S.E.2d 356 (1939); Bynum v. Life Ins. Co., 222 N.C. 742, 24 S.E.2d 613 (1943); Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945).

III. SUBDIVISION (2)—LIABILITY CREATED BY STATUTE.

Section Absolute Bar. — After the time prescribed in § 1-50, subdivision (2), and this subdivision, the statute is an absolute bar to the next of kin. Spruill v. Sanderson, 79 N.C. 466 (1878); Vaughan v. Hines, 87 N.C. 445 (1882).

Liability of National Bank Stockholder for Assessment.—Though original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a stock assessment fixing amount of liability is "statutory" and not contractual, as respects running of limitations. Briley v. Crouch, 115 F.2d 443 (4th Cir. 1940).

Partial payments by national bank stockholder on stock assessment did not toll the running of this section against his liability. Briley v. Crouch, 115 F.2d 443 (4th Cir. 1940).

Action for Failure to Collect Check. — An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former is barred as against the latter bank by this section, where not commenced until five years after the transaction and four years after the transfer of the assets. Standard Trust Co. v. Commercial Nat'l Bank, 240 F. 303 (4th Cir. 1917).

Action to Recover Delinquent Taxes. — Neither the three nor the ten-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. Wilmington v. Cronly, 122 N.C. 383, 30 S.E. 9 (1898).

Application to Tort against Clerk Failing to Index Judgment.—In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required by § 1-233, this section is applicable. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Application to Petition to Have Damages Assessed. — Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation of the

action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of this section, subdivisions (2) and (3), and the refusal of the trial judge to submit an issue upon the statute of limitations was not error. Land v. Wilmington & W.R.R., 107 N.C. 72, 12 S.E. 125 (1890); Utley v. Wilmington & W.R.R., 119 N.C. 720, 25 S.E. 1021 (1896).

An action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

Actions under Antitrust Laws. — It is not clear whether § 1-54(2) or § 1-52(2) governs actions under the antitrust laws. It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations. Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790 (M.D.N.C. 1957).

Section Applicable to Private Action for Treble Damages under Antitrust Laws.— A private action for treble damages under the antitrust laws is not an action to recover a penalty or forfeiture, but rather is an action upon a liability created by statute and is in the nature of an action of tort. It is remedial and compensatory. Therefore this section is the applicable statute of limitations under which the plaintiff's cause of action lies. Thompson v. North Carolina Theatres, Inc., 176 F. Supp. 73 (W.D.N.C. 1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

Cited in Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958).

IV. SUBDIVISION (3)—TRESPASS UPON REALTY.

Presumption as to Date of Conversion. —In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. Parker v. Harden, 121 N.C. 57, 28 S.E. 20 (1897).

Application in Action to Recover Damages Resulting from Sewage Disposal Plant. — Where the plaintiff executed a deed of trust, deeded his equity of redemption to his sons, and the deed of trust was foreclosed, all more than three years before the institution of the action, and the plaintiff did not again acquire title until less than a year before the action, it was held in an action to recover damages to the land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of the institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of the institution of the action and the date three years prior thereto, constitutes reversible error. Ballard v. Town of Cherryville, 210 N.C. 728, 188 S.E. 334 (1936).

Negligence in Logging Operations. — Where plaintiff instituted this action to recover for damages resulting from the overflow on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations, even if it be conceded that the alleged negligence constituted a continuing omission of duty toward the plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statutory period. Hooper v. Carr Lumber Co., 215 N.C. 308, 1 S.E.2d 818 (1939).

Continuing Trespass Defined.—Speaking of this section in Sample v. John L. Roper Lumber Co., 150 N.C. 161, 63 S.E. 731 (1909), the court said "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such actions shall be commenced within three years from the original trespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong." Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

Same—As Applied to Telegraph Line.— Where a telegraph company has constructed its line of poles and wires along a railroad right-of-way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones, in the same holes, it was held that the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded it.

Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903).

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitations, the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right by prescription. Love v. Postal Telegraph-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942).

The law will not permit recovery for negligence which has become a fait accompli at a remote time not within the period specified by subdivision (3), although injury may result from it within the period of limitation. Davenport v. Pitt County Drainage Dist. No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941), citing Hooper v. Carr Lumber Co., 215 N.C. 308, 1 S.E.2d 818 (1939).

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, stated a cause of action for continuing trespass, and the right of action for damages to crops for all the years was barred after the lapse of three years from the original trespass. Davenport v. Pitt County Drainage Dist. No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941).

Action in Tort for Continuing Trespass. — Plaintiffs alleged that construction of dam caused progressive injury to their land from improper drainage, and that the mere construction was the cause of the injury. It was held that the action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. Tate v. Western Carolina Power Co., 230 N.C. 256, 53 S.E.2d 88 (1949).

Application to Diversion of River Water.—The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. Geer v. Durham Water Co., 127 N.C. 349, 37 S.E. 474 (1900).

Application to Negligence in Widening Canal.—In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under this subdivision. Cherry v. Canal Co., 140 N.C. 422, 53 S.E. 138 (1906).

Action for Cutting Timber.—The three-year statute applies to actions to recover damages for trespass in cutting and removing trees from the land. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Burden of Proof.—Where the defendant pleads this section to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Allegations Properly Stricken Where No Damages for Trespass Claimed. — In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading that plaintiffs' cause of action for trespass accrued more than three years prior to the commencement of the action are properly stricken as irrelevant, there being no claim of damages for trespass. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Action for Recurrent Trespass Not Barred by Statute of Limitations.—Plaintiff instituted this action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank. Defendant pleaded the statute of limitations because the action was not instituted within three years from the first injury alleged. By reply plaintiff alleged that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of the institution of the action. It was held that, construing the reply liberally it was sufficient to allege recurring acts of negligence or wrongful

conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. Oakley v. Texas Co., 236 N.C. 751, 73 S.E.2d 898 (1953).

Cited in Lyda v. Marion, 239 N.C. 265, 79 S.E.2d 726 (1954); Teseneer v. Henrietta Mills Co., 209 N.C. 615, 184 S.E. 535 (1936); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939).

V. SUBDIVISION (4)—GOODS OR CHATTELS.

Section Does Not Confer Title—Period Necessary.—Possession of a chattel for a sufficient period to bar its recovery under this section does not confer title. The prior law, c. 65, § 20 Revised Code, so provided, but it has been repealed so that now there is no statute fixing a period at the end of which title to personal property will vest in the possessor. It is true that if held for a sufficient time the title will vest, but four years' possession is insufficient. Pate v. Hazell, 107 N.C. 189, 11 S.E. 1089 (1890).

Charging in Conjunction with § 1-56.—Where if the action has not been barred by the provisions of subdivisions (4) and (9) of this section, it would have been barred under § 1-56, it was not error to tell the jury that the action was barred in three years, or in ten years. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

When Applicable to Funds Held by Trustee. — When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitations begins to run, so that the cause of action is barred in three years. County Bd. of Educ. v. State Bd. of Educ., 107 N.C. 366, 12 S.E. 452 (1890).

Bonds Held by Bank as Trustee.—In an action instituted against the statutory receiver of an insolvent bank to recover certain bonds which had been held by the bank, trustee, for safekeeping, there was evidence that plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds, and that action was instituted within three years from the receipt of this letter. The action was not barred by the three-year statute, this section, since under the facts of this case the cause of action did not accrue until the disavowal or repudiation of the trust. Bright v. Hood, 214 N.C. 410, 199 S.E. 630 (1938).

Property Advanced by Father.—Where slaves advanced by A to his son B were, on the death of the son, divided between his widow and children and held adversely thereafter for three years, A, the father is barred by the statute of limitations from afterwards reclaiming them. Jones v. Gordon, 55 N.C. 352 (1856).

Burden of Proof.—Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

VI. SUBDIVISION (6)—SURETIES OF EXECUTORS, ETC.

Purpose of Section. — This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

Effect of Seal.—This section creates the statute of limitations for sureties, notwithstanding the fact that a seal may appear after their names. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Section 1-56 Not Affected.—Section 1-56, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of this section, as to actions on their official bonds. Pierce v. Faison, 183 N.C. 177, 110 S.E. 857 (1922).

Sureties also Protected by § 1-50.—In addition to the protection of § 1-50, subdivision (2), the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

While the sureties have the protection of six years under § 1-50 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Section 1-50, subdivision (2), expressly applies to actions on the "official bond," this section to sureties only. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Effect of Surety Being Foreign Corporation. — The statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general agent within the jurisdiction of North Carolina courts for executing judicial bonds and collecting premiums thereon for the company and had

complied with the section authorizing service of process on the Commissioner of Insurance. State ex rel. Anderson v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

Effect of Payment by Principal.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. Moore v. Goodwin, 109 N.C. 218, 13 S.E. 772 (1891).

Intervening Disabilities. — When this statute begins to run, the subsequent marriage of the feme plaintiff will not stop it. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891). See § 1-17 and note.

When Statute Begins to Run—Demand.—From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to do so, this section began to run in favor of the defendant sureties on the administration bond. If the action is brought within three years of this time it is not barred. Gill v. Cooper, 111 N.C. 311, 15 S.E. 316 (1892); Stonestreet v. Frost, 123 N.C. 290, 31 S.E. 718 (1898).

Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. State ex rel. Anderson v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

The cause of action by the administrator d.b.n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until three years subsequent to his appointment. Dunn v. Dunn, 206 N.C. 373, 173 S.E. 900 (1934).

Action by Cestui against Trustee after Settlement. — Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of court, the trust is closed, and an action will be barred within three years from a demand and refusal. Whedbee v. Whedbee, 58 N.C. 393 (1860); Barham v. Lomax, 73 N.C. 78 (1875); Spruill v. Sanderson, 79 N.C. 466 (1878); Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890).

Effect of Estate Being Unrepresented during Period.—When there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891).

Burden of Proof. — This section being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. Hussey v. Kirkman, 95 N.C. 63 (1886); Moore v. Garner, 101 N.C. 374, 7 S.E. 732 (1888); Hobbs v. Barefoot, 104 N.C. 224, 10 S.E. 170 (1889); Nunnery v. Averitt, 111 N.C. 394, 16 S.E. 683 (1892). This was not done, and the surety is protected by the lapse of three years after demand and refusal. Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888); Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889); Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891); Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891); Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894).

Action to Reopen Account.—An action or proceeding to reopen an account stated by an executor and readjust a settlement made under the supervision of a court, and sanctioned by a decree, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a court of law. This conclusion finds some support in the provisions of this subdivision. Spruill v. Sanderson, 79 N.C. 466 (1878).

Action to recover for alleged breach of bond as administratrix accrues at the time the alleged breach is committed, this subdivision having no provision relating to discovery of the breach of the official bond as is provided for in cases under subdivision (9). Hicks v. Purvis, 208 N.C. 657, 182 S.E. 151 (1935).

Ward's Suit against Sureties.—A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three-year limit. Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

The running of the statute under this section as against the plaintiffs and in favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on

the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards, when she became twenty-one years of age. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933).

Applied in Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938).

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

VII. SUBDIVISION (7)—BAIL.

Effect of Bail Being Out of State.—The language and meaning of this section is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892).

VIII. SUBDIVISION (8)—CLERK FEES.

Application to Judgment for Costs.—A plaintiff in a judgment on which costs only are due, is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not of the officers of the court. Cowles v. Hall, 113 N.C. 359, 18 S.E. 329 (1893).

Not Applicable to Referee.—The claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report is not barred by this section. Farmers Bank v. Merchants & Farmers Bank, 204 N.C. 378, 168 S.E. 221 (1933).

IX. SUBDIVISION (9)—FRAUD OR MISTAKE.

Editor's Note.—For comment on running of limitations against equitable claims, see 44 N.C.L. Rev. 202 (1965).

Purpose and Construction of Section.—The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation. The like spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, where gross injustice would be worked by its application. Mask v. Tiller, 89 N.C. 423 (1883).

Scope of Words "Relief on the Ground of Fraud". — In the construction of this section, the words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Declaration of Constructive Trust.—The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

A declaration that one is a constructive trustee is an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that the plaintiff seeks it is irrelevant to the question of limitations. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

When Applied to Exclusion of § 1-56.—This section cannot be applied where the allegations and proof are insufficient to sustain it, in preference to § 1-56, where there is a question as to which applies. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Applies to Actions at Law and Suits in Equity.—While this subdivision originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of North Carolina courts it now applies to all actions for relief on the ground of fraud or mistake. Stancill v. Norville, 203 N.C. 457, 166 S.E. 319 (1932).

Fraud or Mistake Prerequisite to Application.—This section has no application to an action to recover money for there is no evidence or allegation of fraud and mistake. Barden v. Stickney, 132 N.C. 416, 43 S.E. 912 (1903); Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

When Statute Begins to Run.—The statute runs from the discovery of the fraud or mistake, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action.

Sinclair v. Teal, 156 N.C. 458, 72 S.E. 487 (1911). See Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Peacock v. Barnes, 142 N.C. 215, 55 S.E. 99 (1906).

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Wimberly v. Washington Furniture Stores, Inc., 216 N.C. 732, 6 S.E.2d 512 (1940); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

A cause of action to set aside an instrument for fraud accrues, and limitations begin running, when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

The three-year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence, and conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950).

It is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922). See Johnson v. Pilot Life Ins. Co., 219 N.C. 202, 13 S.E.2d 241 (1941).

This statute begins to run from the time of discovery of a breach of the trust relationship and not from the time the relation was brought to an end. Egerton v. Logan, 81 N.C. 172 (1879).

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. Jefferson v. Roanoke R.R. & Lumber Co., 165 N.C. 46, 80 S.E. 882 (1914). See Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890).

Where plaintiff acquired title to real estate, subject to a contract to cut timber within three years, thinking the time for cutting was eighteen months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was three years, the action was barred by this section. Blankenship v. English, 222 N.C. 91, 21 S.E.2d 891 (1942).

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk it was held that insured should have been put on notice thereby that company's agent's promise to redeliver a second policy within seven months after it was tendered to insured and refused because of illness, was false and that insured's claim, if any he had, had atrophied as a result of his procrastination and became barred by this section. Jones v. Bankers Life Co., 131 F.2d 989 (4th Cir. 1942).

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hereto unknown to him. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on (after the investigation of the receiver) that the bank was insolvent at the time the incorrect statements were put forth. Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

Applying this section to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, this section by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

Where a clerk of the superior court embezzles funds and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 1-50 applies. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931); State ex rel. Pasquotank County v. American

Sur. Co., 201 N.C. 325, 160 S.E. 176 (1931).

The actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. Moore v. Fidelity & Cas. Co., 207 N.C. 433, 177 S.E. 406 (1934). See also, in this connection, Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934); Hood v. Paddison, 206 N.C. 631, 175 S.E. 105 (1934).

Defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land. Defendant surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor. The grantor died some three years and seven months thereafter. There was nothing to rebut the inference that she retained possession of the property until her death. It was held that there being nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, is not barred. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

Evidence did not show that guardian knew or should have known of the fraud and his failure to institute suit did not bar the ward. Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

The action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

In order to exercise their right to an accounting twenty-six years after it accrued, plaintiffs must establish that they exercised it within three years of the time they discovered or ought by reasonable diligence under the circumstances to have discovered the fraud. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

It is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Same—Record as Notice of Fraud.—The mere registration of a deed, containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

True, as indicated in Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907) and Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907), the mere registration of a deed will not usually, in these and like cases, be imputed for constructive knowledge; but in the present case the deed under which feme defendant claims and now holds this property had been on the registry in the proper county for more than eleven years before this action was instituted, and plaintiff's judgment had been docketed in the county since 1897. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to

each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

Same—Sale of Trust Land by Trustee as Notice.—Proceedings before clerk to sell trust lands to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

Same—Necessity for Newly Discovered Evidence.—One can derive no aid from this section in an action to reconsider a case which has been sanctioned by the court and settled by a decree from it, in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at first that are now known the first action must stand notwithstanding this section. Spruill v. Sanderson, 79 N.C. 466 (1878).

Same—Sufficiency of Evidence. — See Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916); Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922); Small v. Dorsett, 223 N.C. 754, 28 S.E.2d 514 (1944).

Application to Foreign Corporation.—A foreign corporation cannot set up the statute of limitations in bar of an action for false warranty. Alpha Mills v. Watertown Steam Engine Co., 116 N.C. 797, 21 S.E. 917 (1895).

Actions to Which Applicable.—The relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit. Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

Same—Fraudulent Conveyance. — Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, this section, limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten-year statute relating to actions to impress a trust upon property only was applicable. Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee is an action based on fraud and must be instituted within three years from the discovery of the acts constituting the fraud, and the ten-year statute has no application. Massengill v. Oliver, 221 N.C. 132, 19 S.E.2d 253 (1942).

Same — Reformation of Mortgage for Mistake.—Whether a cause of action for reformation of a mortgage for mistake was instituted within three years from discovery of the facts as provided by this section, or the time they should have been discovered in the exercise of due diligence, held for jury in this case. Lowery v. Wilson, 214 N.C. 800, 200 S.E. 861 (1939).

Same — A Fraudulent Distribution of Dividends.—This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Same—Proceedings to Set Aside Probate.—This section is not necessarily controlling upon the hearing upon petition before the clerk of the superior court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. In re Will of Johnson, 182 N.C. 522, 109 S.E. 373 (1921).

Same — Setting Aside Settlement by Guardian.—The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. Wheeler v. Piper, 56 N.C. 249 (1857); Whedbee v. Whedbee, 58 N.C. 392 (1860); Spruill v. Sanderson, 79 N.C. 466 (1878); State v. Smith, 83 N.C. 306 (1880).

Same—Action for Obtaining Deed by Fraud.—In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907).

Same — Action to Declare Purchasing Partner a Trustee. — An action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the surety of their debts, is not barred by this section. Quaere, as to the application of subdivision (4). Ross v. Henderson, 77 N.C. 170 (1877).

Same—Action to Remove Cloud from Title.—The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. Cauble v. Trexler, 227 N.C. 307, 42 S.E.2d 77 (1947).

Action for Omission from Deed.—Where a reversionary clause was omitted from a deed by mistake of the draftsman it was held that the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Action Barred by Negligence in Asserting Right.—The plaintiffs contended that usurious interest was paid defendant by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although instituted more than two years after the last usurious payment (see § 1-53). It was held that the plaintiffs are not entitled to invoke the statute, it appearing that plaintiffs did not institute action until more than three years after they had executed a note bearing six percent interest in renewal of the original note upon which usury was paid, and that plaintiffs were negligent in asserting their rights if any they had. Ghormley v. Hyatt, 208 N.C. 478, 181 S.E. 242 (1935).

Where Purchaser Did Not Participate in Fraud.—Where there is no allegation or proof that a purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, then as to him the action is barred by the lapse of three years, this section not applying as to the action against him. Johnson Cotton Co. v. Alex. Sprunt & Co., 201 N.C. 419, 160 S.E. 457 (1931).

Remedy Where Action on Contract Barred. — The remedy by the vendor of goods obtained by the fraud of the purchaser, first discovered after the action on the contract has been barred, is by an action for damages under this section as amended by c. 269, Acts of 1889. Rouss v. Ditmore, 122 N.C. 775, 30 S.E. 335 (1898).

When Replication Required.—When the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course, pass judgment, unless matter in avoidance is pleaded as a new promise, or the like. It is only in such cases that a replication is now required. Moore v. Garner, 101 N.C. 374, 7 S.E. 732 (1888), though under the former practice a replication was required, whenever the statute of limitations was pleaded. Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893).

Bar of Statute May Be Raised Only by Answer. — Subdivision (9) of this section is not annexed to the cause of action in a case of fraudulent substitution of names in a deed which is then registered. The bar thereof may only be raised by answer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Same—Record as Notice of Fraud. — A cause of action for fraud does not accrue and the statute of limitations, subdivision (9) of this section, does not begin to run until the facts constituting the fraud are known or should have been discovered in the exercise of due diligence, and the mere registration of a deed, standing alone, will not be imputed for constructive notice. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

Cause of Action to Set Aside Deed for Fraud and Undue Influence. — Where it is established that the person under whom plaintiffs claim was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim is barred. Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954).

Rescission of Insurance Policy. — Whether considered fraud "in the broad sense," or "mistake," subdivision (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of the alleged fraud more than three years prior to the filing of an amendment to her complaint, which

for the first time alleged the cause of action for fraud, the action was barred by subsection (9) of this section. Nowell v. Hamilton, 249 N.C. 523, 107 S.E.2d 112 (1959).

Burden of Proof.—In an action to set aside a conveyance on account of fraud, the statute of limitations being pleaded thereto, the burden is on the plaintiff to show that the fraud was not discovered until within three years of the commencement of the action. Hooker v. Worthington, 134 N.C. 283, 46 S.E. 726 (1904); Willetts v. Willetts, 254 N.C. 136, 118 S.E.2d 548 (1961).

The burden is on the plaintiffs to show that neither they nor their predecessor in title, knew of the fraud, or would have discovered it in the exercise of reasonable business prudence. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

The plea of the statute of limitations put the burden upon the defendant, in the cross action, to show that the statute of limitations had not barred his right, by a lapse of more that three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law. Taylor v. Edmunds, 176 N.C. 325, 97 S.E. 42 (1918).

Effect of Nonresidence of Plaintiff. — The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

A nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of this section, requiring that he must bring his action within three years from the discovery of the fraud. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

Erroneous Ruling Not Cured by Other Defects.—The reversible error of ruling that as a matter of law the evidence was insufficient under this section, is not relieved by the principle that the statute does not begin to run till the undue influence constituting fraud has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

Effect of Failure of Referee to Find Facts. — When the referee to whom the case was referred failed to find the facts upon which this statute of limitations can be determined, the case must be remanded. Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890).

Evidence Sufficient to Show Action Commenced within Statutory Time. — In an action to recover damages for fraudulent representations as to the amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered, or should have been discovered by them in the exercise of reasonable diligence. Swinton v. Savoy Realty Co., 236 N.C. 723, 73 S.E.2d 785 (1953).

Cross Action Filed More than Three Years from Discovery of Fraud Properly Dismissed. — Where defendant in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and files a cross action against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three-year statute of limitations is without error. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961).

Applied in Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954).

Stated in Life Ins. Co. v. Edgerton, 206 N.C. 402, 174 S.E. 96 (1934).

Cited in Fort Worth & D.C. Ry. v. Hegwood, 198 N.C. 309, 151 S.E. 641 (1930); McCormick v. Jackson, 209 N.C. 359, 183 S.E. 369 (1936); State ex rel. Thacker v. Fidelity & Deposit Co., 216 N.C. 135, 4 S.E.2d 324 (1939); Venus Lodge No. 62, F. & A.M. v. Acme Benevolent Ass'n, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950); Holt v. Holt, 232 N.C. 497, 61 S.E.2d 448 (1950).

X. SUBDIVISION (10)—REALTY SOLD FOR TAXES.

This section does not apply where the owner remains in possession. Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936).

Application to Tenancy in Common.— The statute permits the sheriff to sell the lands of tenants in common for the nonpayment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years' possession by the purchaser under the tax deed bars the former rightful owners. Ruark v. Harper, 178 N.C. 249, 100 S.E. 584 (1919).

Application to Suit to Remove Cloud.— In Price v. Slagle, 189 N.C. 757, 128 S.E.

161 (1925), the court said: "This three-year statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax sale purchaser, or his assigns, who are in possession of the lands so sold."

Application Where Deed Color of Title Only. — Where a sheriff's deed given for the nonpayment of taxes is not under seal, it is good as color of title, which seven year's adverse possession will ripen into an absolute one, under § 1-38. Ruark v. Harper, 178 N.C. 249, 100 S.E. 584 (1919).

Applies to Action for and against Claimants.—The three-year statute of limitations barring the right of action in favor of a claimant under a tax deed is broad enough to include actions for and against such claimant. Jordan v. Simmons, 169 N.C. 140, 85 S.E. 214 (1915).

Possession as Affecting Application.—The three-year statute of limitations may not be successively pleaded by the claimant under the tax deed against the original owner in possession of the lands. Jordan v. Simmons, 169 N.C. 140, 85 S.E. 214 (1915).

The purchaser's possession for three years under an irregular sheriff's deed would be sufficient to bar action thereon. Lyman v. Hunter, 123 N.C. 508, 31 S.E. 827 (1898); Kivett v. Gardner, 169 N.C. 78, 85 S.E. 145 (1915).

Necessity of Pleading Section. — The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available. Jordon v. Simmons, 169 N.C. 140, 85 S.E. 214 (1915).

In an action against the administrator of the deceased to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations in order to avail himself of it as a bar to the plaintiff's recovery thereon. Smith v. Allen, 181 N.C. 56, 106 S.E. 143 (1921).

XI. SUBDIVISION (11) — FAIR LABOR STANDARDS ACT.

Purpose.—Subdivision (11) of this section was passed in order to enlarge the period of limitations for the recovery of penalties under the Fair Labor Standards Act, which would otherwise have been limited to the period of one year under subdivision (2) of § 1-54. North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

§ 1-53. Two years.—Within two years—

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

(2) An action to recover the penalty for usury.

(3) The forfeiture of all interest for usury.

(4) Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under § 28-173 of the General Statutes of North Carolina. (1874-5, c. 243; 1876-7, c. 91,

s. 3; Code, ss. 756, 3836; 1895, c. 69; Rev., s. 396; C. S., s. 442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2.)

Local Modification.—Carteret: 1933, c. 386; Cherokee, Clay: 1933, c. 318; Haywood: 1933, c. 386.

I. Subdivision (1) — Political Subdivisions of State.
II. Subdivision (2)—Penalty for Usury.
III. Subdivision (3)—Forfeiture of All Interest for Usury.
IV. Subdivision (4)—Death by Wrongful Act.

Cross References.

As to power of county to be sued, see § 153-2, subdivision (1). As to power of city or town to be sued, see § 160-2, subdivision (1). As to requirement of demand before suit, see § 153-64. As to penalty and forfeiture for usury, see § 24-2. See note to § 28-173.

I. SUBDIVISION (1)—POLITICAL SUBDIVISIONS OF STATE.

Editor's Note.—As to necessity for presenting tort claims, see 27 N.C.L. Rev. 145.

The 1937 amendment did not operate retrospectively, and hence did not revive action previously barred for face value of unpaid coupons on bonds issued by county, in township's behalf. Valleytown Tp. v. Women's Catholic Order of Foresters, 115 F.2d 459 (4th Cir. 1940).

Purpose of Section.—The obvious purpose of the law is to enable those municipal bodies mentioned in it to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the Constitution. Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880). See post this note, "Nature and Effect of Section."

Constitutionality.—Under the interpretation of this section, it may admit of question whether the condition engrafted by it upon the contract, as affecting the pre-existing rights of the creditor, does not impair its obligation within the prohibition of the federal Constitution. Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880).

Nature and Effect of Section.—The language of this section is plain and explicit, and there is room for but one construction of it. The court has said that the provision of the statute is not in strict terms a limitation of the time within which an action may be prosecuted, but that it imposes upon the creditor the duty of presenting his claim within a prescribed period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter commenced. Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880). See Moore v. City of Charlotte, 204 N.C. 37, 167 S.E. 380 (1933).

In a later case the court held that "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890), citing Moore v. Commissioners of Greene, 87 N.C. 209 (1882); Royster v. Board of Comm'rs, 98 N.C. 148, 3 S.E. 739 (1887).

In Board of Educ. v. Town of Greenville, 132 N.C. 4, 43 S.E. 472 (1903), the court said, "We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute the claimant, by its very words, is 'barred from a recovery' of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal."

This section is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action. Dockery v. Town of Hamlet, 162 N.C. 118, 78 S.E. 13 (1913).

Liberal Construction. — In Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880), the court said, "We are not disposed to give so strict an interpretation to the requirement of the act, which, as all its useful purposes are met, would be to sacrifice substance for form and convert a judicious measure of legislation into an instrument of injustice and wrong."

When Statute Begins to Run. — Where the plaintiff made a payment, the defendant promising to refund any excess of the amount due, and upon a reference a balance was reported in favor of the plaintiff it was held, in an action to recover the amount, that the statute begins to run only from the date of such finding. Moore v. Commissioners of Greene, 87 N.C. 209 (1882).

Where the defendants and their predecessors in office had notice from the beginning of the origin, nature and amount

of a claim against a county, and of the fact that it could not mature until the accuracy or inaccuracy of their previous settlement with the plaintiff could be ascertained, such a claim falls neither within the letter nor the spirit of this section. Moore v. Commissioners of Greene, 87 N.C. 209 (1882).

Effect of Failure to Present Claim in Time.—Where a creditor fails to present his claim in the prescribed time, any action thereon thereafter is barred. Board of Educ. v. Town of Greenville, 132 N.C. 4, 43 S.E. 472 (1903).

What Plaintiff Must Allege and Prove. —Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. Dockery v. Town of Hamlet, 162 N.C. 118, 78 S.E. 13 (1913).

Same—When Defect Attacked by Demurrer.—Where upon the face of a complaint it does not appear that claim was made upon a town's officers as this section provides, within two years after its maturity, the claim is barred, and a demurrer that it states no cause of action should be sustained. Dockery v. Town of Hamlet, 162 N.C. 118, 78 S.E. 13 (1913).

Same—When Action Amendable.—The complaint, not stating a cause of action under the requirements of this section, is demurrable; but as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute. Dockery v. Town of Hamlet, 162 N.C. 118, 78 S.E. 13 (1913).

Application to Claim of Sheriff. — A sheriff must present his claim against a county for an allowance to him to pay off a county debt within the two years prescribed in the section. Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890).

Action for Services Rendered as Attorney.—Where plaintiff instituted this action to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action, and defendants alleged that final judgment in the civil action was entered more than two years prior to the institution of the present suit, that plaintiff's cause of action for services rendered therein accrued at the time of the rendition of the judgment, and that plaintiff's cause of action for services rendered therein is barred, the plea of the statute of limitations relates solely to the claim for services rendered in the civil action, and is not a plea in bar which would defeat plaintiff's claim in its entirety. Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940).

Actions for Damages Based on Torts. — The words "claims," "maturity" and "holders," appearing in the first clause of subdivision (1), as well as the further provisions thereof, and the history of the statute, impel the conclusion that this subdivision does not apply to actions for damages based on torts. Dennis v. Albemarle, 242 N.C. 263, 87 S.E.2d 561 (1965).

This section and § 153-64 do not require the filing of a claim with a city before suit may be brought for damages for a tort committed by the city in a proprietary activity. Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966).

Applied in Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Cited in Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966); Lightner v. City of Raleigh, 206 N.C. 496, 174 S.E. 272 (1934); Fletcher v. Parlier, 206 N.C. 904, 173 S.E. 343 (1934); Mebane Graded School Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937); Reed v. Madison County, 213 N.C. 145, 195 S.E. 620 (1938); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Rivers v. Town of Wilson, 233 N.C. 272, 63 S.E.2d 544 (1951).

II. SUBDIVISION (2)—PENALTY FOR USURY.

Origin of Section. — The right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

Section Not Retroactive. — The right added by the act of 1876-77 to recover back interest paid could not apply to contracts made prior to its passage. Moore v. Beaman, 112 N.C. 558, 17 S.E. 676 (1893).

The act of 1895, c. 69, which provides for the recovery of usurious interest if the action is brought within two years after the payment in full of the indebtedness, by

its express terms, does not apply to contracts antedating its ratification. Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

When Statute Begins to Run.—The act of 1895 provides for bringing an action to recover back double the amount of usurious interest paid if the action is brought within two years after the payment in full of such indebtedness, in this respect changing what is now § 24-2, which provided that "the action must be brought within two years from the time the usurious transaction occurred." Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896). The provision no longer appears in § 24-2.—Ed. note.

The cause of action for the penalty for each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. Sloan v. Piedmont Fire Ins. Co., 189 N.C. 690, 128 S.E. 2 (1925).

Under this section the statute of limitations began to run at the date the cause of action accrued, and as service could have been made under the statute at any time before the commencement of this action, the statute continued to run against the plaintiffs. The defendant, although a nonresident or foreign corporation, was at all times from the date the cause of action accrued until the commencement of this action subject to the jurisdiction of the courts of this State and for that reason, two years having elapsed from the date the cause of action accrued to the date of the commencement of the action, the action is barred. Smith v. Finance Co. of America, 207 N.C. 367, 177 S.E. 183 (1934). See also Ghormley v. Hyatt, 208 N.C. 478, 181 S.E. 242 (1935).

The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made, each payment of usurious interest giving rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment. Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

Same — Mutual Running Account. — Where the transaction constitutes a mutual running account an action for the penalty under the statute is not barred within two years next from the last item therein. English Lumber Co. v. Wachovia Bank & Trust Co., 179 N.C. 211, 102 S.E. 205 (1920).

Effect of Defendant Being Out of State. —This two-year prescription is subject to the provisions of § 1-21 that when a cause of action accrues against a person he shall be out of the State or shall thereafter depart therefrom and reside out of the State, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

The two years within which an action may be brought, under this section, is to be construed in connection with the provisions of § 1-21, which provides that if the defendant departs from or resides out of the State, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial, in favor of nonresidents. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

Application to Action against Foreign Corporation.—An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

Bar of Counterclaim.—Where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged is barred. Farmers Bank & Trust Co. v. Redwine, 204 N.C. 125, 167 S.E. 687 (1933).

Attorney's Fee Held Not Usurious. — See Woody v. Prudential Life Ins. Co. of America, 209 N.C. 364, 183 S.E. 296 (1936).

Necessity of Pleading. — This section need not be specifically pleaded. Roberts v. Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

Must Be Pleaded When Relied on as a Defense.—In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense, the clause relating thereto having been taken out of § 3836 of the Code and placed in this section and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued. McNeill v. Suggs, 199 N.C. 477, 154 S.E. 729 (1930).

Section 24-2 Defines the Penalty for Usury.—The right to recover interest is

governed by § 24-2 which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. Roberts v. Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

Application illustrated in Rogers v. Bank of Oxford, 108 N.C. 574, 13 S.E. 245 (1891).

Applied in Preyer v. Parker, 257 N.C. 440, 125 S.E.2d 916 (1962).

III. SUBDIVISION (3) — FORFEITURE OF ALL INTEREST FOR USURY.

This section is prospective only, and is applicable only to a forfeiture under § 24-2, which has occurred, or shall occur, since its ratification on April 1, 1931. Farmers Bank & Trust Co. v. Redwine, 204 N.C. 125, 167 S.E. 687 (1933).

Continuing Injunction against Foreclosure.—Since a junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a bona fide controversy as to the amount due under the prior debt is settled, is not entitled to invoke the forfeiture of all interest, but is required to tender the principal of the debt plus legal interest, a decree continuing the injunction to the final hearing is not error notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, even if it be conceded that an action for forfeiture of the interest is barred by the statute. Pinnix v. Maryland Cas. Co., 214 N.C. 760, 200 S.E. 874 (1939).

IV. SUBDIVISION (4)—DEATH BY WRONGFUL ACT.

Editor's Note.—This section and § 28-173 were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in which an action for damages for wrongful death must be instituted and so as to make such action subject to the two-year statute of limitations set forth in this section. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Effect of 1951 Amendments to This Section and § 27-173.—Up to the time of the amendments of 1951 to § 28-173 and this section it had consistently been held that the time limitation in § 28-173 was not a statute of limitations, but rather a condition precedent to maintenance of an action. The effect of the amendments was to remove the time limitation from the Wrongful Death Act and make the act subject to the statute of limitations of two years. McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Prior to the enactment of subdivision (4) of this section, which amended § 28-173, 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 limitation. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Amendment of Complaint. — In an action for wrongful death, where the original complaint fails to state facts sufficient to constitute a cause of action, an amendment supplying the deficiency does not relate back to the commencement of the action but constitutes a new cause of action for the purpose of computing the bar of the statute of limitations. In each such instance the ultimate determinative question is whether the amendment states a new cause of action. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

Applied in Hall v. Carroll, 253 N.C. 220, 116 S.E.2d 459 (1960); Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962); High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

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

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

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

(3) For libel, slander, assault, battery, or false imprisonment.

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

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or

other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2.)

Cross References.—As to actions in the nature of quo warranto, see § 1-514 et seq. See also § 28-175. As to liability for escape under civil process, see § 162-21. As to permitting escape of prisoners, see § 14-257. As to widow's year's allowance and application therefor, see § 30-15.

Editor's Note.—The 1969 amendment inserted "slander" in subdivision (3).

Session Laws 1969, c. 1001, s. 4, provides: "This act shall be effective upon ratification but shall apply only to causes of action accruing on or after ratification." The act was ratified June 23, 1969.

This section does not apply to causes of action for (1) tortious injury and damage to the automobile, and (2) for wrongful seizure and conversion of the tires. Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955).

Subdivision (1) Extent to Which Application Limited—Town Officers. — This section is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence or force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right-of-way for it. Brown v. Walker, 188 N.C. 52, 123 S.E. 633 (1924).

Same—Railroad Conspiring with Officials. — Where a railroad company, through its agents has participated in the unlawful appropriation of a town's funds, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of this section, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them. Brown v. Walker, 188 N.C. 52, 123 S.E. 633 (1924).

Action against Justice of Peace. — A summons was issued to recover the penalty against a justice of the peace, for performing the marriage ceremony without the delivery of the license therefor to him, § 51-6, within less than a year from the time he had performed it, it was held, the plea of this section could not be sustained. Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922).

Subdivision (2)—Application to Clerk of Court. — An action against a clerk for a penalty, if not brought within one year, is barred by the statute of limitations. State ex rel. Hewlett v. Nutt, 79 N.C. 263 (1878).

Subdivision (3)—Disability Preventing Bar.—An action for assault and battery is barred upon the plea of this section, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. Hayes v. Lancester, 200 N.C. 293, 156 S.E. 530 (1931).

Same—Action for Libel.—Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations. Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).

Actions under Antitrust Laws. — It is not clear whether § 1-54 (2) or § 1-52 (2) governs actions under the antitrust laws. It is clear, however, that in such cases, the sources of damage are separable for purposes of limitations. Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790 (M.D.N.C. 1957).

Subdivision (2) of this section is not applicable in a right of action arising out of the federal antitrust statutes. Thompson v. North Carolina Theatres, Inc., 176 F. Supp. 73 (W.D.N.C. 1959).

Same—Action for False Imprisonment. —Where it appeared that plaintiff's cause of action based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane, plaintiff's cause of action was not barred. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

A cause of action for false imprisonment is barred by this section after the expiration of one year from plaintiff's release from custody by the giving of bond, notwithstanding that the criminal prosecution in which the arrest took place continues within the limitation period. Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958).

Subdivision (6)—Actions to Recover Deficiency Judgments.—The cases cited below were decided under the former statute which became § 1-48 and was subsequently rewritten as subdivision (6) of this section.

The statute protects all substantial rights of the parties and its application was held not to impair plaintiff's contractual rights. Orange County Bldg. & Loan Ass'n v. Jones, 214 N.C. 30, 197 S.E. 618 (1938).

An action for a deficiency judgment after foreclosure is not barred by this section when it is instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale. Shelby Bldg. & Loan Ass'n v. Black, 215 N.C. 400, 2 S.E.2d 6 (1939).

Applied in Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); as to subdivision (3), Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953); Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

Stated in North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

Cited in United States v. Lance, Inc., 95 F. Supp. 327 (W.D.N.C. 1951); Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); Waldron Buick Co. v. General Motors Corp., 254 N.C. 117, 118 S.E.2d 559 (1961); Jocie Motor Lines, Inc. v. International Bhd. of Teamsters, 260 N.C. 315, 132 S.E.2d 697 (1963); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

§ 1-55. Six months.—Within six months an action—

(1) Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument.

(2) For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof. (C. C. P., s. 36; Code, s. 157; Rev., s. 398; C. S., s. 444; 1931, c. 168; 1943, c. 642, s. 2; 1969, c. 1001, s. 1.)

Local Modification.—Cleveland, Rutherford: 1933, c. 167.

Editor's Note.—The 1969 amendment deleted former subdivision (1), which read "For slander," and renumbered former subdivisions (2) and (3) as (1) and (2).

Session Laws 1969, c. 1001, s. 4, provides: "This act shall be effective upon ratification but shall apply only to causes of action accruing on or after ratification." The act was ratified June 23, 1969.

See 11 N.C.L. Rev. 220.

Necessity for Affirmative Plea.—In an action for slander, if the defendant does not plead the statute of limitations, the plaintiff may recover, though the proof shows that the words were spoken more than six months before the commencement of the action. Pegram v. Stoltz, 67 N.C. 144 (1872).

Same—Where Misled by Petition. — If the defendant has been misled by allegation of a different date from the one proved, so that he failed to set up this statute in his answer, the judge would, of course, allow him to amend his answer. Pegram v. Stoltz, 67 N.C. 144 (1872).

An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations under this section, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof. Gordon v. Fredle, 206 N.C. 734, 175 S.E. 126 (1934).

When Action Begun.—Where a writ in slander was issued, returnable to a term of the court, and no alias issued from such return term, but a writ issued from the next term thereafter, it was held that the latter writ was the commencement of the suit, and the limitation to the action must be determined accordingly. Hanna v. Ingram, 53 N.C. 55 (1860).

Application Illustrated. — Where the plaintiff brought an action for slander

more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations, it was held, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. Hester v. Mullen, 107 N.C. 724, 12 S.E. 447 (1890).

Cited in Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

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

I. In General.
II. Actions to Which Applicable.

I. IN GENERAL.

Purpose of Section.—This section was intended as a sweeping statute of repose and to cure omissions in former statutes. Brown v. Morsey, 124 N.C. 292, 32 S.E. 687 (1899) (con. op.).

This section was intended to be a universal statute of repose, applying to all causes of action not included among those specifically enumerated in the preceding sections of the statute of limitations. It could have no other purpose. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904) (dis. op.).

See to same effect Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890); Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

When Statute Begins Running.—Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section begins running against an action for such breach from the time of the delivery. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

This section begins to run against an action by the vendor to recover possession from the vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

An action to impeach the final account of a personal representative must be brought within ten years from the filing and auditing thereof as provided in this section. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. Frazier v. Gibson, 140 N.C. 272, 52 S.E. 1035 (1905); Philips v. Buchanan Lumber Co., 151 N.C. 519, 66 S.E. 603 (1909).

This statute does not begin to run until there is a person in esse competent to begin the suit, that is, until the appointment of an administrator. This is a well-recognized rule. Godley v. Taylor, 14 N.C. 178 (1931); Lynn v. Lowe, 88 N.C. 478 (1883).

Application Immaterial Where Period Has Not Run.—Where ten years has not elapsed it is not necessary to determine whether this section applies. Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894).

Charging Section with § 1-52.—Where, if the action had not been barred by the provisions of subdivisions (4) and (9) of § 1-52, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years or in ten years. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

Section Not Affected by § 1-52. — This section applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of § 1-52, as to actions on their official bonds. Pierce v. Faison, 183 N.C. 177, 110 S.E. 857 (1922).

Practice.—Under the former practice an objection that the equity of plaintiff seeking to declare a trust in land was barred could be taken by demurrer; under the present practice it may be taken by a motion to dismiss the action. Marshall v. Hammock, 195 N.C. 498, 142 S.E. 776 (1928).

Statute Runs between Spouses.—Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Nonsuit Proper.—Where a party against whom the statute has been pleaded

fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper for the court to grant a motion for nonsuit. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Laches. — Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Applied in Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957); Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83 (1938).

Cited in Quevedo v. Deans, 234 N.C. 618, 68 S.E.2d 275 (1951); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Smith v. Smith, 72 N.C. 139 (1875); Mauney v. Coit, 86 N.C. 464 (1882); Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930); Creech v. Creech, 222 N.C. 656, 24 S.E.2d 642 (1943); Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946); Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950); United States v. Pastell, 91 F.2d 575 (4th Cir. 1937).

II. ACTIONS TO WHICH APPLICABLE.

The ten-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is ten years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading this section upon the assertion that plaintiffs' action accrued more than ten years prior to the commencement of the action are properly stricken as irrelevant. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Where an action is for breach of contract and not one to establish a constructive or resulting trust, the action is barred after three years from defendant's categorical denial of plaintiff's rights. Parsons v. Gunter, 266 N.C. 731, 147 S.E.2d 162 (1966).

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954); Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The institution of an action to enforce a resulting trust is governed by the ten-year statute. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

Were plaintiff the cestui que trust of a resulting or a constructive trust, the ten-year statute would apply. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that land should be retained by him who holds it. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Claim for Services Where Compensation Was to Be Made by Will. — When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefore does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947).

Creditor's Action against Purchasing Partners.—The question as to whether an action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the security of their debts, is barred by this section, was raised but not decided. Ross v. Henderson, 77 N.C. 170 (1877).

An action for relief against an executor must be filed within ten years after the action accrues. King v. Richardson, 136 F.2d 849 (4th Cir. 1943) (dis. op.).

Passive Trust — Actions by Children against Trustee. — Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and set-

tlement after ten years, especially when the relationship of trustee has been openly repudiated. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

Claim for Admeasurements of Dower.—This section is applicable to the claim for admeasurement of dower against the heirs, or one claiming under them. Brown v. Morrisey, 124 N.C. 292, 32 S.E. 687 (1899).

Action to Test Validity of Stockholder's Election.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890).

Action of Cotenants to Protect Title.—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefits of the others, to be held in trust for them, and the ten-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. Gentry v. Gentry, 187 N.C. 29, 121 S.E. 188 (1924).

Impeachment of Final Account of Representative. — When a final account of a representative is filed and audited, an action to impeach it must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

When the administrator of A died eight years after filing an ex parte account, the plaintiff qualified as his executor within one month, and within seventeen months began a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account, it was held, that although this section applied for the reason stated in Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889), it did not bar the action. Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890).

Release of Right to Surcharge and Restate Final Account. — There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been ten years, the same length of time which is now required by this section to bar such action. Nunnery v. Averitt, 111 N.C. 394, 16 S.E. 683 (1892).

Action for Balance Due Heirs.—Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either § 1-50, subdivision (2) or this section. Culp v. Lee, 109 N.C. 675, 14 S.E. 74 (1891).

Partition Proceedings. — Where a petition in partition is filed, and the petitioners enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result. Aldridge v. Dixon, 205 N.C. 480, 171 S.E. 777 (1933).

Recovery of Real Estate.—This section does not apply to actions for the recovery of real estate because §§ 1-39, 1-40 apply to its exclusion. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Same—Defendant in Ejectment. — The ten-year statute of limitations does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Same — To Declare Senior Grantee a Trustee.—An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by this section. Ritchie v. Fowler, 132 N.C. 788, 44 S.E. 616 (1903).

Same—To Declare Vendee a Trustee. — Since the other statutes of limitations do not expressly mention the trust relation between vendor and vendee, it could be only included under this section, and it would then be allowed only where the possession was adverse or where it was necessary to prevent some wrong or gross injustice.

Bradsher v. Hightower, 118 N.C. 399, 24 S.E. 120 (1896).

Same—Enforcement of Parol Trust in Favor of Wife. — Section apparently not applicable, see Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923).

Same—To Recover Possession of Vendee. —In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Same—Against Remainderman.—Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Same—Contract Action for Breach of Covenant.—An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by § 1-52, subdivision (9), but by this section. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

This section applies to an action which is brought upon the covenants in the deed and not upon the theory that there was fraud or mistake in the deed, nor upon the theory that the defendant had made a fraudulent representation as to the quantity or acreage, which would entitle the plaintiff to recover damages for deceit. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same—Where No Possession by Either Party.—Where there is no possession by either the mortgagor or mortgagee there can be no running of the statute. If it were intended that this section should apply where there is no possession by either party, it was utterly useless to insert in § 1-47, subdivision (3), the provision in regard to possession, as the statute, under such a construction of this section, would run whether there was any possession or not, and the period of limitation is the same in both sections. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904). But see dissenting opinion, and see the dissenting opinion in Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889).

Same—Action to Foreclose Mortgage.—Since § 1-47, subdivision (3) is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before this section would be a complete reversal of the will of the legislature as plainly expressed. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Same—Where Mortgagee Sells and Repurchases. — Where the mortgagee sells and conveys to one who reconveys to him the mortgagor or his representatives can call upon the mortgagee for an account at any time within ten years after the cause of action accrues. Bruner v. Threadgill, 88 N.C. 361 (1883).

Same—To Declare Defendants in Execution Equitable Owners.—A suit to declare one of the defendants in execution, the equitable owner of lands for the purchase of which he has furnished the price, and his codefendants trustees, is barred by the ten-year statute of limitations. Sexton v. Farrington, 185 N.C. 339, 117 S.E. 172 (1923).

Same — Failure to Call for Grant of State Lands.—A failure of the enterer upon unappropriated and vacant State lands, or those claiming under him, to call for the grant within ten years after entry, would presume an abandonment in favor of those claiming under and by virtue of a junior grant. Frazier v. Eastern Band of Cherokee Indians, 146 N.C. 477, 59 S.E. 1005 (1907).

Same—Taking of Land without Compensation.—Where in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, in which the city pleaded the statute of limitations and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. Dayton v. City of Asheville, 185 N.C. 12, 115 S.E. 827 (1923).

Enforcement of Decree. — An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. Hunter v. West, 172 N.C. 160, 90 S.E. 130 (1916).

Action to Declare Trust in Land.—In Marshall v. Hammock, 195 N.C. 498, 142 S.E. 776 (1928), this section was held applicable to plaintiff's right of action to declare a trust in land.

Action to Declare Trust in Stock. — An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought with-

in ten years from the date of the accrual of the cause of action. Jarrett v. Green, 230 N.C. 104, 52 S.E.2d 223 (1949).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of § 1-52 and not by this section. Reynolds v. Whitin Mach. Works, 167 F.2d 78 (4th Cir. 1948).

Action for Delinquent Taxes.—Neither the three nor ten-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. City of Wilmington v. Cronly, 122 N.C. 383, 30 S.E. 9 (1898).

Application to Judgments of State Courts. — The words "any state" appearing in § 1-47, subdivision (1), must be taken to mean the judgment of a court of any state including our own, but it could make no material difference even if not construed to include this State, since, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N.C. 248 (1881).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (C. C. P., s. 55; 1874-5, c. 256; Code, s. 177; Rev., s. 400; C. S., s. 446.)

I. Real Parties in Interest.
  A. In General.
  B. Personal Actions.
  C. Actions Concerning Realty.
II. Actions by Grantees.
III. Assignments.

Cross References.

As to bonds of executors, administrators, and collectors, and right of action on such bonds, see §§ 28-34, 28-42. As to bonds of guardians and right of action thereon, see §§ 33-13, 33-14. As to actions on official bonds and bonds in suit, see §§ 109-33, 109-34, 109-35.

For provisions of Rules of Civil Procedure as to prosecuting claim in name of real party in interest, see Rule 17 (§ 1A-1.)

I. REAL PARTIES IN INTEREST.

A. In General.

Editor's Note.—For case law survey on pleading and parties, see 43 N.C.L. Rev., 873 (1965); 44 N.C.L. Rev. 897 (1966).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

Purpose.—The provision requiring every action to be prosecuted in the name of the real party in interest is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a resort to another action, so as to harmonize with N.C. Const., Art. II, [IV] § 1. Abrams v. Cureton, 74 N.C. 523 (1876).

Enabling Act.—The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. Usury v. Suit, 91 N.C. 406 (1884).

Strict Compliance.—Under this section there is no middle ground; for whenever the action can be brought in the name of the real party in interest it must be so done. Rogers v. Gooch, 87 N.C. 442 (1882). See McGuinn v. City of High Point, 219 N.C. 56, 13 S.E.2d 48 (1941).

A motion in the cause is the prosecution of an action within the meaning of this sec-

tion. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

Plaintiff Must Be Real Party in Interest. —Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest. State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958).

For nearly a century North Carolina statutory law has required every action to be prosecuted in the name of the real party in interest. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

A right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to a contract. Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Who Is Real Party in Interest.—The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation, 5 W.L. Monthly 80.

The requirement that an action must be maintained by the real party in interest means some interest in the subject matter of the litigation and not merely an interest in the action. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

A real party in interest is a party who is benefited or injured by the judgment in the case. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 455, 139 S.E.2d 723 (1965).

Exception Does Not Apply to Fire Insurance Companies.—If the exception in this section ("But this section does not authorize the assignment of a thing in action not arising out of contract") operated to prevent a fire insurance company, on paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, c. 54, s. 43 (see now § 58-177), which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured. Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936), citing Insurance Co. v. Atlantic Coast Line R.R., 132 N.C. 75, 43 S.E. 548 (1903).

Right to Jury Trial. — On the issue as to whether the plaintiff was the real party in interest he was entitled to a trial by jury. Hershey Corp. v. Atlantic Coast Line R.R., 207 N.C. 122, 176 S.E. 265 (1934).

Action Dismissed.—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. Chapman v. McLawhorn, 150 N.C. 166, 63 S.E. 721 (1909).

Actions should be brought by the real parties in interest. Hyatt v. McCoy, 194 N.C. 25, 138 S.E. 405 (1927).

When it appears that the real party in interest is not before the court, the proceeding should be dismissed. Howard v. Boyce, 266 N.C. 572, 147 S.E.2d 828 (1966).

Sole Stockholder. — In a suit instituted by a corporation wherein all the stock was owned by one person, the sole stockholder was a real party in interest, and was a necessary party plaintiff. Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956).

Administrator C.T.A. — Where notes were bequeathed to testator's widow for life and she, as executrix, distributed them to herself, and there was no evidence that they were not endorsed or that such distribution did not pass title to the notes from her as representative, plaintiff, as testator's administrator c.t.a., did not show that he was the real party in interest under this section to recover the notes from the widow's administrators. Upon distribution the property had inured to the benefit of the life tenant and remaindermen and was not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957).

Allegations Disclosing Plaintiff Not Real Party in Interest.—In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship may be inferred, disclose that plaintiff is not the real party in interest and that he is without any right to maintain the action. Skinner v. Empresa Transformadora De Productos Agropecuarios, S.A., 252 N.C. 320, 113 S.E.2d 717 (1960).

Applied in First Union Nat'l Bank v.

Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965); Berwer v. Union Cent. Life Ins. Co., 214 N.C. 554, 200 S.E. 1 (1938).

Stated in Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937); Ionic Lodge #72 F. & A.A.M. v. Ionic Lodge F. & A.A.M. #72 Co., 232 N.C. 648, 62 S.E.2d 73 (1950).

Cited in Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Bizzell v. Bizzell, 237 N.C. 535, 75 S.E.2d 536 (1953); Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955); Hendrix v. B & L. Motors, Inc., 241 N.C. 644, 86 S.E.2d 448 (1955); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Adams v. Flora Macdonald College, 251 N.C. 617, 111 S.E.2d 859 (1960); Branch Banking & Trust Co. v. Bank of Washington, 255 N.C. 205, 120 S.E.2d 830 (1961); Gulf Life Ins. Co. v. Waters, 255 N.C. 553, 122 S.E.2d 387 (1961); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969); In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937); John P. Nutt Corp. v. Southern Ry., 214 N.C. 19, 197 S.E. 534 (1938); Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941).

B. Personal Actions.

Contract for Benefit of Third Person.—The principle, sanctioned by several respectable authorities, is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. This section provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. No reason can be seen why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor can it be seen how the defendant is prejudiced thereby. Shoaf v. Palatine Ins. Co., 127 N.C. 308, 37 S.E. 451 (1900); Voorhees v. Porter, 134 N.C. 591, 47 S.E. 31 (1904).

Presumption from Possession of Chose in Action.—The possession of a chose in action raises a presumption that the person producing it on trial is the real party in interest. Jackson v. Love, 82 N.C. 408 (1880); Pate v. Brown, 85 N.C. 166 (1881).

Where the plaintiff produces an unendorsed bill of lading, and the evidence tends to show that he had sold the shipment to a person named therein as consignee, it is sufficient of the intent of the consignee to transfer the title by delivery of the bill of lading, to sustain the plaintiff's right to maintain his action as the real party in interest. Lawshe v. Norfolk & S.R.R., 191 N.C. 437, 132 S.E. 160 (1926).

Ward Equitable Owner of Bond Payable to Guardian.—A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian's settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. Usry v. Suit, 91 N.C. 406 (1884). See also Melbane v. Melbane, 66 N.C. 334 (1872).

Rights of Subrogated Insurer. — When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured and can alone, under this section, as the real party in interest, maintain an action against the wrongdoer. Cunningham v. Railroad, 139 N.C. 427, 51 S.E. 1029 (1905).

Employer or Insurer Subrogated to Rights of Injured Employee. — Where an employee has accepted compensation awarded by the Industrial Commission for an injury sustained by him in the course of his employment he cannot maintain an action against a third person upon the allegations that the negligence of the third person was the cause of the injury, as the employer or insurance carrier was subrogated to the right of action against the third person and the injured employee was not the real party in interest. McCarley v. Council, 205 N.C. 370, 171 S.E. 323 (1933).

And May Sue Third Persons.—Under this section an insurance carrier who has paid compensation to an injured employee may proceed in an action which has been instituted against a third person by the injured employee or his personal representative. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Endorser Subrogated to Rights of Payee.—Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions

of this section to determine the liability of the parties. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Rights of Undisclosed Principal on Contract.—An undisclosed principal holding the business rights and interests under the contract, may sustain the action thereon. Virginia-Carolina Peanut Co. v. Atlantic Coast Line R.R., 155 N.C. 148, 71 S.E. 71 (1911); Williams v. Honeycutt, 176 N.C. 102, 96 S.E. 730 (1918).

Liability of Bank Directors to Each Other.—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924).

Subrogated Insurer Must Sue in Its Own Name.—Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under this section. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); commented on in 31 N.C.L. Rev. 224 (1953); Milwaukee Ins. Co. v. McLean Trucking Co., 256 N.C. 721, 125 S.E.2d 25 (1962); Shambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965). See Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where insured property is destroyed or damaged by the tortious act of a third party and the insurance company pays its insured, the owner, the full amount of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case, the insurance company as the real party in interest under this section, may maintain such action in its name and for its benefit. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961); Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963).

An insurance company, as plaintiff, may bring suit in its own name against parents of minor who set fire to school property upon a claim to which it has become subrogated by payment in full of its loss to the school board under the provisions of its policy of insurance, who, pursuant to the provisions of § 1-538.1, would have been able to bring such an action in its own name. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insurance company becomes a necessary party plaintiff and must sue in its own name to enforce its right of subrogation where it has paid the insured the loss in full. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

And Not in Name of Injured Party.—An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor, and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

Where an insurance company pays the insured in part only for the loss sustained it is subrogated pro tanto in equity to the rights of the insured against the tort-feasor and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 167 N.C. 302, 148 S.E.2d 117 (1966).

Liability Insurance Carrier Not Proper Party Defendant.—In an action ex delicto for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Generally an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E. 143 (1956).

Plaintiff employee alleged the existence of a collective labor contract between defendant and a labor union, that plaintiff was required to work under an increased work load assignment in violation of the

contract, and that such violation entitled plaintiff to back pay under the terms of the contract. It was held that the complaint states a cause of action in plaintiff's favor as a third party beneficiary. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Agent as Real Party in Interest. — Where, under agreement with his principal, the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, within the meaning of this section, and may maintain his actions to recover the excess, and also the penalty when entitled thereunto. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

The appointment of an agent does not divest the owner of his property rights. The agent is not the real party in interest and cannot maintain an action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

An agent is not the real party in interest and cannot maintain an action. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Since the enactment of this section it has been consistently held that an agent for another could not maintain an action in his name for the benefit of his principal. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

Agent for Collection.—An agent for the collection of rents is not the real party in interest. Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912).

A rental agent may not maintain a suit in ejection or for the collection of rents, the owner being the real party in interest, under this section. Home Real Estate Loan & Ins. Co. v. Locker, 214 N.C. 1, 197 S.E. 555 (1938).

Assignee for Collection. — An assignee for purposes of collection is not a "real party in interest." Abrams v. Cureton, 74 N.C. 523 (1876); Morefield v. Harris, 126 N.C. 628, 36 S.E. 125 (1900); Third Nat'l Bank v. Exum, 163 N.C. 199, 79 S.E. 498 (1913); First Nat'l Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927); Federal Reserve Bank v. Whitford, 207 N.C. 267, 176 S.E. 584 (1934). See 5 N.C.L. Rev. 369.

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. North Carolina Bank & Trust Co. v. Williams, 201 N.C. 464, 160 S.E. 484 (1931).

Transferor of Claim.—A plaintiff having transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions to apply the proceeds to demands which he held for collection against the said plaintiff, an action will not lie in the name of the plaintiff on the claim, he not being the real party in interest. Wynne v. Heck, 92 N.C. 415 (1885).

Action on Note by Liquidating Agent. —In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security are both interested parties and may jointly sue the makers of the note. Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc., 209 N.C. 36, 182 S.E. 694 (1935).

Shippers Are Real Parties in Interest in Action for Discrimination in Rates. — Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest not the contract truck carriers. Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Action on Fidelity Bond.—Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrenders nor assigns the fidelity bond of the defaulting cashier, the bank is the real party in interest and entitled to maintain an action upon the bond. Peoples' Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933).

Lessor Must Bring Action of Summary Ejectment. — Although an agent of the lessor may make the oath in writing required in summary ejectment under § 42-28, the action must be prosecuted in the name of the lessor as the real party in interest, and it may not be maintained in the name of the lessor's rental agent. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

Title to Public Office.—Taxpayers may not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs are

not the real parties in interest. Freeman v. Board of County Comm'rs, 217 N.C. 209, 7 S.E.2d 354 (1940).

Suit by Retiring State Officer.—Where a State officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, the State is the real party in interest, appearing in the name of its successive agents. Lacy v. Webb, 130 N.C. 546, 41 S.E. 549 (1902). See Peebles v. Boone, 116 N.C. 57, 21 S.E. 187, 44 Am. St. Rep. 429 (1895).

Quo Warranto. — Every action must be prosecuted by the party in interest, and hence, in a quo warranto, (now a proceeding by the Attorney General) while it need not appear that the relator is a contestant for the office, it must appear from the complaint that he is an inhabitant and taxpayer of the jurisdiction over which the officer, whose title is questioned, exercises his duties and powers. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); Hines v. Vann, 118 N.C. 6, 23 S.E. 932 (1896).

Transfer beyond Authority of Agent.—When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. McMinn v. Freeman, 68 N.C. 342 (1873).

Actions by Executor or Administrator.—An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. Rogers v. Gooch, 87 N.C. 442 (1882). See Sitzer v. Lewis, 69 N.C. 133 (1873); Danis v. Fox, 69 N.C. 435 (1873).

When Action by Administrator d.b.n.—Where a bond for the payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator de bonis non of the testator. Ballinger v. Curriton, 104 N.C. 477, 10 S.E. 664 (1889).

Administrator of Deceased Guardian as Party. — An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon, had become the property of the intestate's estate. Alexander v. Wriston, 81 N.C. 193 (1879).

Personal Representative.—Where an action has been instituted by an injured employee who subsequently accepts an award of compensation, the insurance carrier should be made a party plaintiff; but this is not necessary in the case of suit instituted by the personal representative of a deceased employee. Such personal representative continues the suit which has been commenced; but after the acceptance of an award of compensation, the recovery goes, so far as necessary, to the reimbursement of the insurance carrier and only the excess to the persons entitled under the wrongful death statute. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Widow Entitled to Burial Expenses of Husband.—A widow who pays an account for burial expenses of her husband is the proper party plaintiff in an action against the administrator, being the real party in interest. Ray v. Honeycutt, 119 N.C. 513, 26 S.E. 127 (1896).

Action of Heirs at Law on Doubtful Claim.—Where a trustee in bankruptcy or the creditor has waived a doubtful claim in favor of a bankrupt's estate and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. Cunningham v. Long, 185 N.C. 613, 125 S.E. 265 (1923).

Parties to Interpretation of Will.—Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court to be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. Citizens Bank & Trust Co. v. Dustowe, 188 N.C. 777, 125 S.E. 546 (1924).

Claim under Workmen's Compensation Act.—It is required by this section, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and where a claim under the Workmen's Compensation Act is litigated in the name of the deceased the proceeding is a nullity and will be dismissed on appeal. Hunt v. State, 201 N.C. 37, 158 S.E. 703 (1931).

Action for Seduction. — In an action brought to recover damages for seduction, if the female is under twenty-one years of age, the father is the real party in interest; if she be over twenty-one, then the wronged female is the real party in inter-

est. Hood v. Sudderth, 111 N.C. 219, 16 S.E. 397 (1892); Scarlett v. Norwood, 115 N.C. 285, 20 S.E. 459 (1894); Williford v. Bailey, 132 N.C. 404, 43 S.E. 929 (1903); Snider v. Newell, 132 N.C. 614, 44 S.E. 354 (1903); Tillaston v. Currin, 176 N.C. 479, 97 S.E. 395 (1918).

Slander. — Where an action is brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleges no special damages, his action will not lie because he is not the real party in interest. Harper v. Pinkston, 112 N.C. 293, 17 S.E. 161 (1893).

Negligent Mutilation of Dead Body. — In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. Floyd v. Atlantic Coast Line Ry., 167 N.C. 55, 83 S.E. 12 (1914).

Applied in Hood v. Mitchell, 206 N.C. 156, 173 S.E. 61 (1934).

C. Actions Concerning Realty.

Conveyance of Land Pendente Lite. — Where it is sought by the owner of land, to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed 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. Plotkin v. Merchants Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926).

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. Blount v. Johnson, 165 N.C. 26, 80 S.E. 882 (1914).

Action to Vacate Grant When State Not Interested. — Where the State has no interest in the land, as where title would not revest in the State, an action to vacate a grant must be brought by the party in interest in his own name, the State not being such a party. State ex rel. Atty. Gen. v. Bland, 123 N.C. 739, 31 S.E. 475 (1898). See State v. Bevers, 86 N.C. 588 (1882); Carter v. White, 101 N.C. 30, 7 S.E. 473 (1888); Henry v. McCoy, 131 N.C. 586, 42 S.E. 955 (1902).

Action by Tenant.—Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. Bridgers v. Dill, 97 N.C. 222, 1 S.E. 767 (1887); State v. Higgins, 126 N.C. 1112, 36 S.E. 113 (1900).

Where the land has broom sage growing thereon the tenant is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on the leased premises. Chauncy v. Atlantic Coast Line R.R., 195 N.C. 415, 142 S.E. 327 (1928).

Action of Tenant for Trespass. — Under the provisions of this section, the court has the power to order the owner of the title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. Tripp v. Little, 186 N.C. 215, 119 S.E. 225 (1923).

Feme Covert as Party.—The rents arising from the real estate of a feme covert belong to her under the Constitution of 1868, Art. X, § 6, therefore an action therefor must be brought by the wife, she being the real party in interest. Thompson v. Wiggins, 109 N.C. 509, 14 S.E. 301 (1891).

A suit by mortgagor to correct mortgage, which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgages entitled thereto, will be entertained in equity, as he is a real party in interest. Gray v. Mewborn, 194 N.C. 348, 139 S.E. 695 (1927).

Reformation of Deed of Trust.—Where a substituted trustee brings an action to reform a deed of trust and certain mortgage notes which are negotiable, the holders of the notes are necessary parties. First Nat'l Bank v. Thomas, 204 N.C. 599, 169 S.E. 189 (1933).

In an action to reform a deed, all parties claiming an interest in the land or any part thereof, purported to have been conveyed by the instrument sought to be reformed, and whose interest will be affected by the reformation of the instrument, are necessary parties to the action. Kemp v. Funderburk, 224 N.C. 353, 30 S.E.2d 155 (1944).

Lease of Hunting Rights.—The grantor of land reserved the hunting rights and later leased them. Defendant successor to grantee refused to permit the lessee to enter upon the property for the purpose of hunting. It was held that the lessee and not the lessor was the proper party to maintain an action against defendant for

damages. Jones v. Neisler, 228 N.C. 444, 45 S.E.2d 369 (1947).

II. ACTIONS BY GRANTEES.

Constitutionality.—This section permitting a grantee of real estate to maintain an action in his own name is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. Buie v. Carver, 75 N.C. 559 (1876); Justice v. Eddings, 75 N.C. 581 (1876).

Rights of Grantee in Ejectment Suit.—An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor. Buie v. Carver, 75 N.C. 559 (1876); Osborne v. Anderson, 89 N.C. 263 (1883); Johnson v. Prairie, 94 N.C. 775 (1886); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907). As to summary ejectment, see § 42-26, and note thereto.

III. ASSIGNMENTS.

Assignment Defined.—An assignment is substantially a transfer, actual or constructive with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Effect in General. — A construction was given to this section in Harris v. Burnwell, 65 N.C. 584 (1871), where Pearson, C.J., says, "it abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any setoff or other defense existing at the time of or before notice of the assignment; the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.' This language is as broad as it well can be; so that a note assigned after it is due, a half dozen times, will be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof." Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958).

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. American Sur. Co. v. Baker, 172 F.2d 689 (4th Cir. 1949).

General Rule. — It would seem that something of a general rule concerning the relation of this section to assignability was laid down in Woodcock v. Bostic, 118 N.C. 830, 24 S.E. 362 (1896), in which Montgomery, J. says: "If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing to be assignable, must be the subject of assignment generally, to everyone, and not to be confined in its application to particular persons."

Effect of Assignment of Negotiable Paper.—In Holly v. Holly, 94 N.C. 670 (1886), it was said: "Unquestionably, the complete equitable title to, and the substantial ownership of, a note or bond, negotiable by endorsement, may, without endorsement, be passed by the payee or obligee, to another person, by a sale and delivery thereof, and in this State, the purchaser thus becomes so thoroughly the owner, that an action upon the note or bond so transferred, can only be maintained in the name of the real or equitable owner."

The one to whom there has been an absolute assignment is the "real party in interest" rather that the assignor who has parted with all interest therein. Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (E.D.N.C. 1956).

An assignee of a contractual right is a real party in interest and may maintain the action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Assignee Sues in Own Name.—An assignee may sue in his own name, under this section, as an equitable assignee or cestui que trust could formerly have done in equity. Miller v. Tharel, 75 N.C. 148 (1876). See Sutton v. Owen, 65 N.C. 124 (1871).

If the assignee elected to sue on the judgment, the action could only be maintained in the name of the assignee. Safeco Ins. Co. of America v. Nationwide Mut.

Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

Equitable Owner Real Party in Interest.—In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal title, the equitable owner being the real party in interest may sue in his own name. Andrews v. McDaniel, 68 N.C. 385 (1873); Milley v. Gatling, 70 N.C. 410 (1874); Egerton v. Carr, 94 N.C. 653 (1886); Tyson v. Joyner, 139 N.C. 73, 51 S.E. 803 (1905); Ball-Thrash & Co. v. McCormick, 162 N.C. 471, 78 S.E. 303 (1913).

Assignee of Negotiable and Nonnegotiable Notes.—The assignee of a promissory note or bill of exchange endorsed before maturity, takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a nonnegotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between original parties at the time of the assignment; bonds or sealed notes, are on the same footing with nonnegotiable instruments. Hanens v. Potts, 86 N.C. 31 (1882); Spence v. Tabscott, 93 N.C. 248 (1885); Clinton Loan Ass'n v. Merritt, 112 N.C. 243, 17 S.E. 296 (1893). See Andrews v. McDaniel, 68 N.C. 385 (1873); First Nat'l Bank v. Bynum, 84 N.C. 24 (1881).

The assignee of a nonnegotiable instrument for value and in good faith before maturity nevertheless takes same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. William Iselin & Co. v. Saunders, 231 N.C. 642, 58 S.E.2d 614 (1950).

Unauthorized Endorsement of Negotiable Paper.—The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, prima facie, the equitable title, and can maintain a suit thereon. Bresee v. Crumpton, 121 N.C. 123, 28 S.E. 351 (1897).

Assignment of Note by One of Joint Payees.—A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. Johnson v. Mangum, 65 N.C. 148 (1871).

Past Due Notes Subject to Defenses.—A note taken after it is due is subject to any setoff, or any other defense existing at the time of or before notice of assignment. Vaughan v. Jeffreys, 119 N.C. 144, 26 S.E. 94 (1896); Guthrie v. Moore, 182 N.C. 24, 108 S.E. 334 (1921). See Mosby v. Hodge, 76 N.C. 387 (1877); Capell v. Long, 84 N.C. 17 (1881).

Action on Assigned Nonnegotiable Note.—The assignee of a nonnegotiable note can maintain an action thereon; and so can the owner where there is no written assignment. Wilcoxon v. Logan, 91 N.C. 452 (1884).

When Judgments Treated as Contracts.—While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising ex delicto, and are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. Winbury v. Koonce, 83 N.C. 351 (1880); Moore v. Norvell, 94 N.C. 270 (1886).

Assignment of a Judgment Pending Appeal.—Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should be substituted as plaintiff. Field v. Wheeler, 120 N.C. 270, 26 S.E. 812 (1897).

Assignor of Contract Not a Party.—The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence and he has assigned the contract to a third party, not to the action, and has no further interest therein. Vaughan & Barnes v. Davenport, 157 N.C. 156, 72 S.E. 842 (1911).

When Executory Contracts Assignable.—As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, are imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned. Atlantic & N.C.R.R. v. Atlantic & N.C. Co., 147 N.C. 368, 61 S.E. 185 (1908).

Installments of Pension. — Installments of a pension payable in the future are not assignable. Gill v. Dixon, 131 N.C. 87, 42 S.E. 538 (1902).

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific performance. Harry's Cadillac-Pontiac Co. v. Norburn, 230 N.C. 23, 51 S.E.2d 916 (1949).

Assignor of Bank Deposit May Not Maintain Action. — As a consequence of

the requirement that every action be prosecuted in the name of the real party in interest, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. Lipe v. Guilford Nat'l Bank, 236 N.C. 328, 72 S.E.2d 759 (1952).

Assignee Takes Subject to Setoffs and Other Defenses.—An assignee of a chose in action is by this section given the right to maintain the action in his name but that right is circumscribed by the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

Where plaintiff, according to the allegations of its complaint, became the assignee of a lease, a nonnegotiable chose in action, it took it subject to any setoff or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958).

A claim for unpaid wages is a chose in action which may be assigned and, when assigned the assignee may maintain an action thereon in his own name. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

Cited in Atlantic Joint Stock Land Bank v. Foster, 217 N.C. 415, 8 S.E.2d 235 (1940).

§ 1-58. Suits for penalties.—Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by anyone who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the State. (R. C., c. 35, ss. 47, 48; Code, ss. 1212, 1213; Rev., ss. 401, 402; C. S., s. 447.)

Editor's Note. — The three provisions permitting the plaintiff to reply fraud to a plea of release in a suit for penalty; the defendant to plead satisfaction in a suit on bonds; and that the sum due, with interest and costs, discharges penalty bonds, were §§ 932, 933, 934 of the Code of 1883 and §§ 1521, 1522, 1523 of the Revisal of 1905. They were left out of the Consolidated Statutes, but were again inserted by Public Laws 1925, c. 21. See § 1-59 et. seq.

The construction of this section in Norman v. Dunbar, 53 N.C. 319 (1861), is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of Duncan v. Philpot, 64 N.C. 479 (1870), it is held that it should be prosecuted in the name of the State for his use. But in looking to the cases which have been maintained in the Supreme Court, and to which no objection on this ground seems to have been taken, we find that all have been in the name of the person suing and none in the name of the State. Branch v. Wilmington & W.R.R., 77 N.C. 347 (1877); Katzenstein v. Raleigh & G.R.R., 84 N.C. 688 (1881); Keeter v. Wilmington & W.R.R., 86 N.C. 346 (1882); Whitehead & Stokes v. Wilmington & W.R.R., 87 N.C. 255 (1882); Branch & Pope v. Wilmington & W.R.R., 88 N.C. 570 (1883); Middleton v. Wilmington & W.R.R., 95 N.C. 167 (1886); Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891); State ex rel. Carter v. Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900). This uniform practice, acquiesced in, if not sanctioned by the court, must be deemed a settlement of the construction of the statute.

Constitutionality. — This section does not conflict with the Constitution. Katzenstein v. Raleigh & G.R.R., 84 N.C. 688 (1881); State ex rel. Hodge v. Marietta & N. Ga. R.R., 108 N.C. 24, 12 S.E. 1041 (1891); Sutton v. Phillips, 116 N.C. 502, 21 S.E. 968 (1895); State ex rel. Goodwin v. Caraleigh Phosphate & Fertilizer Works, 119 N.C. 120, 25 S.E. 795 (1896).

Penalty against Railroads Recovered by Statute. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the State. State ex rel. Hodge v. Marietta & N. Ga. R.R., 108 N.C. 24, 12 S.E. 1041 (1891).

Applied, in fixing penalty for illegal weighing of cotton, in State v. Briggs, 203 N.C. 158, 165 S.E. 339 (1932).

§ 1-59. Suit for penalty, plaintiff may reply fraud to plea of release.—If an action be brought in good faith by any person to recover a penalty under a law of this State, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought

by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual. (4 Hen. VII, c. 20; R. C., c. 31, s. 100; Code, s. 932; Rev., s. 1521; C. S., s. 447(a); 1925, c. 21.)

§ 1-60. Suit on bonds; defendant may plead satisfaction.—When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (4 Hen. VII, c. 20; R. C., c. 31, s. 101; Code, s. 933; Rev., s. 1522; C. S., s. 147(b); 1925, c. 21.)

§ 1-61: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-62. Action by purchaser under judicial sale.—Anyone given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (1858-9, c. 50; Code, s. 942; Rev., s. 403; C. S., s. 448.)

No Rights Acquired by Bidder before Confirmation. — In Attorney-General v. Roanoke Nav. Co., 86 N.C. 408 (1882), it is said ("The doctrine has been settled in this State, that the bidder at a judicial sale acquired no right before the confirmation of the report of the commissioner who made the sale under the order of the court." In re Dickerson, 111 N.C. 108, 15 S.E. 1025 (1892), holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with." Both cases being quoted, approved and followed in Vanderbilt v. Brown, 128 N.C. 498, 39 S.E. 36 (1901).

But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. Vass v. Arrington, 89 N.C. 14 (1883).

Notice to Purchaser. — All that a purchaser at a judicial sale is required to know is that the court has jurisdiction of the subject matter and the person. Cord v. Finch, 142 N.C. 139, 54 S.E. 1009 (1906); Hackley v. Roberts, 147 N.C. 201, 60 S.E. 975 (1908); Harris v. Bennett, 160 N.C. 340, 76 S.E. 217 (1912).

Collection of Purchase Price.—The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

§ **1-63**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ **1-64**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-65 to 1-65.4**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note. — Session Laws 1955, c. 1366, amended former § 1-65 by changing its number to 1-65.1 and by adding §§ 1-65.2 to 1-65.4. Former § 1-65.1 was amended by Session Laws 1957, c. 249. For provisions similar to those of the repealed sections, see section (b), Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ **1-65.5**: Repealed by Session Laws 1969, c. 895, s. 19.

Editor's Note. — Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

§ **1-66**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ **1-67**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-68**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1.)

§ **1-69**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ **1-69.1. Unincorporated associations; suit by or against.**—All unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. This section shall not apply to

partnerships or copartnerships which are organized to engage in any business, trade or profession. (1955, c. 545, s. 3.)

Not Retroactive. — This section does not apply to actions filed prior to its effective date. Youngblood v. Bright, 243 N.C. 599, 91 S.E.2d 559 (1956).

The words "sue" and "be sued" used in this statute include the natural and appropriate incidents of legal proceedings, and embrace all civil process incident to the commencement or continuance of legal proceedings. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

Service of Process. — No provision of this section purports to prescribe the manner in which service of process is to be made on such unincorporated association. Melton v. Hill, 251 N.C. 134, 110 S.E.2d 875 (1959).

An unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed is suable in this State as a separate legal entity. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. Martin v. Local 71, International Bhd. of Teamsters, 248 N.C. 409, 103 S.E.2d 462 (1958); Gainey v. Local 71, International Bhd. of Teamsters, 252 N.C. 256, 113 S.E.2d 594 (1960).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. R.H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

An unincorporated labor union, as a legal entity separate and apart from its members, may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. R.H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967).

Evidence was sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed. Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

Applied in Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Cited in Solon Lodge v. Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957); Glover v. Brotherhood of Railway & Steamship Clerks, 250 N.C. 35, 108 S.E.2d 78 (1959); Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962); Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538 (1969).

§ 1-70: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to joinder of parties, see Rules 19 and 20 of the Rules of Civil Procedure (§ 1A-1). As to class actions, see Rule 23 of the Rules of Civil Procedure (§ 1A-1).

§ 1-71: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-72. Persons jointly liable.—In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (R. C., c. 31, s. 84; 1871-2, c. 24, s. 1; Code, s. 187; Rev., s. 413; C. S., s. 459.)

Cross Reference.—For another provision that in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts, see Rule 19 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — Contracts made by copartners (or other joint obligors) were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, s. 84. This provision was not introduced into the Code of Civil Procedure and hence the principle governing contracts as construed at common law was restored. The necessity for remedy arose. The omitted section, which in Merwin v.

Ballard, 65 N.C. 168 (1871), was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, c. 24, s. 1, which was § 187 of the Code, and now constitutes this section. See Rufty v. Claywell, 93 N.C. 306 (1885).

Effect. — In Rufty v. Claywell, 93 N.C. 306 (1885), it was said: "The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint. . . . That the contract possesses the twofold quality of being joint as well as several in law, cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York."

A firm in Maryland gave its promissory note to A signed in the name of the firm, and A sued one of the partners alone, he was permitted to do so, as this section does not affect the contract, but only extends the remedy. Palyart v. Goulding, 1 N.C. 691 (1796).

Partnership Liability. — Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners, Hanstein v. Johnson, 112 N.C. 253, 17 S.E. 155 (1893). See Bain v. Clinton Loan Ass'n, 112 N.C. 248, 17 S.E. 154 (1893); Daniel v. Bethell, 167 N.C. 218, 83 S.E. 307 (1914).

Where a judgment has been obtained in an action against a partnership and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process. Daniel v. Bethell, 167 N.C. 218, 83 S.E. 307 (1914).

Procedure in Partnership Actions. — Where a judgment is taken against two or three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered, it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N.C. 84, 25 S.E. 815 (1896).

Nonsuit against One Alleged Party to Contract Does Not Constitute Variance Justifying Nonsuit against the Other. — When an action is brought against more than one defendant on what is alleged to be a joint contract, and the evidence shows that the agreement was made with only one defendant, nonsuit against the other defendants does not constitute a variance which justifies a nonsuit against the defendant with whom the agreement was made. The existence of other defendants is not an essential element of the contract. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

Cited in Jones v. Rhea, 198 N.C. 190, 151 S.E.255 (1930).

§ **1-73**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to those of the first sentence of repealed § 1-73, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to interpleader, see Rule 22 of the Rules of Civil Procedure (§ 1A-1).

§ **1-74**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of repealed § 1-74, see Rule 25 of the Rules of Civil Procedure (§ 1A-1).

§ **1-75**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.—This article shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this article. (1967, c. 954, s. 2.)

Effective Date of Article.—Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Editor's Note.—For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46 (1969).

§ 1-75.2. Definitions.—In this article the following words have the designated meanings:

(1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.

(2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this article acts of the plaintiff are referred to, the reference includes the acts of his agent within the scope of the agent's authority.

(3) "Defendant" means the person named as defendant in a civil action, and where in this article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

(4) Where jurisdiction of the person is drawn into question in respect to any claim asserted under Rule 14 of the Rules of Civil Procedure, the terms "Plaintiff" and "Defendant" as above defined shall include a third-party plaintiff and a third-party defendant respectively. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.—(a) Jurisdiction of Subject Matter Not Affected by This Article.—Nothing in this article shall be construed to confer, enlarge or diminish the subject matter jurisdiction of any court.

(b) Personal Jurisdiction.—A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in § 1-75.4 or § 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4 (j) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in § 1-75.7.

(c) Jurisdiction in Rem or Quasi in Rem.—A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to § 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4 (k) of the Rules of Civil Procedure. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ **1-75.4. Personal jurisdiction, grounds for generally.**—A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4 (j) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
   a. Is a natural person present within this State; or
   b. Is a natural person domiciled within this State; or
   c. Is a domestic corporation; or
   d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
   a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
   b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.

(5) Local Services, Goods or Contracts.—In any action which:
   a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
   b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
   c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
   d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or
   e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property.—In any action which arises out of:
   a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or
   b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the de-

fendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.

(7) Deficiency Judgment on Local Foreclosure or Resale.—In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation.—In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments.—In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers.—In any action which arises out of a contract of insurance as defined in G.S. 58-3 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative.—In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living. (1967, c. 954, s. 2.)

Editor's Note.—Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1. The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.5. Joinder of causes in the same action.—In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of § 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under § 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined. (1967, c. 954, s. 2.)

§ 1-75.6. Personal jurisdiction—manner of exercising by service of process. — A court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 1-75.4 may exercise personal jurisdiction over a defendant by service of process in accordance with the provisions of Rule 4 (j) of the Rules of Civil Procedure. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.7. Personal jurisdiction — grounds for without service of summons.—A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a general appearance in an action; or

(2) With respect to any counterclaim asserted against that person in an action which he has commenced in this State. (1967, c. 954, s. 2.)

§ 1-75.8. Jurisdiction in rem or quasi in rem — grounds for generally.—A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4 (k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

(1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subdivision shall apply whether any such defendant is known or unknown.

(2) When the action is to foreclose, redeem from or satisfy a deed of trust, mortgage, claim or lien upon real or personal property in this State.

(3) When the action is for a divorce or for annulment of marriage of a resident of this State.

(4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section.

(5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.9. Jurisdiction in rem or quasi in rem—manner of exercising.—A court of this State exercising jurisdiction in rem or quasi in rem pursuant to § 1-75.8 may affect the interests of a defendant in such an action only if process has been served upon the defendant in accordance with the provisions of Rule 4 (k) of the Rules of Civil Procedure, but nothing herein shall prevent the court from making interlocutory orders for the protection of the res while the action is pending. (1967, c. 954, s. 2.)

Editor's Note.—The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.10. Proof of service of summons, defendant appearing in action.—Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service.—

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4 (a) or Rule 4 (j) (9) d of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall

state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication.—In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. — The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness. (1967, c. 954, s. 2; 1969, c. 895, s. 14.)

Comment.—Paragraph b of subdivision (1) now provides that proof of service of process may, in the alternative, be made in accordance with the law of the place where service is effected. It is intended to prevent technical objections to a return of service prepared by a foreign process server in accordance with the practices and requirements of his own jurisdiction.

Editor's Note.—The 1969 amendment rewrote paragraph b of subdivision (1).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The Rules of Civil Procedure are found in § 1A-1.

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.—Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by § 1-75.10 and, in addition, shall require further proof as follows:

(1) Where Personal Jurisdiction Is Claimed Over the Defendant.—Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(2) Where Jurisdiction Is in Rem or Quasi in Rem.—Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require. (1967, c. 954, s. 2.)

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.—(a) When Stay May be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

(b) Subsequent Modification of Order to Stay Proceedings.—In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction

of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

(c) Review of Rulings on Motion.—Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal. Whenever such a motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion. (1967, c. 954, s. 2.)

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

(1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
(2) Partition of real property.
(3) Foreclosure of a mortgage of real property.
(4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded. (C. C. P., s. 66; Code, s. 190; 1889, c. 219; Rev., s. 419; C. S., s. 463; 1951, c. 837, s. 4.)

I. In General.
II. Actions Relating to Real Property.
III. Partition of Realty.
IV. Foreclosure of Mortgage of Real Property.
V. Recovery of Personal Property.

Cross References.

As to change of venue, see § 1-83. As to removal for fair and impartial trial, see § 1-84. As to venue in criminal actions, see § 15-128 et seq. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in partition proceedings, see § 46-2.

See note under § 1-82.

I. IN GENERAL.

Local and Transitory Actions Distinguished.—If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968).

Venue a Matter of Legislative Control.—The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. Interstate Cooperage Co. v. Eureka Lumber Co., 151 N.C. 455, 66 S.E. 434 (1909). It deals with the procedure and is not jurisdictional, in the absence of statutory provision to that effect. State ex rel. McCullen v. Seaboard Air Line Ry., 146 N.C. 568, 60 S.E. 506 (1908); Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919); Clark v. Carolina Homes, Inc., 189 N.C. 703, 128 S.E. 20 (1925).

This subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the State. State ex rel. Snuggs v. Stone, 52 N.C. 382 (1860).

Contract Stipulation Regarding Venue.—There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921).

Determining Nature of Transaction.—In Councill v. Bailey, 154 N.C. 54, 69

S.E. 760 (1910), it is said: "This court has recently held in Bridgers v. Ormond, 148 N.C. 375, 62 S.E. 422 (1908), that such a motion as this one (as to proper venue) must be considered with reference to the questions that may be raised by the pleadings, and do not depend for their decision solely upon the allegations of the complaint."

Applicability to Trials before Justices. —In Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891), the court said: "We do not find any statute making the provisions of the Code of Civil Procedure (this section), as to the place for trial, applicable to trials before a justice." But § 7-149 provides that the whole chapter on civil procedure is applicable in certain attachment cases before justices. Mohn v. Creesey, 193 N.C. 568, 137 S.E. 718 (1927).

Habeas Corpus. — The sections of this subchapter relating to venue refer to "actions" and have no reference to the writ of habeas corpus which has been denominated a "high prerogative writ." McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

An action by an administrator is not within any of the subdivisions of this section. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911).

Applied in Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961); Holden v. Totten, 224 N.C. 547, 31 S.E.2d 635 (1944).

Cited in Evans v. Morrow, 233 N.C. 562, 64 S.E.2d 842 (1951); Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968); Bohannon v. Virginia Trust Co., 198 N.C. 701, 153 S.E. 262 (1930); Guy v. Gould, 199 N.C. 820, 155 S.E. 925 (1930); Miller v. Miller, 205 N.C. 753, 172 S.E. 493 (1934); Guilford County v. Estates Administration, Inc., 212 N.C. 653, 194 S.E. 295 (1937).

II. ACTIONS RELATING TO REAL PROPERTY.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N.C. 12, 103 S.E. 915 (1920).

Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as incident to the essential and controlling purpose of setting aside the deed, and the venue is governed by this section. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

Setting Sale Aside.—A suit by a purchaser of land to set aside the purchase and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of the lots, without which he would not have purchased, the controversy involves an interest in the lands as required by this section, to be brought in the county where the land is situated. Vaughan v. Fallin, 183 N.C. 318, 111 S.E. 513 (1922).

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue, under this section, therefore, is in the county in which the land is situated. Williams v. McRackan, 186 N.C. 381, 119 S.E. 746 (1923).

Action on Note Secured by Deed of Trust.—An action against the endorser of a negotiable note, secured by a deed of trust on land, is not an action involving an estate or interest in land and does not have to be brought where the land is located. White v. Rankins, 206 N.C. 104, 173 S.E. 282 (1934).

Specific Performance. — The fact that there are other questions to be determined in the action, does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending. Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890).

An action for subrogation to the rights of the vendor must be tried in the county where the land is situated. Fraley v. March, 68 N.C. 160 (1873).

Conversion as Aggravation of Damages. —Where the intent of the pleading was to sue for a trespass on the land, and an allegation of a conversion was inserted in aggravation of damages, the refusal of the lower court upon motion properly made in due time, to remove the cause to the county in which the land was situated, was erroneous. Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

Setting Aside Grant or Patent.—This section applies to the exclusion of § 146-67, which controls where there are separate transactions affecting distinct pieces of property lying wholly in different counties. Kanawha Hardwood Co. v. Waldo, 161 N.C. 196, 76 S.E. 680 (1912).

Docketed judgments confer no estate or interest in real estate within the meaning of this section, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside judgments as fraudulent and for the appointment of a receiver need not be brought in the county where the property upon which such judgments are liens is situated. Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895).

An action for the breach of covenants of siezin and the right to convey is not required to be tried in the county in which the realty is situated. Eames v. Armstrong, 136 N.C. 392, 48 S.E. 769 (1904).

Petitions for dower should be filed in the county of the husband's usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. Askew v. Bynum, 81 N.C. 350 (1879).

Injuries to Land.—The fact that a complaint for injuries to real estate fails to expressly allege in what county the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper county. Lucas v. Carolina Cent. Ry., 121 N.C. 506, 28 S.E. 265 (1897).

In an action for wrongful conversion of oysters taken from oyster beds, the defendant is not entitled to a change of venue to the county in which the beds are situated. Makely v. Boothe Co., 129 N.C. 11, 39 S.E. 582 (1901).

The action to recover for injuries to land caused by backing water upon it is transitory. Cox v. Oakdale Cotton Mills, Inc., 211 N.C. 473, 190 S.E. 750 (1937).

Action to recover damages to real property is transitory. Wheatley v. Phillips, 228 F. Supp. 439 (W.D.N.C. 1964).

Same—Burning Timber. — An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred irrespective of § 1-81. Perry v. Seaboard Air Line Ry., 153 N.C. 117, 66 S.E. 1060 (1910). See note of this case under § 1-81.

Same—By Public Officers. — Section 1-77, providing for venue in actions against public officers, constitutes an exception to this section; see note to § 1-77.

Pollution of Stream. — An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine appears to be a transitory one and is not such as contemplated by this section. Harris Clay Co. v. Carolina China Clay Co., 203 N.C. 12, 164 S.E. 341 (1932).

Cutting and Removing Timber. — The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass de bonis asportatis, for the value of the trees, both of which actions are transitory, or for trespass quare clausum fregit, which is local, and should be brought in the county wherein the land is situated. Blevens v. Kitchen Lumber Co., 207 N.C. 144, 176 S.E. 262 (1934).

An action to recover the value, or "worth," of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass de bonis asportatis, and is therefore transitory. Blevens v. Kitchen Lumber Co., 207 N.C. 144, 176 S.E. 262 (1934).

Action was one to determine amounts to be paid for extension of rights under timber and not one affecting realty. Hilton Lumber Co. v. Estate Corp., 215 N.C. 649, 2 S.E.2d 869 (1939).

A complaint alleging that defendant entered upon the land of plaintiff and cut and removed therefrom a specified amount of timber and praying that plaintiff recover the value of the timber wrongfully cut and removed states a transitory cause of action, and defendant's motion to remove from the county of plaintiff's residence to the county wherein the land is situate, was properly denied. Bunting v. Henderson, 220 N.C. 194, 16 S.E.2d 836 (1941).

Fraudulent Representations Inducing Conveyance of Lands. — When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subdivision (1) of this section and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under § 1-82. Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928).

Action for Damages for Breach of Contract.—Where the plaintiff in his complaint does not undertake to allege facts to support a decree for specific performance, but on the contrary bottoms his action on the breach of the contract, and seeks to recover damages resulting there-

from, such an action is not for the recovery of real property or any interest therein as contemplated by this section. Lamb v. Staples, 234 N.C. 166, 66 S.E.2d 660 (1951).

Action to Enforce Contract Rights under Lease.—Where plaintiff brought an action to obtain a decree in personam to enforce contractual rights under a lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, the defendant's motion to remove as a matter of right to the county in which the land is situate was properly denied. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Venue of action against regional housing authority to determine respective rights of parties in certain land is properly the county in which the realty is situated and in which the authority has express power to act, notwithstanding that the principal office of the authority is in another county. Powell v. Eastern Carolina Regional Housing Authority, 251 N.C. 812, 112 S.E.2d 386 (1960).

Removal of Action to County Where Land Lies.—Where on the facts alleged in his complaint, the plaintiff is entitled not only to a judgment that he recover of the defendant the amount of his debt, but also to a decree for the foreclosure of the mortgage by which his debt is secured, and the action was begun and is pending in the county in which the plaintiff resides, but the land conveyed by the mortgage is in another county, the plaintiff cannot deprive the defendant of his right, under the statute, to the removal of the action to the county in which the land is situate, for trial, by his failure to pray for a foreclosure of the mortgage, at least, when he prays judgment for his debt, and also for such other and further relief as he may be entitled to, in law or in equity, on the facts alleged in his complaint. Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934).

When the title to real estate may be affected by an action, the action is local and removable to the county where the land is situate by proper motion made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967); Goodyear Mtg. Corp. v. Montclair Dev. Corp., 2 N.C. App. 138, 162 S.E.2d 623 (1968).

III. PARTITION OF REALTY.

Editor's Note.—Section 46-2, in the article on Partition, is substantially the same as subdivision (2) of this section. The two provisions seem to constitute simply an illustration or application of the first subdivision of this section, as proceedings for partition certainly determine "a right or interest" in real property.

Subdivision (2) has never received a direct construction from the courts, but in In re Skinner's Heirs, 22 N.C. 63 (1838), decided prior to the merger of the courts of law and equity, it is held that land situated in two counties could be sold for partition by a decree of the court of equity of either county.

IV. FORECLOSURE OF MORTGAGE OF REAL PROPERTY.

Vendor's Lien.—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is within subdivision (3). Councill v. Bailey, 154 N.C. 54, 69 S.E. 760 (1910).

Subrogation.—An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage of real estate," must be tried in the county in which the land is situate within the meaning of subdivision (3). Fraley v. March, 68 N.C. 160 (1873).

In Connor v. Dillard, 129 N.C. 50, 39 S.E. 641 (1901), it is said: The action is "substantially for the foreclosure of a mortgage" (Fraley v. March, 68 N.C. 160 (1873)), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890). If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in debtor's land. McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899); Gammon v. Johnson, 126 N.C. 64, 35 S.E. 185 (1900).

Land in Two Counties.—A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by subdivision (3). King v. Portis, 81 N.C. 382 (1879).

V. RECOVERY OF PERSONAL PROPERTY.

Editor's Note.—In Smithdeal v. Wilkerson, 100 N.C. 52, 6 S.E. 71 (1888), it was held that the requirements of subdivision (4) of this section, were restricted to personal property, "distrained for any cause." Thereupon the 1889 amendment struck out the restriction and made the venue for the "recovery of personal property" in all cases in the county where the property is situated. Brown v. Cogdell, 136 N.C. 32, 48 S.E. 515 (1904).

It is now held that the venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. Brown v. Cogdell, 136 N.C. 32, 48 S.E. 515 (1904).

Recovery as Sole Object.—Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. Woodard v. Sauls, 134 N.C. 274, 46 S.E. 507 (1904); Bowen Piano Co. v. Newell, 177 N.C. 533, 98 S.E. 774 (1919).

Thus an action being for an accounting, and the question of ownership of notes and bonds being raised only incidentally, it need not be brought in the county in which they are situated. Clow v. McNeill, 167 N.C. 212, 83 S.E. 308 (1914).

But where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint as an incident thereto, the cause is within subdivision (4). Fairley Bros. v. Abernathy, 190 N.C. 494, 130 S.E. 184 (1925).

Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. Marshburn v. Purifoy, 222 N.C. 219, 22 S.E.2d 431 (1942).

If an action be one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. House Chevrolet Co. v. Cahoon, 223 N.C. 375, 26 S.E.2d 864 (1943).

Section Does Not Apply to Actions for Monetary Recovery.—This section applies to action for the recovery of specific tangible articles of personal property and not to actions for monetary recovery. Flythe v. Wilson, 227 N.C. 230, 41 S.E.2d 751 (1947).

Setting Aside Transfer.—An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by subdivision (4) of the section. Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895).

Removal for Convenience of Witnesses.—Once a cause involving recovery of personal property is properly instituted, this section does not prevent the seeking of a removal for the convenience of witnesses, and whether the motion to remove should be granted is a matter in the discretion of the court. Moody v. Warren-Robbins, Inc., 251 N.C. 172, 110 S.E.2d 866 (1959).

Applied in Dubose v. Harpe, 239 N.C. 672, 80 S.E.2d 454 (1954).

§ 1-77. Where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

(1) Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

(2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (C. C. P., s. 67; Code, s. 191; Rev., s. 420; C. S., s. 464.)

Cross References.—See note to § 1-82. As to suit on official bond, by board of county commissioners, of sheriff, etc., see § 155-18. As to neglect of duty by member of board of county commissioners, a misdemeanor, see § 153-15. As to actions

against registers of deeds, see §§ 161-16, 161-27. As to corporate powers of municipal corporation, see § 160-2. As to quo warranto, see § 1-514 et seq.

Editor's Note.—In spite of the fact that § 1-76 provides that actions for injuries to realty must be brought in the county where the land lies, it is held that damage to land occasioned by the acts of public officers, officiating in counties other than where the land lies, must be brought, as provided in this section, where the cause arose. For example in Cecil v. City of High Point, 165 N.C. 431, 81 S.E. 616 (1914), it was held that the venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such cause arose by reason of the official conduct of municipal officers and consequently is regulated by this section.

Nature of Acts of Officer.—An action is controlled by this section irrespective of the question as to whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

Thus a cause of action for damages for breach of contract made by a board of a municipal corporation is within the meaning of this section. Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

"By His Command" or "in His Aid".—The words, "in his aid," immediately following the words, "by his command," were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing. Harvey v. Brevard, 98 N.C. 93, 3 S.E. 911 (1887).

The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such office." Harvey v. Brevard, 98 N.C. 93, 3 S.E. 911 (1887).

Any consideration of subdivision (2) involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Officers of Counties and Cities. — The Supreme Court has repeatedly and uniformly held that actions against county commissioners and other officers must be brought in the county of which they are officers, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. Johnston v. Board of Comm'rs, 67 N.C. 101 (1872); Alexander v. Commissioners of McDowell, 67 N.C. 330 (1872); Jones v. Board of Comm'rs, 69 N.C. 412 (1873); Steele v. Commissioners of Rutherford, 70 N.C. 137 (1874); Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887).

In Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887), this section was construed by this court, in the following language, to embrace a municipal corporation: "The defendant is a municipal corporation, public in its nature; it is an artificial person, created and recognized by the law, invested with important corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. The Supreme Court therefore thinks that actions against it fairly come within the meaning of and are embraced by the statutory provision first above recited (this section)." Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

Actions against counties must be brought in the county sued. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Action against Municipality Is Action against Public Officer. — Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940); Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944); Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951).

Venue of Action against Municipality.—The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940); Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944).

Where Cause of Action Arose. — The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land lies and in which the municipality maintained and

operated its sewage disposal plant. The municipality made a motion that the action be removed to the county in which it is located. Held: The alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant and the cause of action there arose, and therefore the municipality's motion for change of venue was erroneously granted. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940).

Against Register of Deeds.—An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

Action Dismissed as to Town is Properly Remanded to County of Origin. — Where the plaintiff instituted a suit in the county of her residence, the county in which defendant administrator qualified, and upon joinder of a town as a party defendant, the action was removed to the county in which the town is located, the town's demurrer being sustained and the action dismissed as to it, it was held that the court properly remanded the action to the county in which it was originally instituted. Banks v. Joyner, 209 N.C. 261, 183 S.E. 273 (1936).

Acts Not Done by Virtue of Office.—In an action in Catawba County, residence of plaintiff, for an alleged wrongful conspiracy and damages therefor which occurred in Wilkes County, against a corporation and two individuals acting as the corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes County, a motion for change of venue to Wilkes County, under this section was properly denied, there being no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. Potts v. United Supply Co., 222 N.C. 176, 22 S.E.2d 255 (1942).

Quo Warranto and Mandamus. — This section should apply in the writs of quo warranto (no longer used in this State) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitute the charge, and in effect amounts to a criminal action, or an action to subject the parties to pains and penalties. Johnston v. Board of Comm'rs, 67 N.C. 101 (1872).

An action by an administrator does not come within this section. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911).

Codefendants—Nol Pros of Officers. — An action against the sheriff of X county instituted in Y county does not entitle the codefendant of the sheriff to have the suit removed to X county where the cause is nol prossed as to the sheriff. Harvey v. Rich, 98 N.C. 95, 3 S.E. 912 (1887).

Proving Defendants Are Officers. — If made to appear properly by affidavit or otherwise that the defendants came within the terms of this section, the fact that they insist that the action was brought against them as individuals and not as public officers, is immaterial. Shaver v. Huntley, 107 N.C. 623, 12 S.E. 316 (1890).

Venue in Other Cases. — Section 1-82 may constitute an exception to this section. See note to § 1-82.

Trial of Whole Controversy in County Where Offense Occurred.—Where in an action against the clerk of the superior court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. Kellis v. Welch, 201 N.C. 39, 158 S.E. 742 (1931).

Actions for Penalties—Applicability to Justice's Court. — This section, providing that actions for recovery of penalties must be brought in the county where the cause of action arose, applies to those actions of which the superior court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace (i.e., $200 or less). Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891); Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

Same—Applied.—In State ex rel. McCullen v. Seaboard Air Line Ry., 146 N.C. 568, 60 S.E. 506 (1908).

County Hospital Held an Agency of the County.—See Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Section Not Applicable to Religious Corporation.—See Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951).

Injurious Results Taking Effect in Another County.—Where the cause of an alleged grievance is situate or exists in one state or county, and the injurious results take effect in another, the courts of the former have jurisdiction. Powell v. Eastern Carolina Regional Housing Authority, 251 N.C. 812, 112 S.E.2d 386 (1960).

Cited in Mitchell v. Jones, 272 N.C. 499,

158 S.E.2d 706 (1968); McFadden v. Maxwell, 198 N.C. 223, 151 S.E. 250 (1930); Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Flythe v. Wilson, 227 N.C. 230, 41 S.E.2d 751 (1947).

§ 1-78. Official bonds, executors and administrators. — All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. (1868-9, c. 258; Code, s. 193; Rev., s. 421; C. S., s. 465.)

Applicable to All Actions against Administrators.—This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944).

It was the intent of the legislature to require all actions against the executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, if not, then in the plaintiff's county. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact all the business of the estate in their hands. Stanley v. Mason, 69 N.C. 1 (1873); Foy v. Morehead, 69 N.C. 512 (1873); Bidwell v. King, 71 N.C. 287 (1874). The same principle is recognized, in reference to an action upon a guardian bond, in State ex rel. Cloman v. Staton, 78 N.C. 235 (1878).

These cases were followed in Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896) which criticizes and refuses to follow State ex rel. Clark v. Peebles, 100 N.C. 348, 6 S.E. 798 (1888).

A personal action against an administrator is not, of course, within the meaning of this section. Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915).

To Foreclose Tax Liens. — An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. Guilford County v. Estates Administration, Inc. 212 N.C. 653, 194 S.E. 195 (1937).

Applies to Actions against Not by Administrators.—This section applies only to actions against administrators and not to actions brought by them. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911). See Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

The clear inference from this section is that it was the purpose of the legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911).

The proper venue for actions against executors and administrators is the county in which they qualify. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Section Includes Guardians.—This section has been held to include guardians notwithstanding the only words used are "executors" and "administrators." Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963), citing State ex rel. Cloman v. Staton, 78 N.C. 235 (1878).

And All Court-Appointed Fiduciaries Required to Account to Court Appointing Them.—This section is limited to actions against executors and administrators; but there can be no doubt that the legislature intended the words used to encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Representative Is Not Entitled to Removal If Not Sued in His Official Capacity.—That fact that an executor or administrator is sued and the defendant is named as such executor or administrator in the summons caption and complaint, does not entitle such defendant to an order of removal to the county in which he qualified if the complaint discloses the alleged cause of action is not against such executor or

administrator in his official capacity. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962).

When Action Is against Representative in Official Capacity.—An action is against the representative in his official capacity if it (a) asserts a claim against the estate; (b) involves the settlement of his accounts; or (c) involves the distribution of the estate. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962).

"Instituted".—The word "instituted" as used in this section signifies the commencement of the proceedings—to institute an action is to bring an action. Here a difference is apparent from the language of the other sections pertaining to venue as they provide that the action shall be "tried."

In consequence of this distinction it is held that this section has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party. Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919).

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and the defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant, the administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal of the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. Johnson v. Smith, 215 N.C. 322, 1 S.E.2d 834 (1939).

This section applies to original actions "instituted," i.e., originally commenced, against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. Evans v. Morrow, 233 N.C. 562, 64 S.E.2d 842 (1951).

Action for Account and Settlement. — Where an action involves an account and settlement of an estate, by the express words of this section, such an action must be instituted in the county where the administrator qualified. The case of Roberts v. Connor, 125 N.C. 45, 34 S.E. 107 (1899), does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct of the executor were in nowise involved. Thomas v. Ellington, 162 N.C. 131, 78 S.E. 12 (1913).

Suits against Successor of Administrator.—A qualified as administrator of B, in Halifax County, and gave bond there. Afterwards A died in Northampton, and C qualified as his administratrix in that county. C, administratrix, and D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a resident of Halifax: Held, that the action was properly brought in Halifax, under this section. State ex rel. Clark v. Peebles, 100 N.C. 348, 6 S.E. 798 (1888).

An action against an executrix to recover on a guardianship bond executed by testator is properly brought in the county in which the bond was given and the sureties thereon resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified is properly denied, the primary and controlling intent of this section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond is in the county. State ex rel. Thomasson v. Patterson, 213 N.C. 138, 195 S.E. 389 (1938).

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified, is untenable, since the controlling factors are the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties. State ex rel. Thomasson v. Patterson, 213 N.C. 138, 195 S.E. 389 (1938).

Motions for Change of Venue. — The right of an administratrix in regard to motions for change of venue under this section may not be invoked by another party to the action. Herring v. Queen City Coach Co., 231 N.C. 430, 57 S.E.2d 307 (1950).

Compelling Institution of Action in Particular County Does Not Prevent Motion for Removal.—Where a plaintiff was compelled to institute his action in a particular county by reason of the mandate of this section, his act in so doing could not therefore be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal under § 1-83, subdivision (2). Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

Hence, the trial judge in the exercise of

a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the cause was instituted. Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

The fact that an individual is joined as a defendant with an executor or administrator, and that the individual defendant is a resident of the county in which the cause of action is brought was held not to affect the executor's or administrator's right to removal to the county in which it qualified. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting, instituted against it in the county in which the will was probated, removed to the county in which it maintains its principal office. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Quoted in Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936).

Cited in Evans v. Morrow, 234 N.C. 600, 68 S.E.2d 258 (1951); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

§ **1-79. Domestic corporations.**—For the purpose of suing and being sued, the residence of a domestic corporation is as follows:

(1) Where the registered office of the corporation is located.

(2) If the corporation having been formed prior to July 1, 1957 does not have a registered office in this State, but does have a principal office in this State, its residence is in the county where such principal office is said to be located by its certificate of incorporation, or amendment thereto, or legislative charter. (1903, c. 806; Rev., s. 422; C. S., s. 466; 1951, c. 837, s. 5; 1957, c. 492.)

Cross Reference.—As to actions against railroads, see § 1-81.

Editor's Note.—Prior to the passage f this section, there was no express statute regulating the venue in actions against domestic corporations and such actions were controlled by § 1-82. Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896). See Cline v. Bryson City Mfg. Co., 116 N.C. 837, 21 S.E. 791 (1895).

The purpose of this section was not to change the provisions of § 1-81 or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of § 1-81 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by §§ 1-76, 1-77 and 1-78. Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910).

This section is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

"Principal Office".—The words "principal place of business," as formerly used in this section were regarded as synonymous with the words "principal office," as used in §§ 55-2, 55-34, 55-105, and other sections of the General Statutes. Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910).

The words "principal place of business," formerly used in this section are regarded as synonymous with the words "principal office" as used in § 55-2, requiring the location of the principal office in this State to be set forth in the certificate of incorporation by which the corporation is formed. Howle v. Twin States Express, Inc., 237 N.C. 667, 75 S.E.2d 732 (1953); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Same—Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business. Garrett & Co. v. Bear, 144 N.C. 23, 56 S.E. 479 (1907).

The residence of a corporate executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office and not the county of its qualification. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or admin-

istrator in its official capacity. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

A corporate administrator instituted suit in the county of its qualification and in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office. It was held that the action was properly removed upon motion to the county in which the corporate administrator maintains its principal office and in which defendant resides. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

Domesticated foreign corporations are residents of the State for purposes of venue of the State courts. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

A foreign corporation domesticated under § 55-118 may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such case § 1-80 does not apply. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Section Does Not Apply to Foreign Insurance Companies.—While statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read in pari materia, the provisions of this section have no application to foreign insurance companies, since § 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Where findings of fact showed that a foreign insurance company had no registered or principal office located in Wake County, it was not entitled as a matter of right to have an action removed for trial to Wake County by virtue of this section. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Applied in Eastern Cotton Oil Co. v. New Bern Oil & Fertilizer Co., 204 N.C. 362, 168 S.E. 411 (1933).

Stated in Haworth v. General Motors Acceptance Corp., 238 F.2d 203 (4th Cir. 1956); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Cited in McCue v. Times-News Co., 199 N.C. 802, 156 S.E. 129 (1930); Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933).

§ 1-80. Foreign corporations.—An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

(1) By a resident of this State, for any cause of action.

(2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.

(3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C. C. P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C. S., s. 467.)

Cross References.—As to actions against railroads, see § 1-81. As to domesticated foreign corporations, see note to § 1-79.

See notes to §§ 1-81 and 1-82.

Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under North Carolina decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of North Carolina courts of transitory causes of actions. Ledford v. Western Union Tel. Co., 179 N.C. 63, 101 S.E. 533 (1919).

In Robinson v. Oceanic Steam Nav. Co., 112 N.Y. 315, 19 N.E. 625 (1889), construing the prototype of this section, it is said: "This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction." See Ledford v. Western Union Tel. Co., 179 N.C. 63, 101 S.E. 533 (1919).

Section 1-81 an Exception. — The enactment of § 1-81 does not repeal this section, but the latter will be confined to

corporations, other than railway companies, which have been chartered by any other state, government or country. Propst v. Railroad, 139 N.C. 397, 51 S.E. 920 (1905).

Cutting Timber.—Where a nonresident plaintiff sues to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situated that being the county wherein the cause of action arose. Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. Allen-Fleming Co. v. Southern Ry., 145 N.C. 37, 58 S.E. 793 (1907).

Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: Held, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. Ange v. Sovereign Camp of the Woodmen of the World, 171 N.C. 40, 87 S.E. 955 (1916).

Claim of State. — Where a receiver of an insolvent foreign corporation was appointed under the Corporation Act of 1901, a claim by the State which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, not applying to this proceeding. Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).

Garnishment against Salesmen. — The courts of this State have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought in the State against its salesmen; the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Action by Administrator for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917).

Quoted in Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951).

Cited in Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

§ 1-81. **Actions against railroads.**—In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C. S., s. 468.)

Editor's Note.—This section was first enacted as a proviso to § 424 of the Revisal. Section 424 of the Revisal is now § 1-82; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of § 1-76. In view of this pronouncement of the legislative intent, it is to be presumed that the language of § 1-82 still applies to this section, although the two sections are now apparently independent.

The acts of 1905, c. 367, amending the Code, § 192 (Revisal, § 424) [now §§ 1-81, 1-82], expressly included actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify § 1-76, in regard to the venue of actions of this character, since it is for damages for personal injuries. Propst v. Railroad, 139 N.C. 397, 51 S.E. 920 (1905); Perry v. Seaboard Air Line Ry., 153 N.C. 117, 68 S.E. 1060 (1910).

Effect of Section in General.—This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county for that purpose where the defendant had a track, unless the injury occurred, or plaintiff resided, therein. Watson v. North Carolina R.R., 152 N.C. 215, 67 S.E. 502 (1910).

Section Pertains to Venue Not Jurisdiction.—This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a non-

resident plaintiff, against a railroad company, incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R.R., 180 N.C. 219, 104 S.E. 534 (1920).

Applies to All Railroads.—This section applies to all railroad companies, both domestic and foreign. Forney v. Black Mt. R.R., 159 N.C. 157, 74 S.E. 884 (1912).

Actions against Railroads under Federal Control.—It was within the power of the director general to prescribe the venue of suits against railroads under federal control. Federal Control Act, March 21, 1918, § 10. Alabama & V. Ry. v. Journey, 257 U.S. 111, 42 S. Ct. 6, 66 L. Ed. 15 (1921).

Same—That Are Sole Defendants.—This section should be construed and held to apply to cases where a railroad company alone is defendant, and the venue in actions where there are other parties defendant is not controlled by the section. Smith v. Patterson, 159 N.C. 138, 74 S.E. 923 (1912).

Where both plaintiff and defendant are corporations, nonresident of the State, an action concerning land brought in a different county from the situs of the property, wherein neither has property, nor conducts its business, the case falls within the intent and meaning of § 1-80 and this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N.C. 12, 103 S.E. 915 (1920).

Suits by Administrators.—Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the section, the terms appearing therein, "where plaintiff resided at the time the cause of action arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910); Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911); Smith v. Patterson, 159 N.C. 138, 74 S.E. 923 (1912).

Applied in John P. Nutt Corp. v. Southern Ry., 214 N.C. 19, 197 S.E. 534 (1938).

Cited in Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 1-82. Venue in all other cases.—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute; provided that any person who has resided on or been stationed in a United States army, navy, marine corps, coast guard or air force installation or reservation within this State for a period of one (1) year or more next preceding the institution of an action shall be deemed a resident of the county within which such installation or reservation, or part thereof, is situated and of any county adjacent to such county where such person stationed at such installation or reservation lives in such adjacent county, for the purposes of this section. The term person shall include military personnel and the spouses and dependents of such personnel. (C. C. P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C. S., s. 469; 1957, c. 1082.)

Cross References.—See note under § 1-76. As to domesticated foreign corporations, see note to § 1-79.

The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. Palmer v. Lowe, 194 N.C. 703, 140 S.E. 718 (1927).

Construed with Other Provisions for Venue. — This section is general in its terms and subject to the provisions of § 1-76. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

Section 1-77 relates to particular cases, and this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, the former section expressing a particular intention will be taken as an exception to the general provision. Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944). But see Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917), wherein it was held that this section should be construed as an exception to § 1-77.

Section Pertains to Venue Not Jurisdiction.—This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina.

McGovern & Co. v. Atlantic Coast Line R.R., 180 N.C. 219, 104 S.E. 534 (1920).

Local and Transitory Actions Distinguished. — If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968).

Fiduciaries. — In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. Hartford Accident & Indem. Co. v. Hood, 225 N.C. 361, 34 S.E.2d 204 (1945).

This section governs the venue of actions instituted by an executor or administrator in his official capacity. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

The word "parties" as used in this section means parties to the record. Rankin v. Allison, 64 N.C. 673 (1870).

Action for Personal Services to Administrator.—An action brought to recover for services rendered personally to an administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915).

Action by Administrator. — An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911). See notes of this case under § 1-78.

Personal Action against Administrator. —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 this 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 is not against defendant as executrix but against her individually on a liability imposed upon her 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).

Action by Nonresidents on Foreign Judgment.—In an action on a judgment of another state, plaintiff's attachment of lands of defendant situate in a county in this State was rendered immaterial by defendant's general appearance. The court found that both parties are nonresidents. Plaintiff was entitled to maintain the action in any court of this State she might designate, the defendant's motion to remove to the county in which the real estate attached is situate and of which he asserted he is a resident, was properly denied. Clement v. Clement, 216 N.C. 240, 4 S.E.2d 434 (1939).

Action by Receiver.—Where a receiver of a corporation resides in a different county from the concern he represents, the venue of the action brought by him for breach of contract is determined by the place of residence of the receiver and not necessarily by that of insolvent corporation. Biggs v. Bowen, 170 N.C. 34, 86 S.E. 692 (1915).

Action by Unemancipated Illegitimate Child.—Such a child sues in county of mother even though living in different county with grandparents. Thayer v. Thayer, 187 N.C. 573, 122 S.E. 307 (1924).

Where Bank and Its Officer Sued Jointly. — Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business. Curlee v. National Bank, 187 N.C. 119, 121 S.E. 194 (1924).

An action on a note by the Commissioner of Banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc., 209 N.C. 36, 182 S.E. 694 (1935).

Nonresident Plaintiffs. — The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. Southern Cotton Oil Co. v. Grimes, 183 N.C. 97, 112 S.E. 598 (1922).

The venue of an action brought by a nonresident of the State in a different county herein from that where the de-

fendant resides or does business, and wherein the defendant has no property, is an improper one. Roberts v. Moore, 185 N.C. 254, 116 S.E. 728 (1923).

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. Sugg v. Pollard, 184 N.C. 494, 115 S.E. 153 (1922).

Where Principal Office of Corporation Is in County Other than Residence of Defendants.—Where the plaintiff is a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants are citizens of this State, and residents of Sampson County, Durham County is the proper venue for the trial of the action. North Carolina Joint Stock Land Bank v. Kerr, 206 N.C. 610, 175 S.E. 102 (1934).

Action against Foreign Corporation and Resident Defendant. — Where a nonresident plaintiff brings action against a foreign corporation, with the joinder of a resident defendant, and the venue in the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, and the action is removable thereto upon his motion duly made. Sections 1-76, 1-80 and 1-81 do not apply. Palmer v. Lowe, 194 N.C. 703, 140 S.E. 718 (1927); Brown v. Brevard Auto Serv. Co., 195 N.C. 647, 143 S.E. 258 (1928).

Effect of Change of Residence.—The defendant by a mere change of residence cannot change the venue as fixed by this section. Taylor v. Sharp, 108 N.C. 377, 13 S.E. 138 (1891); Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917).

Action by Domesticated Foreign Corporation.—The proper venue for an action instituted by a foreign corporation domesticated in this State is in the county in which it maintains its principal place of business. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Residence of Foreign Insurance Company.—Where findings of fact showed that a foreign insurance company maintained a supervisory office in Mecklenburg County, and that that office supervised all of the local and special agents and adjusters of the company throughout the State, the findings showed that the insurance company, for purposes of venue, was not a resident of Wake County, within the purview of this section. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Where the evidence is sufficient to support the court's findings that plaintiff, a nonresident corporation, had domesticated in this State and had brought the action in the county in which it maintained its principal place of business in North Carolina, denial of defendant's motion for change of venue will not be disturbed. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Applied in Brendle v. Stafford, 246 N.C. 218, 97 S.E.2d 843 (1957); Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934); Atlantic Coast Line R.R. v. Thrower, 213 N.C. 637, 197 S.E. 197 (1938).

Stated in Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968); Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

Cited in Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); McCue v. Times-News Co., 199 N.C. 802, 156 S.E. 129 (1930); Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937).

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

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

(1) When the county designated for that purpose is not the proper one.
(2) When the convenience of witnesses and the ends of justice would be promoted by the change.
(3) When the judge has, at any time, been interested as party or counsel.
(4) When motion is made by the plaintiff and the action is for divorce and

the defendant has not been personally served with summons. (R. C., c. 31, ss. 115, 118; C. C. P., s. 69; 1870-1, c. 20; Code, s. 195; Rev., s. 425; C. S., s. 470; 1945, c. 141.)

I. IN GENERAL.

Editor's Note.—For case law survey on venue, see 41 N.C.L. Rev. 525 (1963).

Section Relates to Venue Not Jurisdiction. — It has been held repeatedly that these statutes, §§ 1-76 to 1-83, relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived. Davis v. Davis, 179 N.C. 185, 102 S.E. 270 (1920).

Under the present practice, venue may be waived because it is not jurisdictional, and is available to the objecting party, not by demurrer, but by motion in the cause. Shaffer v. Morris Bank, 201 N.C. 415, 160 S.E. 481 (1931).

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

All Inclusive. — This section indiscriminately embraces all the previously enumerated actions of this subchapter as well as those for the recovery of real estate, which under the former system of pleading were called local actions, as those which were transitory or personal actions; all are embraced in the sweeping enactment. Lafoon v. Shearin, 91 N.C. 370 (1884).

The word "venue," as used in this section, means place of trial, the place or county where the trial of a cause is to be held. The authority thus vested in the superior court judge to remove a cause instituted in a county which "is not the proper one," as provided by the statute fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal—the superior court. Lovegrove v. Lovegrove, 237 N.C. 307, 74 S.E.2d 723 (1953).

Venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

Action Instituted in Wrong County Should Be Removed, Not Dismissed. — When an action is instituted in the wrong county, the superior court should, upon apt motion, remove the action, not dismiss it. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Demand for change of venue must be made by the defendant. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

By adding subdivision 4 to this section, the legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him, in an improper county, removed to one of proper venue. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Motion to Remove Cause Back to Original County.—The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county for the convenience of witnesses and the promotion of the ends of justice. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

Costs of Transporting Witnesses of Adverse Party.—While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. Nichols v. Goldston, 231 N.C. 581, 58 S.E.2d 348 (1950).

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land

from which the trees were severed is situated. Foreman-Blades Lumber Co. v. Tunis Heading & Stave Co., 196 N.C. 38, 144 S.E. 297 (1928).

Denial of Motion for Removal.—In order to deny a motion for removal to a county which is not a proper venue, it is not required that the trial court determine what is the proper county for the trial. Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966).

Applied in Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962); Slater v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962).

Stated in Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

Cited in Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968); Murchison Nat'l Bank v. Broadhurst, 197 N.C. 365, 148 S.E. 452 (1929); Miller v. Miller, 205 N.C. 753, 172 S.E. 493 (1934); Cox v. Oakdale Cotton Mills, Inc., 211 N.C. 473, 190 S.E. 750 (1937); Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Guilford County v. Estates Administration, Inc., 212 N.C. 653, 194 S.E. 295 (1937); Atlantic Coast Line R.R. v. Thrower, 213 N.C. 637, 197 S.E. 197 (1938); Boney v. Parker, 227 N.C. 350, 42 S.E.2d 222 (1947).

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See Lafoon v. Shearin, 91 N.C. 370 (1884); Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904); Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907); Calcagno v. Overby, 217 N.C. 323, 7 S.E.2d 557 (1940); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

The objection must be taken not only "before the time of answering expires," as required by this section, but it must be taken in limine and before answering to the merits. Granville County Bd. of Educ. v. State Bd. of Educ., 106 N.C. 81, 10 S.E. 1002 (1890); Shaver v. Huntley, 107 N.C. 623, 12 S.E. 316 (1890).

But if the motion is based on subdivision (2) of this section, i.e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904).

While this language is slightly different from the federal statute regulating motions to remove to the federal court, which specifies that said motion must be made at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, the tenor and object of the two statutes are the same, i.e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as he is afforded opportunity from filing the complaint to know definitely the scope of the action. Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904).

If the application for removal of an action to the proper county be made before time for answering expires, it matters not when the motion is heard. Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896).

A motion for change of venue, under this section, must be made before a demurrer to the action may be filed for misjoinder of the parties. Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 604, 77 S.E. 770 (1913).

Before Time for Filing Answer.—A motion for removal made before the time for the filing of an answer to the complaint had expired, was made in apt time. Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934).

A motion for change of venue made before the time for answer has expired is made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Demand must be made before the time of answering expires, and before the answer is filed. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

During Term.—Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. Howard v. Hinson, 191 N.C. 366, 131 S.E. 748 (1926); Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928).

Instituting Action under § 1-78 Does Not Prevent Motion for Change.—Where the plaintiff under § 1-78 is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under this section. Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

Right of Defendant after Complaint Filed.—Where an order for the examination of an adverse party is granted before the filing of the complaint, a motion for

change of venue as a matter of right may be denied without prejudice to defendant's right to move for change of venue after the filing of the complaint, the right of defendant to object to venue, applying after complaint is filed. Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936).

B. Jurisdiction of Application.

Editor's Note.—It was formerly held that the filing of an affidavit and motion for change of venue in vacation before the clerk was invalid. Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904). The motion was required to be made in the district and during the term of court. Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907).

By P.L. 1919, c. 304 and P.L. 1920, c. 96 it was provided that the defendant could file in motion with the clerk instead of applying to the court, the clerk could not, however, order the removal—as he may under the most recent legislation, which is discussed in the next paragraph. See Southern Cotton Oil Co. v. Grimes, 183 N.C. 97, 112 S.E. 598 (1922).

Appeal to Judge.—Where the clerk of the superior court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has compled with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. Southern Cotton Oil Co. v. Grimes, 183 N.C. 97, 112 S.E. 598 (1922).

C. Form and Contents of Demand.

The demand must be in writing. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of this section, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. Roberts v. Moore, 185, N.C. 254, 116 S.E. 728 (1923).

Venue cannot be jurisdiction and it may always be waived. Clark v. Carolina Momes, Inc., 189 N.C. 703, 128 S.E. 20 (1925). See Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941).

Waiver occurs when motion was neither "made in writing" nor "before the time of answering expired." McMinn v. Hamilton, 7 N.C. 30 (1819); Lafoon v. Shearin, 91 N.C. 370 (1884) (which was an action of ejectment); Morgan v. First Nat'l Bank, 93 N.C. 352 (1885); Granville County Bd. of Educ. v. State Board of Educ., 106 N.C. 81, 10 S.E. 1002 (1890); Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895); Lucas v. Carolina Cent. Ry., 121 N.C. 506, 28 S.E. 265 (1897).

Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto. Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915).

If the county designated for the purpose of summons and complaint is not the proper one, the action may be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of the parties, or by order of the court. Nelms v. Nelms, 250 N.C. 237, 108 S.E.2d 529 (1959).

Venue, not being jurisdictional, may be waived by any party, including the government. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Filing Answer to Merits.—The defendant who files a formal answer to the merits within the time allowed, thereby waives his privilege of amendment. Trustees of Catawba College v. Fetzer, 162 N.C. 245, 78 S.E. 152 (1913); Stevens Lumber Co. v. Arnold, 179 N.C. 269, 102 S.E. 409 (1920); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Where plaintiff voluntarily institutes an action in an improper county and files his complaint and obtains service on the defendant, he thereby waives his right to have the action removed to the county f his residence. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Withdrawing Answer.—Where answer has been filed and withdrawn for the purpose of the motion, to remove at the proper term, the right to remove will be

taken as waived. Trustees of Catawba College v. Fetzer, 162 N.C. 245, 78 S.E. 152 (1913).

Accepting Continuances.—A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915).

Entry of Default. — Where a defendant has waived his rights to transfer a cause to another county or the same has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances. Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915).

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. Roberts v. Moore, 185 N.C. 254, 116 S.E. 728 (1923).

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—The question of removal, when the action is not brought in the proper county, is not one of discretion, but "may" means shall or must, as it is construed in every act imposing a duty. Pelletier v. Saunders, 67 N.C. 262 (1872); Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887); Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890). See Lewis v. Sanger, 216 N.C. 724, 6 S.E.2d 494 (1940).

If the demand for removal is proporly made, and it appears that the action has been brought in the wrong county, the court has no discretion as to removal. It is a right which the defendant may assert and which the court cannot deny, if properly asserted. The word "may" is construed "must," and from a refusal of the right to remove the defendant may appeal. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

When demand is made in apt time, and in the required manner, the court has no discretion as to removal. Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968).

Appeal Lies.—Consequently, that an appeal lies from an order denying a motion for the removal of a case to the proper county for trial has been thoroughly settled by repeated decisions of the Supreme Court. Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890); Connor v. Dillard, 129 N.C. 50, 39 S.E. 641 (1901); Brown v. Cogdell, 136 N.C. 32, 48 S.E. 515 (1904); Perry v. Seaboard Air Line Ry., 153 N.C. 117, 68 S.E. 1060 (1910); Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

Not Premature.—An appeal from the refusal of the superior court judge to remove a case to the proper county is not premature. Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

An appeal from a ruling on a motion for a change of venue under § 1-77 is not premature. Coats v. Sampson County Mem. Hosp., Inc., 264 N.C. 332, 141 S.E.2d 490 (1965).

Appeal for Delay.—A party to an action cannot be permitted to move repeatedly at each succeeding term for a change of venue and then appeal from each successive refusal for purposes of delay. Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916).

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge. Belding v. Archer, 131 N.C. 287, 42 S.E. 800 (1902); Eames v. Armstrong, 136 N.C. 392, 48 S.E. 769 (1904); Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915).

In Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915), it is said: "The statute is explicit that the judge may remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this court has sustained the plain meaning of the words as giving the judge a discretionary power. . . ."

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the trial judge, and is not subject to review in the Supreme Court. Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928); Western Caro-

lina Power Co. v. Klutz, 196 N.C. 358, 145 S.E. 681 (1928); Farmers Cooperative Exch., Inc. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961). Except upon abuse of this discretion. Grimes v. Fulton, 197 N.C. 84, 147 S.E. 680 (1929).

Until the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968), commented on in 47 N.C.L. Rev. 269 (1968).

Matters Not Presented on Appeal.—Where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined. Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928).

When the trial judge in the proper exercise of his discretion under this section, has transferred a cause from one county to another for trial, the question of his ultimate purpose to consolidate the cause with other like cases does not arise on appeal to the Supreme Court. Western Carolina Power Co. v. Klutz, 196 N.C. 358, 145 S.E. 681 (1928).

No Appeal Lies.—Consequently, refusal of superior court judge to order removal of cause for convenience of witnesses and in the interest of justice, is not reviewable in the Supreme Court. Garrett v. Baar, 144 N.C. 23, 56 S.E. 479 (1907); Byrd v. Carolina Spruce Co., 170 N.C. 429, 87 S.E. 241 (1915); Perry v. Perry, 172 N.C. 62, 89 S.E. 999 (1916). Except upon evidence of abuse of discretion. Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915); Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916).

What Constitutes Abuse of Discretion—Illustrated.—Under the provisions of § 1-82 and this section, it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, it is held, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal. Curlee v. National Bank, 187 N.C. 119, 121 S.E. 194 (1924).

In Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915), it is said: "This (an abuse of discretion), we cannot impute to the learned judge who refused this motion, and upon the evidence before him refused to find as a fact that the ends of justice would be served by such removal or to remove the case for the convenience of witnesses."

Second Appeal.—Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, etc., and appealed from the refusal of this motion, and perfected it. Held, the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made. Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916).

§ 1-84. Removal for fair trial.—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits: Provided, that when a case has been removed to another county for trial on motion of the solicitor, the defendant may, upon call of the case for trial, object to trial therein and move that the case be sent for trial to some other county adjacent to the county from which removed, and in the event the objection is overruled, the defendant may forthwith appeal to the appellate division. If the motion of the defendant is sustained the judge shall order the case tried in some other county adjacent to the county from which the case was first removed. If, upon appeal, the appellate division shall find

error in the order denying the motion or if it shall suggest that the case probably ought to be removed then, and in such event, it shall be the duty of the judge at the next session of court of the county to which the case was first removed to order the case sent for trial to some other county adjacent to the county where the bill of indictment was found. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (1806, c. 693, s. 12, P. R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471; 1957, c. 601; 1969, c. 44, s. 1.)

Editor's Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" in the first and third sentences and substituted "session" for "term" in the third sentence.

Reasons for Removal.—An affidavit for the removal of a cause, which does not set forth the reason of affiants' belief that justice cannot be done in the county from which it is removed, is insufficient. A statement that a fair and impartial trial cannot be had will not suffice. State v. Turtty, 9 N.C. 248 (1822).

Discretion of Trial Judge.—Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919). See State v. Davis, 203 N.C. 13, 164 S.E. 736 (1932); State v. Godwin, 216 N.C. 49, 3 S.E.2d 347 (1939).

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record discloses that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, that each juror selected stated that he could render a verdict influenced by the publicity, and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion is not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967).

A motion for change of venue or for a special venire may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable in the Court of Appeals unless gross abuse of discretion is shown. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

A motion for change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Counter Affidavit.—When the judge is not satisfied by the affidavits ordered, it is immaterial that counter affidavits were not presented. Benton v. North Carolina R.R., 122 N.C. 1007, 30 S.E. 333 (1898).

Appeal.—The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. State v. Johnson, 104 N.C. 780, 10 S.E. 257 (1889); Albertson v. Terry, 109 N.C. 9, 13 S.E. 713 (1891); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Turner, 143 N.C. 641, 57 S.E. 158 (1907).

This is true, even though the judge further states in his order that his findings were based on his personal observation. Gilliken v. Norcom, 193 N.C. 352, 137 S.E. 136 (1927).

The rule of law governing motions for removal for the causes specified, is thus declared in Phillips v. Lentz, 83 N.C. 240 (1880): "The distinction seems to be where there are no facts stated in the affidavit as grounds for removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final." See Gilliken v. Norcom, 193 N.C. 352, 137 S.E. 136 (1927).

Admission of Facts.—The affidavit is required to make the facts appear to the court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. Emry v. Hardee, 94 N.C. 787 (1886).

It is within the power of counsel to consent that the court might hear and consider the facts as if stated in an affidavit. Emry v. Hardee, 94 N.C. 787 (1886).

When it is stated in the order, that the motion is heard "as on affidavit," the implication is, nothing else appearing, that all the parties consented to accept the facts as if stated under oath. Emry v. Hardee, 94 N.C. 787 (1886).

Order Tantamount to Denial of Motion to Remove.—When the judge entered an order directing that venire of jurors be drawn from another county to serve as jurors in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

Waiver of Rights by Failure to Except or Appeal.—The defendant by failing to except to the judge's denial of the motion for removal and by failing to appeal waives all rights for removal. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

Applied in State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968); State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948).

Cited in State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); State v. Perry, 250 N.C. 119, 108 S.E.2d 447 (1959); McFadden v. Maxwell, 198 N.C. 223, 151 S.E. 250 (1930).

§ 1-85. Affidavits on hearing for removal; when removal ordered.—No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (1879, c. 45; Code, s. 197; 1899, c. 104, s. 2; Rev., s. 427; C. S., s. 472.)

Cross Reference.—See note to § 1-84.

Affidavit Must Set Forth Ground of Application. The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

§ 1-86: Repealed by Session Laws 1967, c. 218, s. 4.

Cross Reference. — For present provisions as to supplemental jurors from other counties see § 9-12.

§ 1-87. Transcript of removal; subsequent proceedings; depositions.—(a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

(b) After a cause has been directed to be removed, and prior to the time that the transcript is deposited with the court to which the cause is removed, depositions may be taken in the cause, and subpoenas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (1806, c. 694, s. 12, P. R.; 1810, c. 787, P. R.; R. C., c. 31, s. 118; C. C. P., s. 69; Code, ss. 195, 198; Rev., s. 428; C. S., c. 474; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Provisions similar to those of present subsection (b) formerly appeared in § 8-62, now repealed.

Time to Deposit.—When an action is ordered removed to another county, it is error in the judge presiding in the superior court of the county from which the cause is removed, at the next term thereof, and before the term of the court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. Fisher v. Cid. Copper Mining Co., 105 N.C. 123, 10 S.E. 1055 (1890).

Where the order of removal is by consent and no time is limited in the order of removal, the parties, or either of them,

should have a reasonable time in which to deposit the transcript in the other court. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Effect of Failure to File Transcript within Time Allowed. — In the event the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control over the cause. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953); Farmers Cooperative Exch., Inc. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961).

When neither party has taken steps to perfect the removal of the cause, either party has the right to move the lower court for a reactivation of its jurisdiction, and have it determine, on notice to the other party, whether the order of removal should be rescinded as upon abandonment of the right of removal. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to Transmit Copy of Entire Record.—It is not absolutely essential to the acquirement of jurisdiction by the court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by certiorari, upon suggestion of a diminution of the record. Meanwhile, the jurisdiction of the court of original venue becomes dormant, and that court is functus officio to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Power to Issue Subpoenas.—Until the transcript is deposited the removal is not consummated and the cause is not constituted so as to give full jurisdiction to the court to which the removal is ordered, hence to meet this situation the provision of subsection (b) gives to the clerk of either court the power to issue subpoenas for witnesses. Commissioners of Forsyth v. Lemly, 85 N.C. 341 (1881).

Upon removal jurisdiction of the court from which the cause is removed ceases, unless otherwise provided in the order of removal, or by consent of the parties in writing, duly filed. Subsection (b), however, makes one exception to the general rule by allowing the subpoena to be issued from either court. Fisher v. Cid Copper Mining Co., 105 N.C. 123, 10 S.E. 1055 (1890).

Quoted in State ex rel. Clark v. Peebles, 100 N.C. 349, 6 S.E. 798 (1888).

§ **1-87.1**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ **1-88**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to commencement of action, see Rule 3 (§ 1A-1).

§ **1-88.1**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (a), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ **1-89**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§§ 1-90, 1-91: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§ 1-92. Uniform pleading and practice in inferior courts where summons issued to run outside of county.—In all cases in which any court in North Carolina inferior to the superior court, except courts of justices of the peace, shall issue any summons to run outside the county of such inferior court, the case in which such summons is issued shall, as to the summons and the filing of all pleadings, be subject to, and governed by, the laws and rules applicable to actions in the superior court of North Carolina. (1931, c. 420.)

Cross Reference.—As to when coroner acts as sheriff, see § 152-8.

The issuance of a summons to another county addressed to the sheriff of that county is authorized by this section. Williams v. Cooper, 222 N.C. 589, 24 S.E.2d 484 (1943).

§ 1-93. Amount requisite for summons to run outside of county.—No summons in civil suits or civil proceedings shall run outside the county where issued, unless the amount involved in the litigation is more than two hundred dollars in matters arising out of contract and more than fifty dollars in matters arising in tort. Provided, that this section shall not affect or limit the provisions of §§ 7-138, 7-140 to 7-143, and provided further that this section shall not be applicable to suits for the collection of taxes and foreclosure of tax liens pursuant to the provisions of article 27 of chapter 105 of the General Statutes or other actions or proceedings of which the superior court has exclusive, original jurisdiction. (1939, c. 81; 1955, c. 39.)

Local Modification.—Franklin (recorder's court): 1953, c. 218, s. 3.

Cross Reference.—See §§ 7-121, 7-122.

Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in an action ex contractu involving less than $200.00, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. Four County Agricultural Credit Corp. v. Satterfield, 218 N.C. 298, 10 S.E.2d 914 (1940).

§ 1-94: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to process, see Rule 4 (§ 1A-1).

§ 1-95: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (d), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-96: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (e), Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-97: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions of Rules of Civil Procedure as to service of process, see section (j), Rule 4 (§ 1A-1).

§ 1-98: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions of Rules of Civil Procedure as to service of process, see Rule 4 (§ 1A-1).

§ 1-98.1. Service of process by publication and service of process outside the State; when allowed. — Service of process by publication or service of process outside the State may be ordered in the kinds of actions and special proceedings set out in G.S. 1-98.2, with respect to persons described in G.S. 1-98.3, upon the filing of the sworn statement required by G.S. 1-98.4. (1953, c. 919, s. 1.)

Editor's Note.—For comment on the 1953 act, see 31 N.C.L. Rev. 391 (1953).

§ 1-98.2. Actions and special proceedings in which service of process may be had by publication or by service of process outside the State.—Service of process by publication or service of process outside the State may be had in the following kinds of actions and special proceedings:

(1) Those in which the court has jurisdiction over the real or personal property which is the subject matter of the litigation;
(2) Those in which the court by order of attachment granted therein at any time prior to judgment secures control over property belonging to the person to be served;
(3) Those for annulment of marriage, divorce, adoption or custody of a minor child, or for any other relief involving the domestic status of the person to be served;
(4) Those for the purpose of revoking, cancelling, suspending or otherwise regulating licenses issued or privileges granted by the State or any political subdivision thereof, or by any agency of either, to the person to be served, and
(5) Any other actions and special proceedings in rem or quasi in rem in which the court has jurisdiction over the res.
(6) Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons. (1953, c. 919, s. 1; 1957, c. 553.)

Constitutionality. — The great majority of cases have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the State, and the constitutionality of statutes authorizing such service has generally been sustained so far as residents are concerned. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Purpose of Section.—This section, providing for service by publication in certain actions, is designed to provide for a constructive service of process on nonresidents in certain instances in in rem or quasi in rem actions, and in actions in personam where the defendant, a resident of the State, has departed the State or conceals himself with intent to defraud his creditors or avoid service of process. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

The character of the service usually plays a determinative role in a decision whether the service will be sustained. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Sufficient Averment of Due Diligence. —An averment in the words of this section of the ultimate fact that, after due diligence, personal service cannot be had within the State, is a sufficient averment of due diligence and sufficient compliance with statutory requirements without stating any of the probative, or evidentiary facts. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Constructive Service upon Nonresident Ineffectual in Action in Personam.—In an action in personam constructive service by publication, or personal service outside the State upon a nonresident is ineffectual for

any purpose. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

A judgment in personam rendered in a state court against a nonresident upon constructive service cannot be enforced even in the state where it was rendered. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Subdivision (3) Does Not Authorize Judgment for Child Support.—In a divorce action, service of process outside the State under subdivision (3) of this section does not give the court authority to enter judgment against the defendant for the support of the children. Fleek v. Fleek, 270 N.C. 736, 155 S.E.2d 290 (1967), commented on in 47 N.C.L. Rev. 437 (1969).

Application of Subdivision (6).—Subdivision (6) has no application to a nonresident of this State. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) applies only where the defendant is a resident of this State and has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of process. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

Subdivision (6) can have no application when it appears from the complaint that defendant is a nonresident or if it does not affirmatively appear that he is a resident who has left the State for the purpose of defrauding his creditors and avoiding service of summons. Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under subdivision (6) of this section. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Proof under Subdivision (6).—Since no comma separates the two predicates in subdivision (6) of this section, the intent to defraud creditors or to avoid the service of summons must be shown both as to departure and as to concealment. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Description of Real Estate. — Where service by publication was obtained under provisions of an earlier statute, service was held to be questionable because publication merely notified defendants that action had commenced "concerning real estate, of which the superior court of the said county has jurisdiction." Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Applied in Surratt v. Surratt, 263 N.C. 466, 139 S.E.2d 720 (1965).

§ 1-98.3. Persons upon whom service of process may be had by publication or by service of process outside the State.—(a) Service of process by publication or service of process outside the State may be had upon any person, natural or corporate, known or unknown, when, after due diligence, personal service cannot be had within the State.

(b) The persons described in subsection (a) of this section shall include, but not be limited to,

(1) Natural persons, whether residents or nonresidents of this State, including infants and incompetents as described in subdivisions (2) and (3) of G.S. 1-97 when personal service is had upon the guardian or other person required to be served by such subdivisions, and persons whose existence or identity or residence remains unknown;

(2) Stockholders of corporations or of joint stock companies, even though their existence or identity or residence remains unknown, where the action against the stockholders of such corporations or joint stock companies is authorized by law;

(3) Joint stock associations or other unincorporated associations, even though their existence or identity or residence remains unknown;

(4) Any corporation or other legal entity, whether it is foreign, domestic, or its domicile is unknown, and whether it is dissolved or existing, including corporations or other legal entities not known to be dissolved or existing;

(5) Any business or operation which has done business or operated under a name which includes the word "corporation," "company," "incorpo-

rated," "inc.," or any combination thereof, or under a name which indicates or tends to indicate, that the same may be a corporation or other legal entity. (1953, c. 919, s. 1.)

Applied in Harris v. Upham, 244 N.C. 477, 94 S.E.2d 370 (1956).

§ 1-98.4. Affidavit for service of process by publication or service of process outside the State; amendment thereof; extension of time for pleading.—(a) To secure an order for service of process by publication or service of process outside the State, the applicant must file in the office of the clerk of the court where the action is brought a statement in his verified pleading or separate affidavit, sworn to by the applicant, his agent or attorney, stating:

(1) That he is a party, or the agent or attorney of a party, to the action or special proceeding; and

(2) The facts with sufficient particularity to show: That the action or special proceeding is one of those specified in G.S. 1-98.2, that a cause of action exists against the person to be served or that he is a proper party and that the action or special proceeding is of such a kind that the court will have jurisdiction upon service of process by publication or service of process outside the State; and

(3) That, after due diligence, personal service cannot be had within the State; and

(b) Where such service is to be had upon a natural person, the verified pleading or affidavit must state:

(1) The name and residence of such person, or if they are unknown, that diligent search and inquiry have been made to discover such name and residence, and that they are set forth as particularly as is known to the applicant;

(2) That such person is a minor or an incompetent, if such fact is known to the applicant.

(c) Where such service is to be had upon a corporation, the verified pleading or affidavit must state:

(1) The name, domicile, principal place of business of the corporation, whether it be foreign or dissolved, and if such facts are unknown, that diligent search and inquiry have been made to discover same and that they are set forth in the affidavit as particularly as is known to the applicant.

(2) Whether or not the corporation is qualified to do business in this State, unless shown to be a North Carolina corporation.

(d) Where such service is to be had upon a business or operation doing business or operating under a name which indicates or tends to indicate that the same may be a corporation or other legal entity, the verified pleading or affidavit must state:

(1) The name under which said business or operation has been conducted;

(2) That after diligent search and inquiry the applicant has been unable to ascertain whether or not the organization operating under said name is a corporation, either foreign or domestic;

(3) The names and places of residence, if known, of all persons known to own an interest in such organization, and whether or not other or unknown persons may own any interest in such organization; or that, after diligent search and inquiry, all persons owning an interest in such organization are unknown to the applicant.

(e) Where such service is to be had upon unknown persons, the verified pleading or affidavit must state:

(1) That the plaintiff believes there are persons who are or may be interested in the subject matter of the action or special proceeding whose names are unknown to the applicant; and

(2) Whether said unknown persons are or may be interested as heirs, devisees, grantees, assignees, lienors, grantors, trustees or otherwise, and the nature of such interest, if known to the applicant.

(f) When an affidavit provided for by this section is defective, the judge or clerk may allow the affidavit to be amended and may issue a new order for service of process thereon.

(g) Where an order for publication is sought upon an affidavit instead of a verified pleading, the clerk may, on application, by written order extend the time for filing the pleading to a day, certain, for a period not to exceed twenty (20) days from the filing of the affidavit. (1953, c. 919, s. 1.)

Affidavit Must Allege That Person Served Cannot Be Found within State. — An affidavit on which publications is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence, be found within the State. Nash County v. Allen, 241 N.C. 543, 85 S.E.2d 921 (1955).

Requirements of Statute Must Be Strictly Followed.—Where service of summons is made by publication, the requirements of the statute must be strictly followed, and everything necessary to dispense with personal service of summons must appear by affidavit. Nash County v. Allen, 241 N.C. 543, 85 S.E.2d 921 (1955).

A prerequisite prescribed by statute to support an order of service by publication is jurisdictional. The omission from the pleadings or affidavit of any of the required information or averments, on which the order for substitute service is predicated, is fatal. Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956).

Compliance with this statute is mandatory. The affidavit or sworn statement "That, after due diligence, personal service cannot be had within the State," is jurisdictional. Without it, service outside the State is ineffectual to bring the defendant into court. Temple v. Temple, 246 N.C. 334, 98 S.E.2d 314 (1957).

The affidavit in compliance with this section is jurisdictional. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

The affidavit required to support an order for service of summons by publication is jurisdictional. The omission therefrom of any of the essential averments on which an order for substitute service is predicated is fatal. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Affidavit Must Show Compliance with This Section and That Case Comes within § 1-98.2.—To sustain service upon defendant by publication, plaintiff must show: (1) That the case is one in which service by publication is authorized by statute; and (2) that the questioned service has been made in accordance with statutory requirements. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

To secure an order for service by publication, in his affidavit the applicant must state, inter alia, in addition to averring facts which show the action to be one of those specified in § 1-98.2, the name and residence of the person to be served; or, if they are unknown, that diligent search and inquiry have been made to discover such name and residence; and that they are set forth as particularly as is known to the applicant. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Amicus Curiae Is Not Competent to Make Affidavit. — An amicus curiae may not assume the place of a party in a legal action and is not a competent person under this section to make the jurisdictional affidavit for service by publication. Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958).

If no address is known, or has never been known, the applicant should so state. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

The failure to find defendant at his last known address does not eliminate the requirement that the applicant for an order allowing service by publication should set out the residence of defendant "as particularly as is known to the applicant." Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

It is sufficient if the affidavit states the ultimate fact of due diligence substantially in the language of the statute. Brown v. Doby, 242 N.C. 462, 87 S.E.2d 921 (1955).

An averment in the words of the statute of the ultimate fact, "that, after due diligence, personal service cannot be had within the State," was a sufficient compliance with statutory requirements without stating any of the probative, or evidentiary, facts. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Void Service of Process. — Where

neither the pleadings nor affidavit state the residences of respondents to be served with process by publication, nor that their addresses were unknown, nor that they were minors, when this fact is known to petitioner, service of process based thereon is void. Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956).

Where applicant failed to meet the requirements of subsection (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by § 1-99.2 (c), the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Evidence held insufficient to establish that defendant kept himself concealed in the State in order to avoid service of process. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Quoted in Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963).

§ **1-99**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-99.1. Form of order for service of process by publication or service of process outside the State.**—An order for service of process by publication or service of process outside the State in substantially the following form is sufficient:

STATE OF NORTH CAROLINA

IN THE SUPERIOR COURT

..... COUNTY

(Title of action or special proceeding)

ORDER FOR SERVICE OF PROCESS
(Strike out one of the following)

BY PUBLICATION
OUTSIDE THE STATE

(An affidavit)
(A verified pleading)
satisfying the requirements of G.S. 1-98.4

having been duly filed herein, and it appearing to the satisfaction of the undersigned that ..... (Party to be served) cannot, after due diligence, be found in the State, it is now, therefore,

ORDERED

That service of process in the above-entitled (action) (special proceeding) upon ..... (Party to be served) be made (Strike out one of the following)

By publication in ..... (Newspaper) once a week for four successive weeks of the notice issued by the undersigned as provided by G.S. 1-99.2.

By service of process outside the State as provided by G.S. 1-104.

..... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

Applied in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

§ **1-99.2. Notice of service of process by publication.** — (a) The judge or clerk who signs the order for service of process by publication provided for in G.S. 1-99.1 shall issue a notice of service of process by publication which shall

(1) Designate the court in which the action or special proceeding has been commenced and the title of the action or special proceeding;
(2) Be directed to the person to be thus served;
(3) State either that a pleading seeking relief against the person to be served

has been filed in the action or special proceeding, or has been required to be filed therein not later than a date named in the notice;

(4) State the nature of the relief being sought;

(5) Require the person to be served to make defense to such pleading not later than a designated date, and notify him that upon his failure to do so the party seeking service will apply to the court for the relief sought.

(b) The date to be designated pursuant to subdivision (5) of subsection (a) of this section shall be the date when, after completion of service of process by publication, as provided by G.S. 1-100, the time for answering expires as provided by G.S. 1-125.

(c) The clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or affidavit pursuant to the provisions of G.S. 1-98.4. Such copies shall be sent via ordinary mail, addressed to each party at the address of such party's residence or place of business as set forth in the verified complaint or affidavit, and shall be posted in the mails not later than five (5) days after the issuance of the order for service of process by publication. By certificate at the bottom of the order for service of process by publication or by separate certificate filed with the order, the clerk shall certify that a copy of the notice of service of process by publication has been duly mailed to each party whose name and residence or place of business appear in the verified pleading or affidavit, giving the date of posting thereof in the mails, and the clerk shall make an appropriate record thereof in accordance with the provisions of G.S. 2-42.

Failure on the part of any party to receive a copy of the notice mailed in accordance with the provisions hereof shall not affect the validity of the service of process upon such party by publication, and no such copy of the notice need be mailed to any party as to whom the verified pleading or affidavit states that such party's residence or place of business is unknown and that diligent search and inquiry have been made to discover same. (1953, c. 919, s. 1.)

The clerk of court is not physically and personally required to mail the notice. It goes without saying that when he, or one in his office, authorizes the mailing of a notice, and there is proof by the person to whom the mailing is entrusted that it was mailed, that this constitutes compliance with the statute. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

The mailing of a letter properly addressed presumes a delivery to the addressee. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

Findings of Clerk Conclusive. — Findings of the clerk of the superior court, based on testimony before him, that he had signed an order for publication and had made a certificate, that he had addressed and mailed the notice of publication, and placed the certificate in the file, are conclusive even though the original record failed to so show, and are sufficient to support the clerk's denial of a motion to set aside the judgment in the proceeding for want of proper service. York v. York, 271 N.C. 416, 156 S.E.2d 673 (1967).

When Notice of Service Not Required. — This section does not require the clerk to mail defendant a copy of notice of service of process by publication when plaintiff's affidavit stated defendant's residence was unknown and diligent search and inquiry had been made to discover it. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

Failure of Clerk to Mail Notice. — In Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956), a judgment was vacated for failure of the clerk of the superior court to mail the notice. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Where applicant failed to meet the requirements of § 1-98.4 (b) (1) and (2), and the record failed to show that the clerk of the superior court had mailed the copy of notice as required by subsection (c) of this section, the Supreme Court held the purported service of process by publication to be fatally defective and the judgment entered on it void. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Failure of party to receive copy of notice mailed as required by this section does not invalidate the service of process by publication. Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 21 (1966).

Cited in Jones v. Jones, 243 N.C. 557, 91 S.E.2d 562 (1956); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958).

§ 1-99.3. Form of notice of service of process by publication.—A notice of service of process by publication in substantially the following form, is sufficient:

NOTICE OF SERVICE OF PROCESS
BY PUBLICATION
STATE OF NORTH CAROLINA
..... COUNTY
IN THE SUPERIOR COURT

(Title of action or special proceeding)

To .....: (Person to be served)

Take notice that

A pleading seeking relief against you (has been filed) (is required to be filed not later than ..... 19..) in the above entitled (action) (special proceeding).

The nature of the relief being sought is as follows:

(State nature)

You are required to make defense to such pleading not later than ....., 19.., and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ..... day of ....., 19...

..... (Judge) (Clerk)
Superior Court

(1953, c. 919, s. 1.)

Quoted in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-99.4. Cost of publication of notice in lieu of personal service.—The cost of publishing a notice as provided by G.S. 1-98 through G.S. 1-99.3 shall be governed by the provisions of G.S. 1-596 relating to legal advertising. (1953, c. 919, s. 1.)

§§ 1-100 to 1-105: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-105.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note.—The repealed section derived from Session Laws 1955, c. 232.

§§ 1-106 to 1-107.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-107.2: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note.—The repealed section derived from Session Laws 1961, c. 661, as amended by c. 1202, Session Laws 1961, and related to service upon nonresident operators of watercraft or their personal representatives.

§ 1-107.3: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Editor's Note. — The repealed section derived from Session Laws 1963, c. 1088, and related to service upon nonresident operators of aircraft or their personal representatives.

§ 1-108. Defense after judgment set aside.—If a judgment is set aside pursuant to Rule 60 (b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (C. C. P., s. 85; Code, s. 220; Rev., s. 449; 1917, c. 68; C. S., s. 492; 1943, cc. 228, 543; 1947, c. 817, s. 2; 1949, c. 256; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.—At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within thirty days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.

(3) File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209; Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989.)

Local Modification.—Mecklenburg: 1955, c. 877; Union: 1961, c. 506.

Cross References.—As to mortgage in lieu of bond, see § 109-29. As to bond executed or guaranteed by surety company, see § 109-17. As to costs generally, see § 6-1 et seq.

The object of the prosecution bond is

not to secure the officers but to secure the defendant in the recovery of costs wrongfully paid out. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Who Can Take Bond.—The action of the clerk in taking prosecution bonds was always held to be ministerial. They may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. Shepherd v. Lane, 13 N.C. 148 (1828); Croom v. Morrisey, 63 N.C. 591 (1869); Marsh & Co. v. Cohen, 68 N.C. 283 (1873).

When Bond Not Given. — When the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. Brittain v. Howell, 19 N.C. 107 (1836); Russell v. Saunders, 48 N.C. 432 (1856); Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891); Cooper v. Warlick, 109 N.C. 672, 14 S.E. 106 (1891).

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. Costello v. Parker, 194 N.C. 221, 139 S.E. 224 (1927).

Undertaking under Seal. — Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. Holly v. Perry, 94 N.C. 30 (1886).

Undertaking Written on Summons. — Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of either the plaintiff or defendant, or the surety, it was held to be sufficient. Holly v. Perry, 94 N.C. 30 (1886).

Increasing Penalty of Bond.—The court can increase the penalty on the bond, which is not an unusual procedure in the courts. Jones v. Cox, 46 N.C. 373 (1854); Adams v. Reeves, 76 N.C. 412 (1877); Rollins v. Henry, 77 N.C. 467 (1877); Vaughan v. Vincent, 88 N.C. 116 (1883); Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Same — When Exercised. — Where the defendant has been successful on his appeal, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Same—Court Has Discretion.—Where a plaintiff has given a bond for costs which has become insufficient, the court has the power to allow him to proceed with his case without giving additional security. Holder v. Jones, 29 N.C. 191 (1847); Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

What Undertaking Covers. — The undertaking provided for by this section may cover the defendant's costs on appeal. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Same—Does Not Apply to Plaintiff's Costs.—In contemplation of law, the parties pay the cost of the litigation as the action proceeds and this bond is given, it is true, entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. Hallman v. Dellinger, 84 N.C. 1 (1881); Smith v. Arthur, 116 N.C. 871, 21 S.E. 696 (1895).

No Appeal from Judge's Refusal to Require Bond.—The refusal of the trial judge to require a prosecution bond is not appealable. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904); Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Special Appearance.—A motion to dismiss for failure of plaintiff to file security for costs as required by this section pertains to a procedural question, and an appearance to make this motion and a motion to dismiss for want of jurisdiction is not a general appearance. Mintz v. Frink, 217 N.C. 101, 6 S.E.2d 804 (1940).

Appeal by Surety.—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, 116 N.C. 871, 21 S.E. 696 (1895).

Stated in In re Will of Winborne, 231 N.C. 463, 57 S.E.2d 795 (1950).

§ 1-110. Suit as a pauper; counsel.—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section [§ 1-109]. The

court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (C. C. P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C. S., s. 494.)

Local Modification.—Durham, Forsyth, Nash, Northampton: 1937, c. 381.

Cross References.—As to costs in suits in forma pauperis, see § 6-24. As to appeals in forma pauperis, see § 1-288.

Exception to § 1-109.—This section is in the nature of an exception to the general rule in § 1-109. Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Section Does Not Apply to Appeals. — The leave to sue as a pauper, under this section and § 6-24, does not extend in civil actions, beyond the trial in the superior court, his appeal being governed by § 1-288, which only relieves him from giving security for the costs of the appeal, but he must pay the fees as to the appeal due the officers of both courts for services rendered. Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896). See Martin v. Chasteen, 75 N.C. 96 (1876); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

Court Has Discretion.—The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the court. Dale v. Presnell, 119 N.C. 489, 36, S.E. 27 (1896).

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion, Dale v. Presnell, 119 N.C. 489, 36 S.E. 27 (1896), unless, as said in McKiel v. Cutler, 45 N.C. 139 (1853), it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

Judge, Clerk or Justice May Grant.—A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. Rowark v. Gaston, 67 N.C. 291 (1872).

Plaintiff's Affidavit Necessary.—Whether the application be to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. The necessity of such affidavit is held in Miazza v. Calloway, 74 N.C. 31 (1876); Stell v. Barham, 85 N.C. 88 (1881).

Sufficiency of Affidavit.—A typewritten statement, purporting to have been signed by plaintiff, that plaintiff was unable to comply with § 1-109, which statement is followed by an unsigned, unsealed and unauthenticated jurat is not an affidavit, and will not support an order allowing plaintiff to prosecute the action as a pauper, but the deficiency does not necessarily require the dismissal of the action, since the court may give plaintiff a reasonable time to supply the deficiency. Ogburn v. Sterchi Bros. Stores, 218 N.C. 507, 11 S.E.2d 460 (1940).

Proving Good Cause of Action. — In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. Miazza v. Calloway, 74 N.C. 31 (1876).

Security for Costs.—Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Pauper Must Pay Witnesses.—Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs, it is held, that it does not excuse the pauper from liability for his witnesses. Morris v. Rippy, 49 N.C. 533 (1857); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

Who Can Sue in Forma Pauperis.—A guardian can sue in forma pauperis. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

Same—Nonresident.—The words of this section are broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis. Porter v. Jones, 68 N.C. 320 (1873); Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

Same—Personal Representative.—It has been the unquestioned practice since the adoption of the Code, that a personal representative could sue as a pauper upon proper affidavit and certificate. Allison v. Southern R.R., 129 N.C. 336, 40 S.E. 91 (1901); Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

No Presumption of Contingent Fee. —

The bringing of a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. Allison v. Southern & N.C.R.R., 129 N.C. 336, 40 S.E. 91 (1901).

Where Plaintiff Assigns Interest Pending Action.—Where a plaintiff, pending an action brought in forma pauperis, assigned his interest in the land which was the subject of the action, the court will require the assignee to give security, or it will withdraw the privilege given to the assignor and dismiss the action. Davis v. Higgins, 91 N.C. 382 (1884); Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Cited in Costello v. Parker, 194 N.C. 221, 139 S.E. 224 (1927).

§ 1-111. Defendant's, for costs and damages in actions for land.—In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (1869-70, c. 193; Code, s. 237; Rev., s. 453; C. S., s. 495.)

Purpose of Section.—The purpose of the legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. Henning v. Warner, 109 N.C. 406, 14 S.E. 317 (1891).

The plain purpose of this section is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

Time in Which to File Bond.—Where the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the land, the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, by this section, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. Jones v. Jones, 187 N.C. 589, 122 S.E. 370 (1924).

Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. Dunn v. Marks, 141 N.C. 232, 53 S.E. 845 (1906).

The word "defendant" was not intended to comprehend the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

A municipality is not required to file bond in defending an action for the possession of real property, since this section does not apply to the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

Failure to Give Undertaking.—Where a defendant in ejectment fails to file the undertaking required by this section, or procure leave to defend without bond, § 1-112, the court, at such term, may strike out the answer and render judgment by default. Patrick v. Dunn, 162 N.C. 19, 77 S.E. 995 (1913).

Where the defendant in a petition for partition pleaded sole seizin, it was error to strike out his answer without notice, because no defense bond had been filed, but he should have been given an opportunity to file a bond or obtain leave to defend without it under § 1-112. Cooper v. Warlick, 109 N.C. 672, 14 S.E. 106 (1891).

Same—When No Objection Made.—See Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

When an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. McMillan v. Baker, 92 N.C. 111 (1885); Cooper v. Warlick, 109 N.C. 672, 14 S.E. 106 (1891); Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Same—Waiver. — The failure for three years to move for judgment by default for failure to file a defense bond waives the right thereto. Tennessee River Land & Timber Co. v. Butler, 134 N.C. 50, 45 S.E. 956 (1903).

The requirement that the defendant must "execute and file" a defense bond, or in lieu thereof a certificate and affidavit as provided by § 1-112, may be waived unless seasonably insisted upon by the plaintiff. Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

The provisions of this section and § 1-112 are subject to be waived unless seasonably insisted upon by the plaintiff. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants file a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond is properly set aside when plaintiffs file a reply to the counterclaim and raise no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they move for default judgment before the clerk. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

Although the filing of a bond by defendant before he is allowed to plead in an action for the recovery or possession of real property appears to be a mandatory requirement, the Supreme Court has held that the requirement may be waived and has treated this section with considerable leniency. Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

The undertaking required by this section is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Sufficiency of Bond Is "Matter Included in the Action".—See note under § 1-294.

The bond required by this section does not apply to a defendant who is not in possession of the land in controversy. Hence, this section does not apply to an action by a plaintiff in possession to remove a cloud from his title. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortgagee in possession. Nor does it apply to a special proceeding under G.S. § 38-1 et seq. to establish the location of a boundary line. The decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

This section and § 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when motion to strike a cross action on ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

Bond Not Required in Absence of Allegation That Defendant Is in Actual Possession.—In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by this section. Wilson v. Chandler, 238 N.C. 401, 78 S.E.2d 155 (1953).

Formal Order Fixing Amount of Bond Not Required.—Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. Privette v. Allen, 227 N.C. 164, 41 S.E.2d 364 (1947).

When Landlord and Tenant Joint Defendants.—Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers; or if he be not able to give such bond, he must make affidavit of that fact under § 1-112, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. Harkey v. Houston, 65 N.C. 137 (1871).

When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant. Harkey v. Houston, 65 N.C. 137 (1871).

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. Bat-

tle v. Mercer, 187 N.C. 437, 122 S.E. 4 (1924).

Vendee in Possession.—Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887).

In an action to remove a cloud on the title a defense bond is not required. Tennessee River Land & Timber Co. v. Butler, 134 N.C. 50, 45 S.E. 956 (1903).

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, is held not strictly one in ejectment, and this section requiring defendant in ejectment actions to file bond, is inapplicable. Bryant v. Strickland, 232 N.C. 389, 61 S.E.2d 89 (1950).

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer stricken and judgment by default final rendered for failure of defendant to file bond. Hodges v. Hodges, 227 N.C. 334, 42 S.E.2d 82 (1947).

Liability of Surety.—The surety on the bond under this section is liable only for rents and profits pending litigation and subsequent to filing the bond. Hughes v. Pritchard, 129 N.C. 42, 39 S.E. 632 (1901).

Same — Summary Judgment. — Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. Rollins v. Henry, 84 N.C. 570 (1881).

Liability for Costs on Appeal.—The defense bond and the sureties thereon, in an action of ejectment under this section are liable to the amount of the bond for the costs on appeal as well as those incurred in the superior court. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 49 (1914); Grimes v. Andrews, 171 N.C. 367, 88 S.E. 513 (1916).

Court May Appoint Receiver. — This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N.C. 327 (1884); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Arey v. Williams, 154 N.C. 610, 70 S.E. 931 (1911).

Same—When Unnecessary.—In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the superior court for continued possession, given under this section, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, § 1-502, subdivision (1), is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. Jones v. Jones, 187 N.C. 589, 122 S.E. 370 (1924).

Substantial Compliance with Section. — Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by this section, and the clerk accepts the bond and makes notation thereof on the records, there is a substantial compliance with the statute and plaintiff's remedy if he deems the bond insufficient is by motion in the cause. Privette v. Allen, 227 N.C. 164, 41 S.E.2d 364 (1947).

Ignorance That Bond Required. — Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. Battle v. Mercer, 187 N.C. 437, 122 S.E. 4 (1924).

Mortgage Given for Bond.—A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. Ryan v. Martin, 103 N.C. 282, 9 S.E. 197 (1889).

Applied in Clegg v. Canady, 213 N.C. 258, 195 S.E. 770 (1938); Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948).

Cited in Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946); Teel v. Johnson, 228 N.C. 155, 44 S.E.2d 727 (1947).

§ 1-112. Defense without bond. — The undertaking prescribed in the preceding section [§ 1-111] is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever. (1869-70, c. 193; Code, s. 237; Rev., s. 454; C. S., s. 496.)

Cross Reference.—See note to § 1-111.

Editor's Note.—This section appeared formerly as a proviso attached to § 1-111. In regard to this proviso (now this section) the court said in Wilson v. Fowler, 104 N.C. 471, 10 S.E. 566 (1889): "The terms of the proviso are clear, explicit and exclusive. It declares 'that no such undertaking shall be required' in the case provided for. The words 'no such' are used in the broad sense of not any like that required. There is nothing in the statute that suggests the contrary, or that an undertaking for a less sum than two hundred dollars in amount may be required in any case. The purpose is to allow persons thus poor to make defense in such actions without giving any undertaking, nor does § 350 [now § 109-29] authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allows the party, of whom an undertaking may be required in such cases, to give such mortgage instead of it, and the former must be for the same amount as the latter."

It will be observed that when one proposes to sue in forma pauperis, or to appeal (§§ 1-110 and 1-288) he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. Taylor v. Apple, 90 N.C. 343 (1884).

Notice to Adverse Party Unnecessary. —Nothing in this section requires notice to be given to the adverse party, on an application for permission to defend a suit without giving the required security. Deal v. Palmer, 68 N.C. 215 (1873).

Upon Compliance No Order Needed. — Notice of the certificate and affidavit under this section is not necessary, and it may be questioned whether it is necessary in any case that the court should make an order allowing the defendant, upon filing such certificate and affidavit, to answer, because he answers as of right under the statute. Deal v. Palmer, 68 N.C. 215 (1873); Jones v. Fortune, 69 N.C. 322 (1873); Taylor v. Apple, 90 N.C. 343 (1884); Dempsey v. Rhodes, 93 N.C. 120 (1885).

Same—Waiver.—But if such order is necessary the plaintiff is deemed to have waived its absence where the certificate of counsel and the affidavit of the defendant fully meet the requirements of the statute, and they and the answer were on file without objection for two years and until the trial. Dempsey v. Rhodes, 93 N.C. 120 (1885).

Certificate of Counsel.—Where counsel certifies that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover, it was held that this is a substantial compliance with the statute. It is not intended that the inquiry of counsel should extend beyond the information derived from the defendant. Taylor v. Apple, 90 N.C. 343 (1884).

Same—Applies Only to Present Action. —The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief. Wilson v. Fowler, 104 N.C. 471, 10 S.E. 566 (1889).

Example of Sufficient Compliance. — In an action to recover land, this section was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that they had examined his case and were of opinion he "had a good defense to the action." Wilson v. Fowler, 104 N.C. 471, 10 S.E. 566 (1889).

Costs. — This section allowing a defendant in an action of ejectment to defend without giving bond, and § 1-288 allowing an appeal without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. Lambert v. Kinnery, 74 N.C. 348 (1876); Justice v. Eddings, 75 N.C. 581 (1876); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890); Speller v. Speller, 119 N.C. 356, 357, 26 S.E. 160 (1896).

Cited in Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.—Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

(1) If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

(2) If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

(3) If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action has been against them or any of them alone.

(4) If the name or one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (C. C. P., s. 87; Code, s. 222; Rev., s. 455; C. S., s. 497.)

Editor's Note.—See 13 N.C.L. Rev. 83, for comment on cases discussed in following note.

At common law in actions ex contractu, the general rule is, if the contract be joint, the plaintiff must sue all the persons who either expressly or by implication of law made the contract. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Subdivision (1) applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Partners — In General. — Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. Hanstein v. Johnson, 112 N.C. 253, 17 S.E. 155 (1893).

Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. Hancock v. Southgate, 186 N.C. 278, 119 S.E. 364 (1923).

While a creditor and also each partner has a right to demand that partnership (joint) property be applied to the satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Same—Purpose of Section.—This section was intended to prevent a partner, who was not served with the summons, from defeating an action against him on the ground that judgment had already been taken against his copartner; and so the cause of action was merged in the

judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. Navassa Guano Co. v. Willard, 73 N.C. 521 (1875).

§ 1-114. Summoned after judgment; defense.—When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section [§ 1-113], those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (C. C. P., ss. 318, 322; Code, ss. 223, 224; Rev., ss. 456, 457; C. S., s. 498.)

This section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Statute of Limitations May Bar Action.—Where an action was begun against certain administrators and the sureties on their bond, and one surety was not served with summons and more than three years thereafter this latter surety was served, it was held that the three-year statute of limitations was a bar to the action against the surety. Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894). See Rufty v. Claywell, Power & Co., 93 N.C. 306 (1885).

Where an action was instituted and judgment obtained against A.B. & Co., upon a bill of exchange, and C, who was a secret partner in the firm, was not joined as defendant, and the plaintiff afterwards, and more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him: Held, that the action was barred by the statute of limitations. Navassa Guano Co. v. Willard, 73 N.C. 521 (1875).

When Motion in Cause Proper.—Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N.C. 84, 25 S.E. 815 (1896).

§ 1-115: Repealed by Session Laws 1969, c. 954, s. 4, effective January 1, 1970.

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.—(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

(1) Actions affecting title to real property;
(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
(3) Actions in which any order of attachment is issued and real property is attached.

(b) Notice of pending litigation shall contain:
(1) The name of the court in which the action has been commenced or is pending;
(2) The names of the parties to the action;
(3) The nature and purpose of the action; and
(4) A description of the property to be affected thereby.

(c) Notice of pending litigation may be filed:
(1) At or any time after the commencement of an action pursuant to Rule 3 of the Rules of Civil Procedure; or
(2) At or any time after real property has been attached; or
(3) At or any time after the filing of an answer or other pleading in which

the pleading party states an affirmative claim for relief falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C. C. P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C. S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1; 1967, c. 954, s. 3.)

Editor's Note.—The 1967 amendment deleted former subdivisions (1) and (2) of subsection (c), added present subdivision (1), redesignated former subdivisions (3) and (4) as present subdivisions (2) and (3), and in subdivision (3) substituted "states an affirmative claim for relief," for "alleges an affirmative cause of action."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

In General.—The general doctrine of lis pendens is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. Rollins v. Henry, 78 N.C. 342 (1878).

The principle of lis pendens is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

The established rule is that a lis pendens, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the lis pendens begins from the service of the subpoena after the bill is filed. Lacassagne v. Chapuis, 144 U.S. 119, 12 S. Ct. 659, 36 L. Ed. 368 (1892).

A Harsh Rule. — The rule lis pendens, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts is, nevertheless, in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is strictissimi juris. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894); Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Strict Compliance.—The statutory law as to lis pendens embodied in this article provides a definite method for giving constructive notice, so that a search of known records will convert it into actual notice. Since the application of this rule may work hardship in many instances, a strict compliance with its provisions is required. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

The filing of lis pendens is authorized only in actions affecting the title to real property. Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

Under this section, a notice of lis pendens can be filed against real property only in an action affecting its title. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

Or to Do One of Things Enumerated.— Notice of lis pendens may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question or to do one of the other things mentioned in this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

There can be no valid notice of lis pendens in this State except in one of the three types of actions enumerated in subsection (a) of this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

It Is Required When Claim Is In Derogation of Record. — The rule lis pendens applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, lis pendens notice is required when the claim is contra or in derogation of the record. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

The section is designed to supplement

the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. They are each record notices upon the absence of which a prospective innocent purchaser may rely. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Statutes Construed in Pari Materia. — The law of lis pendens and the statute requiring the registration of instruments affecting title to real property must be construed in pari materia. Otherwise, the one would be destructive of the other. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Section Similar to English and New York Statutes. — This section is in substance a copy of 2 Victoria, which has received a construction by the English courts. It is there held that no lis pendens, of which a purchaser has not express notice, will now bind him unless it be duly registered. The provisions of the New York Code for the filing of lis pendens, is similar to North Carolina's, and has received there the same construction as the English statute. Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

Modifies Common-Law Rule. — The common-law rule, was that if the real estate to be affected by the judgment or decree were situated in several counties, it would all be bound by the lis pendens arising from the pendency of a suit in the county in which only a part of it lies, since, "all persons are supposed to be attentive to what passes in courts of justice"; whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate is situated. Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890).

As to real property, there is but one rule of lis pendens in North Carolina, and the provisions of this section are a substitute for the common-law rule. Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890).

The common-law rule of lis pendens has been replaced in North Carolina by the provisions of this article. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Lis pendens notice under this section is not exclusive. Nor is it designed to protect intermeddlers. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

"Action" as used in this section embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Section Adequately Protects Rights of Trustor. — In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the cestui que trust, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of lis pendens in accordance with this and subsequent sections. Whitford v. North Carolina Joint Stock Land Bank, 207 N.C. 229, 176 S.E. 740 (1934).

Jurisdiction of Court.—In order that the right to real property and personal chattels may be affected by lis pendens, they must be within the jurisdiction of the court and subject to its power. Enfield v. Jordan, 119 U.S. 680, 7 S. Ct. 358, 30 L. Ed. 523 (1887).

Continuous Litigation.—In order for the doctrine of lis pendens to apply, there must be continuous litigation. Lee County v. Rogers 74 U.S. (7 Wall.) 181, 19 L. Ed. 160 (1868).

An unreasonable delay in prosecution, so far as third persons are concerned, loses its force as a lis pendens. Redfield v. Ystalyfera Iron Co., 110 U.S. 174, 3 S. Ct. 570, 28 L. Ed. 109 (1884).

Applies to Action in Another County. — Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in which the action is pending, unless the notice, lis pendens, is given under this section. Spencer v. Credle, 102 N.C. 68, 8 S.E. 901 (1889).

The pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land is located. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Action Not Affecting Title to Realty.— Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of lis pendens from the records will be affirmed on appeal. Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930).

Breach of Option Contract Not Included.—An action to recover damages for the breach of an option contract is not an action affecting the title to realty, within this section, and the filing of notice in such case will not affect a purchaser pending that action. Horney v. Price, 189 N.C. 820, 128 S.E. 321 (1925).

When No Notice Required. — No entry of lis pendens, under this section, is required in any case when the action is in the county where the land lies. Badger v. Daniel, 77 N.C. 251 (1877); Rollins v. Henry, 78 N.C. 342 (1878); Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878); Spencer v. Credle, 102 N.C. 68, 8 S.E. 901 (1889); Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890); Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894); Bird v. Gilliam, 125 N.C. 76, 34 S.E. 196 (1899); Jarrett v. Holland, 213 N.C. 428, 196 S.E. 314 (1938).

No change in the rule is brought about by this section prescribing how notice of a lis pendens shall be given when the transaction is in one and the same county, and notice is furnished in the record in the pending action. Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903).

Where the action is brought in the county where the land is situated, and the pleadings contain "the names of the parties, the object of the action, and the description of the property to be affected in that county," this is a substantial compliance with this section, as to the filing of notice, and puts in operation all of the provisions of the statute. Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890).

If this section has no application to an action of foreclosure when brought in the county where the land lies, and it has been so held in a number of cases, it follows as a necessary corollary that the cross-indexing statute (§ 1-117) is equally inapplicable. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942) (con. op.).

Sufficient Description.—Although it is necessary in order to constitute lis pendens that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that anyone reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient. Benn. Lis Pend., § 93; 1 Freem. Judgm., § 197. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Transfer of Suit. — Where the suit is transferred by consent to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the lis pendens fails and a bona fide purchaser will be protected. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

The nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

The purchaser of land is charged with notice of every description, recital, reference and reservation in deeds or muniments in his grantors' chain of title, and if the facts disclosed in such chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made effort to learn the truth of the matters affecting his interest. However, the rigor of the lis pendens rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it. It logically follows that this equitable requirement would apply with equal force when a party is charged with notice by means other than lis pendens. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Res Must Be Sufficiently Described. — Concomitant to the rule that the lis pen-

dens notification is confined to the apparent effect of the pleadings, they must contain a description of the property affected. The res must be sufficiently described in the pleadings. Hence the lis pendens notification will be confined to the property specified in the papers, and where a partial interest only in the property is asserted to be in issue the lis pendens notification does not extend to the entire interest. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

An action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of subsection (a) (1), and a valid notice of lis pendens may be filed in connection therewith. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Action for Monetary Damages Not Included.—Where it is clear from a reading of the complaint, and the amendment thereto, that the action is one to recover monetary damages, the action is not one affecting the title to real property within the purview of this section. Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

This section does not apply to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968).

An action to secure a personal judgment for payment of money is not an action "affecting title to real property" within the meaning of subsection (a) (1), even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Nor Action to Prevent Change in Record.—An action brought for the purpose of preventing a change in the record and not for the purpose of establishing a trust or lien upon the property, is not an action of a type in which this section permits the filing of a notice of lis pendens. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Section Held Inapplicable.—See McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

Cited in G.L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967); Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

§ 1-116.1. **Service of notice.** — In all actions as defined in § 1-116 in which notice of pendency of the action is filed, a copy of such notice shall be served on the other party or parties as follows:

(1) If filed by the plaintiff at or after service of summons but before the filing of the complaint, service shall be in the manner provided in Rule 4 of the Rules of Civil Procedure for service of summons.

(2) If filed by the plaintiff at or after the filing of the complaint, service shall be in the same manner as the complaint.

(3) All other such notices shall be served in the manner provided in Rule 5 of the Rules of Civil Procedure. (1949, c. 260; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section. Provisions similar to those of the former last four sentences of the section now appear in subsection (b) of § 1-119.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

§ 1-117. **Cross-index of lis pendens.**—Every notice of pending litigation filed under this article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens," to be kept by him pursuant to G.S. 2-42 (6). (1903, c. 472; Rev., s. 464; 1919, c. 31; C. S., s. 501; 1959, c. 1163, s. 2.)

Construed with § 47-18. — Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 47-18 must be construed in para 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).

Registration as Notice of Pendency of Foreclosure Suit. — An action was instituted to foreclose a duly registered deed

of trust in which the trustee and the cestuis and the owner of the equity of redemption by mesne conveyances, were made parties, and while the action was pending the owner of the equity sold the property. It was held that the duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under this section was not required. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929).

§ 1-118. Effect on subsequent purchasers.—From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (C. C. P., s. 90; Code, s. 229; Rev., s. 462; 1919, c. 31; C. S., s. 502.)

Editor's Note. — Previous to the adoption of § 1-117, regarding a cross-index, the filing of notice as provided in § 1-116 was all that was necessary to affect all purchasers with notice. See Toms v. Warson, 66 N.C. 417 (1872).

Judgment Relates Back to Beginning of Suit.—If a suit was pending against a person for certain property when he parted with it, in which there was afterwards a judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers. Briley v. Cherry, 13 N.C. 2 (1828); Cates v. Whitfield, 53 N.C. 266 (1860); Dancy v. Duncan, 96 N.C. 111, 1 S.E. 455 (1887).

Fraudulent Purchaser of Lands.—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up the doctrine of lis pendens as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. Morris v. Basnight, 179 N.C. 298, 102 S.E. 389 (1920).

Purchase before Complaint Filed. — A purchaser of land for value after the filing of a lis pendens, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title. Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903).

Purchase from Litigant with Notice. — The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. Morris v. Basnight, 179 N.C. 298, 102 S.E. 389 (1920).

Purchaser from Successful Party.—One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of the ten days, takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. Rollins v. Henry, 78 N.C. 342 (1878); Dancy v. Duncan, 96 N.C. 111, 1 S.E. 455 (1887); Bird v. Gilliam, 125 N.C. 76, 34 S.E. 196 (1899).

Applied in Cutter v. Cutter Realty Co., 265 N.C. 664, 114 S.E.2d 882 (1965).

Cited in Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928); Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929).

§ 1-119. Notice void unless action prosecuted.—(a) The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an affidavit therefor pursuant to Rule 4 (j) (1) c of the Rules of Civil Procedure or by personal service on the defendant within 60 days after the cross-indexing.

(b) When an action is commenced by the issuance of summons and permission

is granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure, if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis pendens shall become inoperative and of no effect. The clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (C. C. P., s. 90; Code, s. 229; Rev., s. 461; 1919, c. 31; C. S., s. 503; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Service Within 60 Days Required. — Where a party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of lis pendens the requirements of the statute must be strictly followed; among other things, it must be served within sixty days after its filing. Powell v. Dail, 172 N.C. 261, 90 S.E. 194 (1916).

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929).

§ 1-120. Cancellation of notice.—The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be cancelled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (C. C. P., s. 90; Code, s. 229; Rev., s. 463; C. S., s. 504.)

Notice Continues until Cancelled. — Where the suit has been prosecuted with proper diligence the lis pendens continues until the final judgment, or until it has been cancelled under the directions of the court. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Loss or Destruction of Notice. — The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Same—When by Act of Party.—If the party, by any act of his own has, contrary to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of lis pendens (or, as in some cases, its substitute, the complaint), leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Section Applies to Cancellation of Valid Notice. — The provisions of this section with reference to cancellation of a notice of lis pendens are applicable to the cancellation of a valid notice. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

If a notice of lis pendens filed in the office of the clerk is not authorized by statute, a court has jurisdiction to cancel it, upon the motion of the owner of the record title to the land, without waiting for the termination of the action. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Cited in Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952); Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930).

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

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

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§ 1-121: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to commencement of action by issuance of summons on application for permission to delay filing of complaint, see Rule 3 of the Rules of Civil Procedure (§ 1A-1).

§ 1-122: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-123: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to joinder of claims and remedies, see Rule 18 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 13.

Defendant's Pleadings.

§ 1-124: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§ 1-125: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to when and how defenses and objections presented, see Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§ 1-126: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to striking from pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter, see section (f), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 14.

Demurrer.

§ 1-127: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provision abolishing demurrers, pleas, etc., see Rule 7 of the Rules of Civil Procedure (§ 1A-1). As to manner of raising defenses and objections, see Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to procedure upon misjoinder, see Rule 21 of the Rules of Civil Procedure (§ 1A-1). As to waiver of defenses and objections, see Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-128 to 1-131: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-132: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to procedure upon misjoinder, see Rule 21 of the Rules of Civil Procedure (§ 1A-1.)

§§ **1-133, 1-134:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 15.

Answer.

§ **1-134.1:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to the last proviso in the repealed section, see subsection (b) of § 1-277. As to manner of presenting defense of lack of jurisdiction, see Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to counterclaim and cross claim, see Rule 13 of the Rules of Civil Procedure (§ 1A-1).

§ **1-135:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to contents of pleadings, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ **1-136:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-137:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to counterclaim and cross claim, see Rule 13 of the Rules of Civil Procedure (§ 1A-1).

§ **1-138:** Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (e), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§ **1-139. Burden of proof of contributory negligence.**—A party asserting the defense of contributory negligence has the burden of proof of such defense. (1887, c. 33; Rev., s. 483; C. S., s. 523; 1967, c. 954, s. 3.)

Cross Reference. — As to pleading contributory negligence, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Negligence is not presumed from the mere fact that one is killed. Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953).

Presumption against Contributory Negligence. — Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. Norton v. North Carolina R.R., 122 N.C. 910, 29 S.E. 886 (1898).

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. Cogdell v. Wilmington & Weldon R.R., 132 N.C. 852, 4 S.E. 618 (1903).

Assumption of Risk.—While there is a marked distinction between the doctrines of assumption of risk and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. Pigford v. Norfolk S.R.R., 160 N.C. 93, 75 S.E. 860 (1912).

Question for Jury — The question whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. Miller v. Scott, 185 N.C. 93, 116 S.E. 86 (1923).

Hence the trial judge cannot submit a verdict on a plea of contributory negligence, but must submit the issue to the jury. United States Leather Co. v. Howell, 151 F. 444 (4th Cir. 1907).

It is not error, even when contributory negligence is pleaded, since the enactment of this section, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in the negative if they find that

the plaintiff, by concurrent carelessness, contributed to cause the injury. McAdoo v. Richmond & Danville R.R., 105 N.C. 140, 11 S.E. 316 (1890).

Same — Where Court Explains to the Jury the Testimony. — While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had been given the benefit of such testimony with its application. Ruffin v. Atlantic & N.C.R.R., 142 N.C. 120, 55 S.E. 86 (1906).

Defendant must plead contributory negligence in order to be entitled to the submission of the issue to the jury. Bevan v. Carter, 210 N.C. 291, 186 S.E. 321 (1936).

A demurrer to the complaint on the ground of contributory negligence will not be sustained unless upon the face of the complaint itself contributory negligence is patent and unquestionable. Ramsey v. Nash Furniture Co., 209 N.C. 165, 183 S.E. 536 (1936).

A four-year old child is incapable of negligence, primary or contributory. Bevan v. Carter, 210 N.C. 291, 186 S.E. 321 (1936).

Minor between ages of seven and fourteen is presumed to be incapable of contributory negligence. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

But Such Presumption May Be Overcome.—Presumption that a minor between the ages of seven and fourteen is incapable of contributory negligence may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

If a child fails to exercise care and prudence equal to his capacity, and the failure is one of the proximate causes of the injuries in suit, a child cannot recover. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

Applied in Butner v. Atlantic & Y. Ry., 199 N.C. 695, 155 S.E. 601 (1930); Farrell v. Thomas & Howard Co., 204 N.C. 631, 169 S.E. 224 (1933); Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937).

ARTICLE 16.

Reply.

§ 1-140: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1). As to service of pleadings, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ 1-141: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§ 1-142: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to pleadings allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 17.

Pleadings, General Provisions.

§ 1-143: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-144: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to signing and verification of pleadings, see Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-145**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (b), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-146**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (c), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-147**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (d), Rule 11 of the Rules of Civil Procedure (§ 1A-1).

§ **1-148. Verification before what officer.**—Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the State, or justice of the peace, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C. S., s. 532.)

Cross Reference.—As to attorney probating papers to be used in proceedings in which he appears as attorney, see § 47-8.

Editor's Note. — Many decisions of the Supreme Court had formerly declared that the notaries public authorized to take affidavits for the verification of the pleadings were those of this State and not of some other state. Benedict, Hall & Co. v. Hall, 76, N.C. 113 (1877); Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895). But this has now been changed by the express terms of this section which permit verification to be taken by notaries in as well as out of the State. See Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895).

And it seems that the phrase "in or out of the State" immediately succeeding the words "notary public," has reference not only to notaries, but to the other officers designated in the section. Thus in Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895), the verification was made before the clerk of the Hustings Court of Richmond, Va., and it was held valid, the court announcing the general rule that courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public.

§ **1-149. When verification omitted; use in criminal prosecutions.**—The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 493; C. S., s. 533.)

No Pleading Can Be Used in Criminal Prosecution.—It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution, to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. State v. Wilson, 217 N.C. 123, 7 S.E.2d 11 (1940).

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is alleged to have embezzled, is erroneous in view of this section. State v. Ray, 206 N.C. 736, 175 S.E. 109 (1934).

Corroboration of Witness.—Where testimony of a witness as to her bigamous marriage with defendant is competent, the

complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. State v. Phillips, 227 N.C. 277, 41 S.E.2d 766 (1947).

Impeaching Defendant's Testimony.—In prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. State v. McNair, 226 N.C. 462, 38 S.E.2d 514 (1946).

Applied in State v. Dula, 204 N.C. 535, 168 S.E. 836 (1933).

§ 1-150: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pleading special matters, see Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ 1-151: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (f), Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ 1-152: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to enlargement of time, see Rule 6 of the Rules of Civil Procedure (§ 1A-1).

§ 1-153: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References. — For present provisions as to striking redundant, irrelevant, etc., matter, see section (f). Rule 12 of the Rules of Civil Procedure (§ 1A-1). As to motion for more definite statement, see section (e), Rule 12 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-154 to 1-156: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pleading special matters, see Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ 1-157: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (h), Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ 1-158: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (i), Rule 9 of the Rules of Civil Procedure (§ 1A-1).

§ 1-159: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to effect of failure to deny, see section (d), Rule 8 of the Rules of Civil Procedure (§ 1A-1).

§ 1-160: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 18.

Amendments.

§ **1-161**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to amendments, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-162**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-163**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to amendments, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ **1-164. Amendment changing nature of action or relief; effect.**— When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (1901, c. 486; Rev., s. 508; C. S., s. 548.)

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951).

§ **1-165**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-166. Defendant sued in fictitious name; amendment.**—When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (C. C. P., s. 134; Code, s. 275; Rev., s. 510; C. S., s. 550.)

Purpose.—The obvious purpose of this section is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity existed when a defendant desired to pursue a cross action for contribution against an unknown joint tort-feasor under former § 1-240, since the statute did not begin to run on the claim for contribution until judgment had been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

What Section Provides. — This section provides that when the plaintiff is ignorant of the name of a defendant, he may designate such defendant by any name and later amend his pleadings to insert the true name when it is discovered. Wall Funeral Home v. Stafford, 3 N. C. App. 578, 165 S.E.2d 532 (1969).

Discretion of Court.—Where a mistake has been made in designating the parties defendant to the action, it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. Rosenbacher & Brother v. Martin, 170 N.C. 236, 86 S.E. 785 (1915).

Middle Name or Initial. — When the identity of a party is established a variation in name, and especially a difference in the middle initial, as H. instead of J., is immaterial. In Words and Phrases (Second Series), it is said that the common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure. Evans v. Brendle, 173 N.C. 149, 91 S.E. 723 (1917).

Defendant May Not Cross Plead against Unknown Additional Defendant.—This section does not, at least by express language, apply to authorize a defendant to cross plead against an unknown additional defendant, and former § 1-240 contained no provision permitting a cross action for contribution against an additional defendant designated only by a fictitious name. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§ 1-167: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to supplemental pleadings, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ 1-168: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to amendments to conform pleadings to evidence, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ 1-169: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 18A.

Pretrial Hearings.

§ 1-169.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pretrial procedure, see Rule 16 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-169.2 to 1-169.6: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to pretrial procedure, see Rule 16 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 19.

Trial.

§§ 1-170 to 1-173: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-174. Issues of fact before the clerk.—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S., s. 558.)

Preliminary questions of fact are to be decided by the clerk under this section. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the judge, who hears and decides the appeal. Kaperonis v. North Carolina State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Denial of Good Faith in Condemnation Proceedings.—When in proceedings by a railroad company to condemn lands, the answer denies the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the superior court in term, under the provisions of this section. Madison County Ry. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

Review of Clerk's Decisions.—The rulings or decisions of the clerks of the court must, as stated in this section, be transferred for trial to the next succeeding term of the superior court, if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; 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; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the

proper disposition of the question presented. Mills v. McDaniel, 161 N.C. 112, 76 S.E. 551 (1912).

Quoted in In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Cited in Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

§§ 1-175 to 1-178: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-179: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to separate trials, see Rule 42 of the Rules of Civil Procedure (§ 1A-1).

§ 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action. (1796, c. 452, P. R.; R. C., c. 31, s. 130; C. C. P., s. 237; Code, s. 413; Rev., s. 535; C. S., s. 564; 1949, c. 107; 1967, c. 954, s. 3.)

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Cross Reference.

For similar provisions relating to civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

I. IN GENERAL.

Editor's Note.—The 1967 amendment substituted "in a criminal action" for "either in a civil or criminal action" in the first sentence, and deleted "to the contentions of the plaintiff and defendant in a civil action, and" following "equal stress" in the proviso of the last sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

For article discussing this section and possible return to Rule 51, federal Rules of Civil Procedure, in North Carolina, see 36 N.C.L. Rev. 1 (1957).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For case law survey as to expression of opinion by trial judge, see 44 N.C.L. Rev. 1065, (1966); 45 N.C.L. Rev. 981 (1967).

Purpose of Section. — The founders of our legal system intended that the right of trial by jury should be a vital force in the administration of justice. They realized that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in criminal trials in the familiar statute now embodied in this section. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

This section establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the

jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." This section is designed to make effectual the right of every litigant to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952); State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

The provisions of this section are mandatory, and a failure to comply is prejudicial error. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

This section creates a substantial legal right in the parties. Adams v. Beaty Serv. Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

It is a departure from the common-law rule and from the practice which prevails in the English courts, the federal courts, and in the courts of some of the states. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

And is to be strictly construed. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

It has no application where the parties waive trial by jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Judge Not to Invade Prerogative of Jury.—This section denies the judge presiding at a jury trial the right in any manner or in any form, by word of mouth or by action, to invade the prerogative of the jury in its right to find the facts. In re Will of Holcomb, 244 N.C. 391, 93 S.E.2d 454 (1956).

The sole purpose of the portion of this section as to giving an opinion, is to prevent judges from invading the province of the jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Failure of the judge to observe and comply with the provisions of this section is error for which a new trial must be ordered. Adams v. Beaty Serv. Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

This section requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. State v. Jones, 254 N.C. 450, 119 S.E.2d 213 (1961).

Applied in Dillard v. Brown, 233 N.C. 551, 64 S.E.2d 843 (1951); Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); In re Humphrey, 236 N.C. 141, 71 S.E.2d 915 (1952); Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952); Goodwin v. Green, 237 N.C. 244, 74 S.E.2d 630 (1953); State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953); Honeycutt v. Bryan, 240 N.C. 238, 81 S.E.2d 653 (1954); Murray v. Wyatt, 245 N.C. 123, 95 S.E.2d 541 (1956); State v. Robbins, 246 N.C. 332, 98 S.E.2d 309 (1957); State v. Dutch, 246 N.C. 438, 98 S.E.2d 475 (1957; Poindexter v. First Nat'l Bank, 247 N.C. 606, 101 S.E.2d 682 (1958); DeBruhl v. State Highway & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958); State v. Brown, 251 N.C. 216, 110 S.E.2d 892 (1959); North Asheboro-Central Falls Sanitary Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960); In re Will of Sessom, 254 N.C. 369, 119 S.E.2d 193 (1961); Graver v. Rundle, 255 N.C. 744, 122 S.E.2d 720 (1961); General Tire & Rubber Co. v. Distributors, Inc., 256 N.C. 561, 124 S.E.2d 508 (1962); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Nello L. Teer Co. v. Dickerson, Inc., 257 N.C. 522, 126 S.E.2d 500 (1962); Yates v. W.F. Mickey Body Co., 258 N.C. 16, 128 S.E.2d 11 (1962); Hewett v. Bullard, 258 N.C. 347, 128 S.E.2d 411 (1962); Queen v. Jarrett, 258 N.C. 405, 128 S.E.2d 894 (1963); Pettus v. Sanders, 259 N.C. 211, 130 S.E.2d 330 (1963); State Highway Comm'n v. Kenan Oil Co., 260 N.C. 131, 131 S.E.2d 665 (1963); State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); Bell v. Price, 262 N.C. 490, 137 S.E.2d 824 (1964); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965); Upchurch v. Hudson Funeral Home, Inc., 263 N.C. 560, 140 S.E.2d 17 (1965); Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Duke Power Co. v. Black, 263 N.C. 811, 140 S.E.2d 540 (1965); State v. Carroll, 265 N.C. 592, 144 S.E.2d 656 (1965); State v. Bynum, 265 N.C. 732, 145 S.E.2d 5 (1965); Haynie v. Queen, 266 N.C. 758, 147 S.E.2d 188 (1966); State v. Green, 266 N.C. 785, 147 S.E.2d 377 (1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d

38 (1966); State v. Leake, 267 N.C. 662, 148 S.E.2d 630 (1966); State v. Turner, 268 N.C. 225, 150 S.E.2d 406 (1966); State v. Fields, 268 N.C. 456, 150 S.E.2d 852 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Green, 268 N.C. 690, 151 S.E.2d 606 (1966); Griffin v. Watkins, 269 N.C. 650, 153 S.E.2d 356 (1967); Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967); State v. Barber, 270 N.C. 222, 154 S.E.2d 104 (1967); State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967); State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967); State v. Jent, 270 N.C. 652, 155 S.E.2d 171 (1967); Lawson v. Benton, 272 N.C. 627, 158 S.E.2d 805 (1968); Roberts v. Pilot Freight Carriers, 273 N.C. 600, 160 S.E.2d 712 (1968); Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968); State v. Frye, 1 N.C. App. 542, 162 S.E.2d 91 (1968); In re Will of Honeycutt, 1 N.C. App. 595, 162 S.E.2d 87 (1968); State v. Stanley, 1 N.C. App. 628, 162 S.E.2d 123 (1968); Woodward v. Shook, 3 N.C. App. 129, 164 S.E.2d 46 (1968); Wilson Redevelopment Comm'n v. Stewart, 3 N.C. App. 271, 164 S.E.2d 495 (1968); State v. Bertha, 4 N.C. App. 422, 167 S.E.2d 33 (1969).

Quoted in Mattox v. Honeycutt, 3 N.C. App. 63, 164 S.E.2d 28 (1968).

Stated in Short v. Chapman, 261 N.C. 674, 136 S.E.2d 40 (1964).

Cited in Morris v. Wrape, 233 N.C. 462, 64 S.E.2d 420 (1951); State v. Russell, 233 N.C. 487, 64 S.E.2d 579 (1951); State v. Parker, 234 N.C. 236, 66 S.E.2d 907 (1951); Poniros v. Nello L. Teer Co., 236 N.C. 144, 72 S.E.2d 9 (1951); Macon v. Murray, 236 N.C. 484, 73 S.E.2d 165 (1952); Atlantic Coast Line R.R. v. McLean Trucking Co., 238 N.C. 422, 78 S.E.2d 159 (1953); Mills v. Bonin, 239 N.C. 498, 80 S.E.2d 365 (1954); McDevitt v. Chandler, 241 N.C. 677, 86 S.E.2d 438 (1955); State v. Phelps, 242 N.C. 540, 89 S.E.2d 132 (1955); Tillman v. Talbert, 244 N.C. 270, 93 S.E.2d 101 (1956); Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); State v. Crisp, 244 N.C. 407, 94 S.E.2d 402 (1956); Deaton v. Coble, 245 N.C. 190, 95 S.E.2d 569 (1956); State v. Morgan, 245 N.C. 215, 95 S.E.2d 507 (1956); Taylor v. Hunt, 248 N.C. 330, 103 S.E.2d 287 (1958); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Corl, 250 N.C. 258, 108 S.E.2d 615 (1959); Warner v. Gulf Oil Corp., 178 F. Supp. 481 (M.D.N.C. 1959); State v. Gooding, 251 N.C. 175, 110 S.E.2d 865 (1959); State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959); Gauldin v. Stokes Lumber Co., 253 N.C. 579, 117 S.E.2d 393 (1960); Crown Cent. Petroleum Corp. v. Page-Myers Oil Co., 255 N.C. 167, 120 S.E.2d 594 (1961); State v. Hart, 256 N.C. 645, 124 S.E.2d 816 (1962); Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962); Carter v. Bradford, 257 N.C. 481, 126 S.E.2d 158 (1962); Haltiwanger v. Charlotte Amusement Co., 261 N.C. 180, 134 S.E.2d 198 (1964); Massey v. Smith, 262 N.C. 611, 138 S.E.2d 237 (1964); Brown v. Griffin, 263 N.C. 61, 138 S.E.2d 823 (1964); Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965); Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966); Wooten v. Cagle, 268 N.C. 366, 150 S.E.2d 738 (1966); Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 590 (1966); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Fuller, 270 N.C. 710, 155 S.E.2d 286 (1967); Gregory v. Lynch, 271 N.C. 198, 155 S.E.2d 488 (1967); State v. Staten, 271 N.C. 600, 157 S.E.2d 225 (1967); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967); King v. Higgins, 272 N.C. 267, 158 S.E.2d 67 (1967); State v. Clayton, 272 N.C. 377, 158 S.E.2d 557 (1968); State v. Cooper, 273 N.C. 51, 159 S.E.2d 305 (1968); S & W Realty & Bonded Commercial Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968); Bryan Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968); State v. Martin, 2 N.C. App. 148, 162 S.E.2d 667 (1968); State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968); State v. Snyder, 3 N.C. App. 114, 164 S.E.2d 42 (1968); State v. Battle, 4 N.C. App. 588, 167 S.E.2d 476 (1969); In re Will of Goodson, 4 N.C. App. 257, 166 S.E.2d 447 (1969).

II. OPINION OF JUDGE.

A. General Consideration.

Purposes and Effect of Section. — The necessity of judges, in obedience to the statute, avoiding any expression, however inadvertent or well intentioned, which may be reasonably construed by a jury, quick to perceive the judge's point of view, as more favorable to one side than the other, has never been better expressd than by Mr. Justice Walker in Withers v. Lane, 144 N.C. 184, 56 S.E. 855 (1907). He quotes, from Chief Justice Taylor in Reel v. Reel, 9 N.C. 63 (1822), as follows: "Upon considering the whole of the charge, it appears to us that its general tendency is to

preclude that full and free inquiry into the truth of the facts which is contemplated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey."

Mr. Justice Walker, continues in his own language as follows: "What these eminent jurists have so well said about the duty of the trial judge under our statute, and the consequence of a violation of it, will, if it is properly heeded, conduce to the more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." Starling v. Selma Cotton Mills, 171 N.C. 222, 88 S.E. 242 (1916); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

In State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921), the court said: "This court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, this section, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain."

An expression of an opinion by the judge as to an essential fact involved in an issue is condemned by this section. Abernethy v. State Planters' Bank & Trust Co., 202 N.C. 46, 161 S.E. 705 (1932).

The slightest intimation from a judge as to the strength of the evidence, or as to credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The law imposes on the trial judge the duty of absolute impartiality. The expression of an opinion by the trial court on an issue of fact to be submitted to a jury, being prohibited by this section, is a legal error. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner, and if the judge does intimate or express such an opinion, it is prejudicial. Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

This section imposes upon the trial judge the duty to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion of the facts. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The provisions of this section are mandatory. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Two Provisions Are of Equal Dignity.—This section proscribes the judge in charging the jury from expressing an opinion as to the weight and credibility of the evidence, and prescribes that he declare and explain the law arising upon the evidence, and the two provisions are linked together and are of equal dignity, and the failure to observe either is error. Ryals v. Carolina Contracting Co., 219 N.C. 479, 14 S.E.2d 531 (1941).

This section was intended to keep inviolate the line between the functions of court and jury—the one as dispenser of the law, the other as triers of the facts—and thus to preserve the integrity of trial by jury. But it does more. It provides a cooperative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949).

A Substantial Right of Litigants.—This section gives the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law. Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925); Ryals v. Carolina Contracting Co., 219 N.C. 479, 14 S.E.2d 531 (1941).

This section confers a substantial legal right upon litigants, and "calls for instructions as to the law upon all substantial features of the case." McNeill v. McNeill, 223 N.C. 178, 25 S.E.2d 615 (1943).

Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

Cannot Be Extended.—The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919); State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Evidence Must Be Stated Impartially.—It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. State v. Jones, 67 N.C. 280 (1872).

This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. Wallace, 251 N.C. 378, 111 S.E.2d 714 (1959).

This section has been construed to include any opinion or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties with the jury. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

The trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to how the jury should determine a question of fact. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

This section forbids a judge to express to the jury his opinion on the facts of the case he is trying. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The trial judge is forbidden by this section to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by this section. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

There must be no indication of the judge's opinion upon the facts to the hurt of either party, either directly or indirectly, by words or conduct. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

The slightest intimation from the judge as to the weight, importance, or effect of the evidence has great weight with the jury, and, therefore, the Supreme Court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

Where Law Gives Testimony Artificial Weight.—It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight. Bonner v. Hodges, 111 N.C. 66, 15 S.E. 881 (1892).

Section Not Confined to Charge.—In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or

even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. And when once expressed such opinion or intimation cannot be recalled. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

Although this section refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

This section does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. Galloway v. Lawrence, 266 N.C. 245, 145 S.E.2d 861 (1966); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

Section Applies Throughout Trial.—This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. State v. Cook, 162 N.C. 586, 77 S.E. 759 (1913); Thompson v. Angel, 214 N.C. 3, 197 S.E. 618 (1938); State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959); State v. Walker, 266 N.C. 269, 145 S.E.2d 833 (1966).

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. Morris v. Kramer Bros. Co., 182 N.C. 87, 108 S.E. 381 (1921); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

This section proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury. Bailey v. Hayman, 220 N.C. 402, 17 S.E.2d 520 (1941); Hyder v. Asheville Storage Battery Co., 242 N.C. 553, 89 S.E.2d 124 (1955).

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate this section, since this section relates only to the expression of opinion during the trial of the case. State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943).

The trial of a case begins within the purview of this section when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. This being so, it is a violation of the section for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Manner of Stating Contentions of Parties.—The prohibition against the court expressing an opinion on the evidence applies to the manner of stating the contentions of the parties as well as in any other portion of the charge. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Although a statement of contentions is permissible, the trial judge must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Where the court expresses an opinion upon the weight of the evidence while stating contentions, it is not required that it must be brought to the trial judge's attention before verdict; this question can be considered for the first time on appeal upon exceptions duly noted. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Motive of Judge Immaterial.—The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951); State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

When Equal Protection Clause Violated.—The equal protection clause of the Fourteenth Amendment of the United States Constitution is not violated by prejudicial remarks of the judge unless there is shown to be an element of intentional or purposeful discrimination and the burden of showing this is on the accused. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

What Remarks Presumed Correct.—The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Province of Court and Jury.—It is not for the judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. The verdict may be set aside by the court, if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury cannot be denied provided there is some evidence tending to establish the plaintiff's contention. The jury should be instructed that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for them to say whether the evidence is of that convincing character. Avery v. Stewart, 136 N.C. 426, 48 S.E. 775 (1904).

Inadvertent Expression of Opinion.—The fact that an expression of opinion by the trial court upon the evidence is an inadvertence renders such error nonetheless harmful. Miller v. Norfolk S. Ry., 240 N.C. 617, 83 S.E.2d 533 (1954); Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Prejudicial Impression Not Removed by Subsequent Explanation. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates this section by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, of his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error cannot be corrected by instructing the jury not to consider the expression by the court. State v. Carter, 268 N.C. 648, 151 S.E.2d 602 (1966).

Harmless Error.—The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Weight and Sufficiency of Evidence Question for Jury.—Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. State v. Moses, 13 N.C. 452 (1830); Wittkowsky v. Wasson, 71 N.C. 451 (1874); State v. Hardee, 83 N.C. 619 (1880); Withers v. Lane, 144 N.C. 184, 56 S.E. 855 (1907).

A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904).

It is the province of the jury to ascertain the facts from the evidence, the weight and credibility thereof being exclusively for its determination. In re Will of Bergeron, 196 N.C. 649, 146 S.E. 571 (1929).

Discrepancies and contradictions in the evidence are for the jury and not for the court. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

If diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination. Jones v. Johnson, 267 N.C. 656, 148 S.E.2d 583 (1966).

The question of the admissibility of evidence is for the judge; whether there is evidence and its weight and credibility are for the jury. State v. Perry, 3 N.C. App. 356, 164 S.E.2d 629 (1968).

And Final Decision of Facts Rests with Jury.—The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not jusified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. State v. Maxwell, 215 N.C. 32, 1 S.E.2d 125 (1939).

Objections Must Be Made in Apt Time.—The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto will be considered on appeal. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Credibility of Witnesses Is for Jury.—No judge at any time during the trial of a cause is permitted to cast doubt upon

the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943). See State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946); State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965). See State v. Smith, 240 N.C. 99, 81 S.E.2d 263 (1954).

This section prohibits a trial judge from asking questions which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness, and from asking a witness questions for the purpose of impeaching him or casting doubt on his testimony. Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

Judge Cannot Withdraw Case.—A judge cannot pass upon the weight of evidence and withdraw a case from the jury when it appears to him that the evidence is not clear, strong, and convincing. Lehew v. Hewett, 138 N.C. 6, 50 S.E. 459 (1905).

May Explain Law of Concurrent Negligence as Applied to Evidence.—In Harvell v. City of Wilmington, 214 N.C. 608, 200 S.E. 367 (1939), it was held that, the law of concurrent negligence being applicable to the conflicting evidence in the case, the plaintiff had a right to rely thereon, and it was the duty of the court to apply such law to the evidence and to declare and explain, in the manner contemplated by this section, the law of concurrent negligence as it applied to the evidence.

Nonsuit.—It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. Kearns v. Southern Ry., 139 N.C. 470, 52 S.E. 131 (1905).

But he cannot enter a judgment of nonsuit on the grounds of plaintiff's contributory negligence without deciding an issue of fact. Osborne v. Southern Ry., 160 N.C. 309, 76 S.E. 16 (1912).

Directing a Verdict.—Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by this section. United States R.R. Administration v. Hilton Lumber Co., 185 N.C. 227, 117 S.E. 50 (1923).

Even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury, and therefore a recapitulation of the evidence may be necessary. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949).

Court Cannot Direct Affirmative Finding.—Where the party upon whom the burden of proof rests offers no evidence to prove the issue the trial judge should direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the court withdraw the issue from the jury and direct an affirmative finding. Anniston Nat'l Bank v. School Comm., 121 N.C. 107, 28 S.E. 134 (1897); Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898).

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show you will answer the issue" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949).

Evidence Insufficient to Justify Instructed Verdict.—In an action to quiet title, the evidence was not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949).

Examination of Witnesses Discretionary.—The manner of conducting the examination of witnesses is left largely to the discretion of the judge and can but seldom be the subject of review, even when not entirely approved by this court. State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

Dissertation upon Moral Questions.—This section does not prohibit a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial, provided the language used is without prejudice to either party. Stilley v. McCox, 88 N.C. 18 (1883).

A Venire de Novo for Violation.—Under

this section the trial judge is restricted to stating plainly and correctly the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusion of facts, a venire de novo will be ordered. Withers v. Lane, 144 N.C. 184, 56 S.E. 855 (1907).

Exceptions after Verdict. — Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925); State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950). But see State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Record on Appeal Must Show Error.— If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must allege the tone, emphasis or manner. Davis v. Blevins, 125 N.C. 433, 34 S.E. 541 (1899), citing State v. Jones, 67 N.C. 285 (1872); State v. Wilson, 76 N.C. 120 (1877).

An assignment of error to a charge should state wherein the charge fails to comply with this section. Switzerland Co. v. North Carolina State Highway & Pub. Works Comm'n, 216 N.C. 450, 5 S.E.2d 327 (1939); State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947).

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. State v. Spivey, 230 N.C. 375, 53 S.E.2d 259 (1949); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956).

Correctness of Instructions Will Be Presumed.—Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. State v. Chesson, 228 N.C. 259, 45 S.E.2d 563 (1947).

Where the charge of the court to the jury does not appear in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by this section. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

Applied in Misskelley v. Home Life Ins. Co., 205 N.C. 496, 171 S.E. 862 (1933); Rand v. Home Ins. Co., 206 N.C. 760, 174 S.E. 749 (1934); Lamm v. Lamm, 206 N.C. 905, 173 S.E. 309 (1934); Wilson v. Inter-Ocean Cas. Co., 210 N.C. 585, 188 S.E. 102 (1936); State v. Batts, 210 N.C. 659, 188 S.E. 99 (1936); In re Evans' Will, 223 N.C. 206, 25 S.E.2d 556 (1943); Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946); State v. Ellison, 226 N.C. 628, 39 S.E.2d 824 (1946); State v. Correll, 228 N.C. 28, 44 S.E.2d 334 (1947); State v. McMahan, 228 N.C. 293, 45 S.E.2d 340 (1947); Barringer v. Barringer, 228 N.C. 790, 46 S.E.2d 849 (1948); Wyatt v. Queen City Coach Co., 229 N.C. 340, 49 S.E.2d 650 (1948).

Cited in Hunsinger v. Carolina, C. & O. Ry., 194 N.C. 679, 140 S.E. 608 (1927); State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); Bridgeman v. Pilot Life Ins. Co., 197 N.C. 599, 150 S.E. 15 (1929); Bostwick v. Jackson, 197 N.C. 785, 148 S.E. 925 (1929); American Exch. Nat'l Bank v. Winder, 198 N.C. 18, 150 S.E. 489 (1929); State v. Sawyer, 198 N.C. 459, 152 S.E. 153 (1930); Brown v. Postal Telegraph-Cable Co., 198 N.C. 771, 153 S.E. 457 (1930); Moss v. Brown, 199 N.C. 189, 154 S.E. 48 (1930); Pyatt v. Southern Ry., 199 N.C. 397, 154 S.E. 847 (1930); Nelson v. Jefferson Standard Life Ins. Co., 199 N.C. 443, 154 S.E. 752 (1930); Rogers v. Ray, 199 N.C. 577, 155 S.E. 253 (1930); State v. Johnson, 205 N.C. 839, 171 S.E. 926 (1933); Jones v. Metropolitan Life Ins. Co., 206 N.C. 916, 175 S.E. 162 (1934); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937); Noland Co. v. Jones, 211 N.C. 462, 190 S.E. 720 (1937); Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1937); Leonard v. Pacific Mut. Life Ins. Co., 212 N.C. 151, 193 S.E. 166 (1937); In re Worsley, 212 N.C. 320, 193 S.E. 666 (1937); Farrow v. White, 212 N.C. 376, 193 S.E. 386 (1937); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937); Rooks v. Bruce, 213 N.C. 58, 195 S.E. 26 (1938); State v. Robinson, 213 N.C. 273, 195 S.E. 824 (1938); State v. Epps, 213 N.C. 709, 197 S.E. 580 (1938); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); State v. Wells, 221 N.C. 144, 19 S.E.2d 243 (1942); Moyle v. Hopkins, 222 N.C. 33, 21 S.E.2d 826 (1942); State v. Shine, 222 N.C. 237, 22 S.E.2d 447 (1942); Sample v. Spencer, 222 N.C. 580, 24 S.E.2d 241

(1943); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130 (1943); State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944); Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945); State v. Bullins, 226 N.C. 142, 36 S.E.2d 915 (1946); Perry v. First Citizens Nat'l Bank & Trust Co., 226 N.C. 667, 40 S.E.2d 116 (1946); Brown v. Loftis, 226 N.C. 762, 40 S.E.2d 421 (1946); Nichols v. Wachovia Bank & Trust Co., 231 N.C. 158, 56 S.E.2d 429 (1949); Hill v. Atlantic Coast Line R.R., 231 N.C. 499, 57 S.E.2d 781 (1950); Combs v. Porter, 231 N.C. 585, 58 S.E.2d 100 (1950); Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 58 S.E.2d 741 (1950); Collingwood v. Winston-Salem Southbound Ry., 232 N.C. 192, 59 S.E.2d 584 (1950); Fleming v. Carolina Power & Light Co., 232 N.C. 457, 61 S.E.2d 364 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950).

B. What Constitutes an Opinion.

In General.—This section has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927), citing State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925). See Speed v. Perry, 167 N.C. 122, 83 S.E. 176 (1914).

The judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence, nor to express an opinion on the facts. Powell v. Wilmington & W.R.R., 68 N.C. 395 (1873).

A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by this section, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence. Keller v. Caldwell Furniture Co., 199 N.C. 413, 154 S.E. 674 (1930).

Test of Violation.—It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. State v. Browning, 78 N.C. 555 (1878).

Direct Language Not Necessary to Constitute Error.—The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947), citing State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946); State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951).

Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Rhinehart, 209 N.C. 150, 183 S.E. 388 (1936).

It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. This section forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. State v. Simpson, 233 N.C. 438, 64 S.E.2d 568 (1951); Evans v. C.C. Bova & Co., 263 N.C. 91, 138 S.E.2d 781 (1964); State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

If the judge intimates an opinion by his manner of stating the evidence, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial, he violates this section. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial, this section forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to

each and every litigant a fair and impartial trial before the jury. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967).

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948).

Taking Witness into Custody in Presence of Jury.—In the prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, was held to be prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. State v. McNeill, 231 N.C. 666, 58 S.E.2d 366 (1950).

Where the court audibly told the defendant's chief witness in the presence of the jury not to leave the courtroom, and shortly thereafter the witness was placed in custody in the prisoner's box in plain view of the jury, the incident must have resulted in weakening the testimony of the witness in the eyes of the jury and constituted a violation of this section. State v. McBryde, 270 N.C. 776, 155 S.E.2d 266 (1967).

Possibility of Unfair Inference Insufficient.—It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was likely to convey to the jury his opinion on the weight of the testimony. State v. Jones, 67 N.C. 285 (1872).

Section Applies to Issues.—The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. Long v. Byrd, 169 N.C. 659, 86 S.E. 574 (1915), citing State v. Angel, 29 N.C. 27 (1846).

Language Subject to Misapprehension.—When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. State v. Rogers, 93 N.C. 523 (1885).

Intimation That Controverted Facts Have or Have Not Been Established.—Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Declaration That Evidence Tends to Show Fact Beyond Reasonable Doubt.—The credibility of the evidence is always for the jury and the judge may never declare that all the evidence tends to show any fact beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E.2d 568 (1964).

Remarks Made in Mere Pleasantry.—Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921).

Remark That Fact Is "Sufficiently Proved".—The judge is not permitted to express an opinion as to whether a fact is sufficiently proved, in his charge to the jury. Williams v. Crosby Lumber Co., 118 N.C. 928, 24 S.E. 800 (1896).

In an action for wrongful death, an instruction that, according to the mortuary table, testate's age being a stated number of years, his life expectancy was a certain number of years, is error as being an expression of opinion by the court as to the sufficiency of the proof of the fact of age and the life expectancy, contrary to this section. Sebastian v. Horton Motor Lines, 213 N.C. 770, 197 S.E. 539 (1938).

The mortuary tables (see § 8-46), are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that intestate's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. Wachovia Bank & Trust Co. v. Atlantic Greyhound Lines, 210 N.C. 293, 186 S.E. 320 (1936).

No judge, in giving a charge to the petit jury, shall give an opinion whether a fact

is fully or sufficiently proven, that being the true office and province of the jury. Williams v. State Highway Comm'n, 252 N.C. 514, 114 S.E.2d 340 (1960).

Assumption That Fact Controverted by Plea of Not Guilty Has Been Established. —The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963); State v. Patton, 2 N.C. App. 605, 163 S.E.2d 542 (1968).

An expression of opinion or assumption by the trial court that all the essential elements of the offenses charged, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant was prejudicial error. State v. Mitchell, 260 N.C. 235, 132 S.E.2d 481 (1963).

Charge Predicated on Jury Findings.— Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by this section. Ivie v. King, 167 N.C. 174, 83 S.E. 339 (1914).

Positive and Negative Testimony.—It is not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative. Henderson v. Crouse, 52 N.C. 623 (1860).

Assumption of Truth of Fact.—An instruction which assumes the truth of controverted facts is erroneous, as invading the province of the jury. Bradley v. Ohio River & C. Ry., 126 N.C. 735, 36 S.E. 181 (1900); Pigford v. Norfolk S.R.R., 160 N.C. 93, 75 S.E. 860 (1912).

Assumption of Nonexistence of Facts.— A new trial will be awarded, where the charge of the court assumed that certain facts had not been proved, thus taking the questions from the jury. Powell v. Wilmington & W.R.R., 68 N.C. 395 (1873).

Admitted Facts.—An instruction is not erroneous in assuming an admitted fact. Crampton v. Ivie, 124 N.C. 591, 32 S.E. 968 (1899).

Uncontroverted Evidence. — Where the defense is based on the uncontradicted testimony of a witness, it is proper for the court to instruct the jury to find for defendant if they believe such witness. Chemical Co. v. Johnson, 101 N.C. 223, 7 S.E. 770 (1888); Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891); Love v. Gregg, 117 N.C. 467, 23 S.E. 332 (1895).

However, this principle does not apply where the evidence, if true, is susceptible of more than one deduction. Armour Fertilizer Works v. Cox, 187 N.C. 654, 122 S.E. 479 (1924).

Submission to Jury.—Where issues are submitted to the jury, an instruction that plaintiff cannot recover cannot be granted. Witsell v. West Asheville & S.S. Ry., 120 N.C. 557, 27 S.E. 125 (1897); Bradley v. Ohio River & C. Ry., 126 N.C. 735, 36 S.E. 181 (1900).

Instruction That There Is No Evidence. —If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. State v. Allen, 48 N.C. 257 (1855).

Failure of Proof.—Where there is no evidence to prove the affirmative of an issue, the jury may be instructed to answer it in the negative if they believe the evidence. Woodbury v. Evans, 122 N.C. 779, 30 S.E. 2 (1898); Newsome v. Western Union Tel. Co., 144 N.C. 178, 56 S.E. 863 (1907).

Hypothetical Statements by Judge. — Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. State v. Benton, 19 N.C. 196 (1836); State v. Collins, 30 N.C. 407 (1848); State v. Murph, 60 N.C. 129 (1863); Johnson v. Bell, 74 N.C. 355 (1876).

It is not error to refuse any instruction asked on a hypothetical state of facts. Wilson v. Holley, 66 N.C. 408 (1872).

Applies to Inferences of Fact.—Whether a fact is sufficiently proved is within the province of the jury to determine, upon which the court may not intimate an opinion, and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918).

Remarks Must Be Prejudicial.—Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remark or conduct of the court, it cannot be treated as error. State v. Browning, 78 N.C. 555 (1878).

A remark or question by the court during the progress of the trial, even though it amount to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Perry, 231 N.C. 467, 57 S.E.2d 774 (1950).

To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. State v. Puett, 210 N.C. 633,

188 S.E. 75 (1936); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Appellant may not maintain an exception to the charge on the ground that it contained an expression of opinion by the court in violation of this section when the alleged error is in favor of appellant and is therefore harmless as to him. Vaughn v. Booker, 217 N.C. 479, 8 S.E.2d 603 (1940).

Burden of Showing Prejudice.—Petitioner has the burden of showing that the judge's remarks constituted prejudicial error. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. Thompson v. Davis, 223 N.C. 792, 28 S.E.2d 556 (1944); State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

It is not error, as commenting on the weight of evidence, to use in instructions the phrases "the evidence tends to show" and "evidence tending to show." Lewis v. Norfolk & W. Ry., 132 N.C. 382, 43 S.E. 919 (1903); State v. Jackson, 199 N.C. 321, 154 S.E. 402 (1930); State v. Harris, 213 N.C. 648, 197 S.E. 142 (1938).

The use of the phrase "the State has presented evidence in this case which tends to show" in arraying the State's evidence, the same phrase being used when arraying defendant's evidence, did not constitute error as an expression of opinion by the court on the evidence. State v. Huggins, 269 N.C. 752, 153 S.E.2d 475 (1967).

The use of the terms "has offered evidence in substance tending to show" and "offered evidence tending further to show" is not an expression of opinion in violation of this section. Womble v. Morton, 2 N.C. App. 84, 162 S.E.2d 657 (1968).

Remarks to Counsel.—Remarks of the judge, made, not in his charge but to counsel during the introduction of the evidence, are not a ground for a new trial, unless it reasonably appears that a party is prejudiced in the minds of the jury by such remarks. Williams v. Crosby Lumber Co., 118 N.C. 928, 24 S.E. 800 (1896).

Reprimand of Spectators.—A reprimand of spectators is not a violation of this section. State v. Robertson, 121 N.C. 551, 28 S.E. 59 (1897).

Credibility of Witnesses. — Where there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always a question for the jury, and this is so though the testimony may be all on one side. In this case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way; but not upon the evidence, so to answer it. Smith v. Cashie & Chowan R.R. & Lumber Co., 140 N.C. 375, 53 S.E. 233 (1906); Dobbins v. Dobbins, 141 N.C. 210, 53 S.E. 870 (1906).

Appearance and Manner of Witness.—The presiding judge should not state to the jury his estimate of the appearance and manner of a witness. Crutchfield v. Richmond & D.R.R., 76 N.C. 320 (1877).

Time Spent in Outlining Evidence of One Party.—Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Cureton, 218 N.C. 491, 11 S.E.2d 469 (1940); Bryant v. Watford, 240 N.C. 333, 81 S.E.2d 926 (1954).

Questioning Witness.—A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. But he violates this section and commits reversible error in so doing if he puts to a witness questions which convey to the jury his opinion as to what has, or has not, been proved by the testimony of such witness. In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

The presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952); Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

It is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel including the district solicitor, but it is never the privilege of the trial judge. State v. Kimbrey, 236 N.C. 313, 72 S.E.2d 677 (1952).

It is improper for a trial judge to ask questions for the purpose of impeaching a witness. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Questions which serve only to clarify and

promote a proper understanding of the testimony of the witnesses do not amount to an expression of opinion by the judge. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

There are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. State v. Hoyle, 3 N.C. App. 109, 164 S.E.2d 83 (1968).

Frequent Interruptions and Prolonged Questionings.—It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point, and sometimes to facilitate the taking of testimony; but frequent interruptions and prolonged questionings by the court are not approved and may be held for prejudicial error if this tends to create in the minds of the jurors the impression of judicial leaning to one side or the other. Greer v. Whittington, 251 N.C. 630, 111 S.E.2d 912 (1960).

Instructing Plaintiff to Reopen Case and Supply Deficiency in Record.—Where the record disclosed that at the conclusion of all the evidence the court ruled favorably on defendant's motion to nonsuit and stated that there was a serious defect in the record and that if plaintiff wished to reopen the case and supply the deficiency the court would permit him to do so, that there followed a 10-minute recess after which the court told plaintiff he had not introduced the summons which was very material, and that upon plaintiff's request the deficiency in the record was supplied, it was held that the remarks of the court did not constitute an expression of opinion upon the evidence inhibited by this section, but were within the court's sound discretion in discharging its duty to see to it that each side has a fair and impartial trial. Miller v. Greenwood, 218 N.C. 146, 10 S.E.2d 708 (1940).

Remark Complimentary to Witness. — A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is empaneled, is not forbidden by this section. State v. Howard, 129 N.C. 584, 40 S.E. 71 (1901).

Mathematical computations in a charge on the measure of damages is not a usurpation of the powers of the jury, where the court charges they are used merely as an example. Speight v. Seaboard Air Line Ry., 161 N.C. 80, 76 S.E. 684 (1912).

Remarks Made in Directing Nonsuit of One of Several Defendants.—It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. State v. Sullivan, 193 N.C. 754, 138 S.E. 136 (1927).

Assumption of Existence or Nonexistence of Material Fact.—The trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Test for Determining Prejudice. — The trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Carter, 233 N.C. 581, 65 S.E.2d 9 (1951); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C.), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Parties as Witnesses.—Where plaintiff and defendant are the principal witnesses, and the former testifies distinctly to one

contract and its breach by defendant, who testifies as distinctly to another and a different contract, it is not error to charge that, if the jury find that plaintiff has stated the contract correctly, they will find for him, but, if defendant stated it correctly, then the verdict should be for him. Barringer v. Burns, 108 N.C. 606, 13 S.E. 142 (1891).

Remarks During Former Trial. — The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. State v. Baldwin, 178 N.C. 687, 100 S.E. 348 (1919).

Remark That Prisoner Would Escape.— A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. State v. Jacobs, 106 N.C. 695, 10 S.E. 1031 (1890).

Statement That Judge Did Not Understand Claim.—Where the judge in charging the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff based the eleven thousand and some odd dollars," it was held that this was not an expression of opinion prohibited by this section. McDonald v. MacArthur Bros. Co., 154 N.C. 11, 69 S.E. 684 (1910).

Status of Deceased as Boarder or Guest in Home.—The judge did not express an opinion in violation of this section when he instructed the jury: "There was—I would characterize it as limited evidence—about the status of these two principals, that is the deceased and the defendant, with respect to their association with this home. The evidence did indicate that the defendant was living with her parents. There was some evidence that indicated—but it's for you to say—what the status of the deceased was in that home, or his presence in that home was. It was not clear to the court whether he was a boarder, or whether he was a guest, or whether he was living there under some circumstances not clear to the court not fully revealed by the evidence. State v. Hefner, 3 N.C. App. 359, 164 S.E.2d 623 (1968).

b. Remarks Concerning Witnesses.

Defendant Not Prejudiced by Remarks During Cross-Examination of State's Witness.—Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. State v. Puett, 210 N.C. 633, 188 S.E. 75 (1936).

Remark Concerning Emotion of Witness.—On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion," was held not to be error. State v. Laxton, 78 N.C. 564 (1878).

Statement as to Corroboration of Witness.—A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. State v. Mitchell, 193 N.C. 796, 138 S.E. 166 (1927).

A charge that ". . . and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State. State v. McKnight, 226 N.C. 766, 40 S.E.2d 419 (1946).

Remark That Witness Has Fully Answered Question.—Where the same witness has several times fully answered a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926).

Where court was of the opinion that State's witness on cross-examination by defendant's counsel had answered interrogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946).

Referring to Eyewitnesses. — Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eyewitnesses and some were

not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eyewitnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. State v. Boswell, 195 N.C. 496, 142 S.E. 583 (1928).

Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, was not expression of opinion on weight of evidence. State v. Starnes, 218 N.C. 539, 11 S.E.2d 553 (1940).

c. Remarks Concerning Weight and Credibility of Testimony.

In prosecution for homicide committed in the attempted perpetration of a robbery, the charge of the court to the effect that if the jury were satisfied beyond a reasonable doubt that the defendants conspired and agreed to rob deceased, that one defendant committed acts in furtherance of the common design and agreed to share in the proceeds of the robbery and that in furtherance of such plan and agreement, and while attempting to rob deceased, another defendant shot and killed deceased, the jury should return a verdict of guilty of murder in the first degree, was without error and did not contain an expression of opinion on the evidence in violation of this section. State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

Instruction Based on Law. — Where there is evidence of fraud and undue influence in the making of a will, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. In re Will of Hardee, 187 N.C. 381, 121 S.E. 667 (1924).

Statement as to Qualification of Witness. —Where the statement of the court was no more than a statement holding that the witness was qualified to give opinion evidence, it was not prejudicial error. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Statement That Phases of Case Were Admitted.—A trial judge in an action for damages who stated to the jury that there were phases of the case apparently admitted by the defendant's counsel and if not, to be passed upon by the jury, did not violate this section. Means v. Carolina Cent. R.R., 126 N.C. 424, 35 S.E. 813 (1900).

Statement Concerning Admission.—It is not a violation of this section for the judge to tell the jury that the evidence that the defendant had admitted execution of a bond, if believed by the jury to be true, is entitled to more weight than the opinion of experts to the genuineness of the signature, and that such opinions should be received with caution. Buxly v. Buxton, 92 N.C. 479 (1885).

Reference to Testimony of One Witness. —Where the court was evidently stating the contentions of the parties as to the force of the evidence taken as a whole, his reference to the testimony of one witness is not improper as tending to restrict the consideration of the jury to it alone. Wheeler v. Cole, 164 N.C. 378, 80 S.E. 241 (1913).

Charge Based on Uncontradicted Testimony.—A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. State v. Moore, 192 N.C. 209, 134 S.E. 456 (1926).

Remark on Evidence of Character of Defendant.—An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938).

Statement That Evidence Satisfies "Beyond Reasonable Doubt".—Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc., it was held that the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. State v. Johnson, 207 N.C. 273, 176 S.E. 581 (1934).

Statement as to Evidence on Handwriting.—An instruction of the court in stating

the evidence that the propounder had offered three witnesses, beside herself, who had testified that they were familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and had given it as their opinion that the paper-writing and every part thereof is in the handwriting of the deceased, is not erroneous as an expression of the opinion by the court on the weight of the evidence, it appearing that the court, prior to this instruction, went into detail in citing caveators' testimony. In re Will of Williams, 215 N.C. 259, 1 S.E.2d 857 (1939).

d. Miscellaneous Remarks.

The use of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment in a prosecution for manslaughter, is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. State v. Scoggins, 225 N.C. 71, 33 S.E.2d 473 (1945).

Where Court Is Merely Identifying Exhibits.—A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene, it being obvious that the court was merely identifying the exhibits offered by the State. State v. Hooks, 228 N.C. 689, 47 S.E.2d 234 (1948).

Reference to Document as Will of Deceased.—In a caveat proceeding reference in the court's charge to a paper-writing as the will of the deceased was held not reversible error as an expression of opinion in contravention of this section where it appeared that the court was only following the example set by counsel for caveators in the examination of some of the witnesses, and the jury understood that they were trying a caveat filed to the paper-writing which had been probated in common form as the will of the deceased, and because of the caveat it was then being offered for probate in solemn form. In re Will of McDowell, 230 N.C. 259, 52 S.E.2d 807 (1949).

Reference to Effect on Verdict of Notations on Issues Submitted to Jury.—Although a trial judge should not express an opinion before jurors whom he proposes to poll in regard to the influence written notations on the margin of the issues submitted to the jury may have had on the verdict, such remarks do not come within the ban of this section. Call v. Stroud, 232 N.C. 478, 61 S.E.2d 342 (1950).

Where Defense Not Applicable to Issue.—Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value and a holder in due course of the note sued on was not contradicted, and the maker relied solely on the fraud of the payee in procuring the note, the court properly charged that if the jury believed the evidence, the verdict should be for the bank. First Nat'l Bank v. Griffin, 153 N.C. 72, 68 S.E. 919 (1910).

Gambling Nature of Device.—A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

Comment upon Admission of Confession in Evidence.—The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by this section. State v. Fain, 216 N.C. 157, 4 S.E.2d 319 (1939).

Statement to Jury.—Where the jury has returned for further instructions which the court fairly and impartially gives, his statement to them that they should reconcile the evidence if they could and that if they could not, the court would "have to do something else," is not an intimation as to whether "any fact has been fully and sufficiently proved." Nixon v. Buckeye Cotton Oil Mill, 174 N.C. 730, 94 S.E. 410 (1917).

Comment on Jury's Duty.—Where the jury has failed up to that time to agree upon

a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held, not to be an expression of opinion by the judge upon the evidence. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Question as to Verdict.—The question of the court as to whether the verdict of guilty referred to first degree burglary held to be an inquiry and not an expression of opinion. State v. Walls, 211 N.C. 487, 191 S.E. 232 (1937).

Statement after Verdict Excusing Jurors for Term.—When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, it cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Remark Concerning Recall of Witness.—A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about the facts. DeBerry v. Carolina Cent. R.R., 100 N.C. 310, 6 S.E. 723 (1888).

Question to Counsel.—Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. State v. Brown, 100 N.C. 519, 6 S.E. 568 (1888).

Response to Request of Counsel.—Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. State v. Freeman, 100 N.C. 429, 5 S.E. 921 (1888).

Suggestion of Method of Settlement.—In an action for the purchase price of a horse, defended upon the ground of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and drive the horse sufficiently to see what his condition was, is not an expression of opinion. Long v. Byrd, 169 N.C. 658, 86 S.E. 574 (1915).

Matters Subject to Mathematical Calculation.—Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error under this section. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931).

Opinion on One Count Applies to Others.—Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. State v. Sparks, 184 N.C. 745, 114 S.E. 755 (1922).

Question as to Payment.—In an action upon a contract, the trial judge did not express an opinion in violation of this section when he asked plaintiff's attorney: "What about demand of payment on this? You'd better ask him a question on that." Electro Lift, Inc. v. Miller Equip. Co., 4 N.C. App. 203, 166 S.E.2d 454 (1969).

Statement of judge that he had only stated that part of the evidence as seemed to be necessary to enable him to explain and apply the law did not constitute an expression of opinion but was in strict compliance with this section. State v. Tyson, 242 N.C. 574, 89 S.E.2d 138 (1955).

The court's statement of certain of plaintiff's contentions as set out in the record did not amount to the expression of an opinion as to the credibility of witnesses and weight of the evidence, where a reading of the record discloses that the trial judge stated contentions, not only those made by plaintiffs, but those made by the defendant, and there was nothing in the record and case on appeal to show that the contentions as stated by the judge were not actually made by the respective parties. Higgins v. Beaty, 242 N.C. 479, 88 S.E.2d 80 (1955).

Statement Concerning Benefits to Property Owners from Construction of Highway.—Where the court, in charging the jury on the issue of damages, correctly instructs the jury to deduct general and special benefits accruing to petitioner from

the construction of the highway, and correctly leaves it to the jury to determine the amounts, the fact that the court also states that it is a matter of common knowledge that the building of a highway brings certain benefits to property owners along the highway is insufficient to constitute prejudicial error as an expression of opinion by the court on a fact in issue. Simmons v. North Carolina State Highway & Pub. Works Comm'n, 238 N.C. 532, 78 S.E.2d 308 (1953).

2. Remarks Held Erroneous.

a. Remarks Concerning a Party to the Trial.

Character of Accused.—It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. State v. Henry, 50 N.C. 66 (1857).

Motive.—A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Comment on Absence of Defendants.—Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion forbidden by this section. Greene v. Newsome, 184 N.C. 77, 113 S.E. 569 (1922).

Ordinary Care.—An instruction, that if a porter, injured in getting on a train, could have got on in safety by using both hands, his failure to do so was not the exercise of ordinary care, was erroneous. Sanders v. Atlantic Coast Line R.R., 160 N.C. 526, 76 S.E. 553 (1912).

"Proverbial Slowness of Messenger Boy".—In an action against a telegraph company it is error for the court to refer in its charge to the "proverbial slowness of the messenger boy." Meadows v. Western Union Tel. Co., 131 N.C. 73, 42 S.E. 534 (1902).

Corporation Benefits. — In an action against a corporation the judge recited the benefits conferred by corporations upon the citizens, without mentioning the benefits they received in return, and intimated that he would not permit a verdict rendered upon "guesswork, sympathy, pity, or prejudice," etc., the charge was held to be an expression of opinion. Starling v. Selma Cotton Mills, 171 N.C. 222, 88 S.E. 242 (1916).

Identification of Defendant.—Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant's name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. State v. Allen, 190 N.C. 498, 130 S.E. 163 (1925).

Where the State relied upon testimony that tracks had been followed from the scene of the crime to the defendant's room, but did not prove them to be the defendant's, the expression of the court, "You tracked the defendant to whose house?" was held prejudicial, and especially so as the evidence of the State was circumstantial. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

Remark Concerning Plaintiff as Witness.—In an action of claim and delivery for a horse, an instruction by the trial judge, that in passing upon the credibility of the plaintiff as a witness the jury should consider the fact that he had $50 of the defendant's money in his pocket and refused to give it to him, amounts to an expression of an opinion upon the facts. Faulkner v. King, 130 N.C. 494, 41 S.E. 885 (1902).

Time Plaintiff Would Live.—In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within the inhibition of our statute. Cogdill v. Boice Hardwood Co., 194 N.C. 745, 140 S.E. 732 (1927).

Reference by court to defendants as "three black cats in a white Buick" was prejudicial error affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. State v. Belk, 268 N.C. 320, 150 S.E.2d 481 (1966).

Duty to Find Defendant Guilty of Manslaughter. — The instruction "If you find the defendant, Mr. Hardee, guilty of murder in the second degree, you need not consider whether he is guilty of manslaughter. But if you find him not guilty of murder in the second degree, then it would be your duty to find him guilty of manslaughter, as charged in the bill of in-

dictment," constitutes an expression of opinion by the judge which is prohibited by this section. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Assumption That Defendant Fired Fatal Shot.—In homicide prosecution, instruction which assumed that defendant fired the fatal shot is erroneous as an expression of opinion by the trial court, since defendant's admission that he shot at the deceased and his stipulation that the cause of death resulted from gunshot wounds of the chest do not constitute an admission by defendant that he fired the fatal shot. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

b. Remarks Concerning Witnesses.

Remarks Having Effect of Impeaching Witnesses.—Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants' exceptive assignments of error thereto must be sustained. State v. Winckler, 210 N.C. 556, 187 S.E. 792 (1936).

Remark That Witness Was "Admirably Lucid".—The expression of the opinion of the court as to the "admirably lucid" testimony of a medical expert witness constituted reversible error. State v. Horne, 171 N.C. 787, 88 S.E. 433 (1916).

Comments on Witnesses.—The expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw," is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit. State v. Bryant, 189 N.C. 112, 126 S.E. 107 (1925).

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught," was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. State v. Woolard, 227 N.C. 645, 44 S.E.2d 29 (1947).

In prosecution for having carnal knowledge of female under sixteen years of age the disparagement of the defendant's witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

Questioning Nonresident as to Professional Ethics.—In an action to recover damages for personal injury, where a release from liability is set up, it is an ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own state, of such conduct; which reflected on the witness. Morris v. Kramer Bros. Co., 182 N.C. 87, 108 S.E. 381 (1921).

Witness Included in Same Indictment.—Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. State v. Jenkins, 85 N.C. 544 (1881).

Interest of Witness.—It is error to charge the jury that they are bound to believe a witness who is unimpeached and uncontradicted. Though he tells a credible story, his connection with the parties may shake the jury's confidence. Noland v. McCracken, 18 N.C. 594 (1936).

Minister as Witness. — Where a judge charged that, because a witness was clergyman, his testimony was therefore entitled to more weight, it is sufficient ground for a new trial. Sneed v. Creath, 8 N.C. 309 (1821).

Statement That "Both Witnesses Are Gentlemen". — For the judge, where the testimony of two witnesses conflicted, to tell the jury: "Both witnesses are gentlemen. It is a matter of memory"—was erroneous, as interfering with the province of the jury to determine the credibility. McRae v. Lawrence, 75 N.C. 289 (1876).

Endorsing Veracity of Witness. — The court, after interrogating a witness in regard to his knowledge of the signature of the decedent, at issue in the case, stated that as far as the court was concerned the witness knew decedent's signature. It was held that the endorsement of the veracity of the witness by the court constitutes prejudicial error. In re Will of Holcomb, 244 N.C. 391, 93 S.E.2d 454 (1956).

Instruction That Arresting Officer Had No Personal Interest or Bias.—In a prosecution for driving while under the in-

fluence of intoxicating liquor, an instruction to the jury, based on a contention by the State, that the police officer who apprehended defendant had no personal interest in the case or bias toward defendant and that the officer's only interest was in seeing that the law was complied with and in protecting innocent people operating their automobiles on the highway, was a prohibited expression of opinion by the court, and its repetition by the judge, even though stated as a contention, gave it an emphasis that would weigh too heavily upon the defendant. State v. Maready, 269 N.C. 750, 153 S.E.2d 483 (1967).

Characterizing Witness as "of Perhaps Weak Mentality".—This section prohibits the judge from expressing an opinion that "plaintiff offered the testimony of (naming the witness), a young lady of perhaps weak mentality." Burkey v. Kornegay, 261 N.C. 513, 135 S.E.2d 204 (1964).

Questioning of witness by judge, going beyond an effort to obtain a proper understanding and clarification of the witness's testimony, held to have conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. State v. McRae, 240 N.C. 334, 82 S.E.2d 67 (1954).

c. Remarks Concerning Weight and Credibility of Testimony.

Contentions of the Parties.—The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section, and where court in stating State's contentions in regard to the disinterestedness of officers who testified and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" was held error as an expression of opinion by court upon weight of the evidence. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

Remarks as to Testimony of Officer.—Where an officer purchased liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution, an instruction which left the impression that his credibility was enhanced by the fact that he was an officer in the performance of his duty, and that he was protected from prosecution by § 18-8, was held erroneous as an expression of opinion on the credibility of the testimony. State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948).

Remark That Circumstance Was a "Strong Badge of Fraud".—Where a creditor postponed taking judgment because the debtor alleged that he was making arrangements to borrow the money, but before the expiration of the extended time the debtor made an assignment, preferring other creditors, an instruction that the circumstance was a strong badge of fraud was held to be error. Bonner v. Hodges, 111 N.C. 66, 15 S.E. 881 (1892).

Instruction as to Former Marriage.—In an indictment for bigamy an instruction that the weight of the evidence was that there had been no first marriage, is a violation of this section. State v. Parker, 106 N.C. 711, 11 S.E. 517 (1890).

Determination of Preponderance.—A request in a civil action that, "when the minds of the jury are in doubt, they must find for the defendant," is error. Willis v. Atlantic & D.R.R., 122 N.C. 905, 29 S.E. 941 (1898).

Instruction That Evidence Rebuts a Prima Facie Case. — When the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates this section. Sherrill v. Western Union Tel. Co., 116 N.C. 655, 21 S.E. 429 (1895).

Instruction That Guilt is Established.—This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury. State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941).

Statement That Evidence Left Matter Unproved.—Where the judge presiding at a trial said that, while there was some evidence to go to the jury, it was a bare scintilla, leaving the matter not proved, it was held error. The evidence was competent or it was not and should have been withdrawn from the jury or submitted without expression of opinion. Boing v. Raleigh & G.R.R., 87 N.C. 360 (1882).

Concerning Corroboration of Defendant's Testimony.—Where the defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased and where upon the conclusion of his testimony the court by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom, the charge of the court which

set forth as the contention of the State that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the courtroom was held to constitute reversible error. State v. Bean, 211 N.C. 59, 188 S.E. 610 (1936).

Concerning Value of Book as Testimony.—For the judge to say that a book on farriery, which had been read by counsel, was entitled to as much authority as a witness who had been examined as an expert in the science of diseases of horses, is a clear violation of this section. Melvin v. Easley, 46 N.C. 386, 62 Am. Dec. 171 (1854).

Concerning Map.—Where a certain location is material and a surveyor had testified and his map was put in evidence, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses. Swain v. Clemons, 172 N.C. 277, 90 S.E. 193 (1916).

Concerning Location and Acreage.—The weight of the circumstance that one claimed location would give the acreage called for by the deed, while the other would give a greater acreage, being for the jury, it was error to charge that the acreage was not of great value to aid the jury in determining the location. May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

Instruction as to Value of Deed.—In an action for ejectment it was error to instruct the jury that the deed was sufficient to vest the title in the grantees, where plaintiff's right to recover was dependent upon evidence that the defendant's grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905).

Instruction as to Age of Prosecutrix.—Where in prosecution under § 14-26, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age," the instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by this section, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age, if they believed the uncontradicted testimony. State v. Wyont, 218 N.C. 505, 11 S.E.2d 473 (1940).

Where the charge on the issue of testamentary capacity, read from the text book, is that where the testator's sickness is wholly physical, proof of his condition as to lethargy, unconsciousness, etc., "is entitled to little consideration," and that the courts will "scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error under this section. In re Will of Bergeron, 196 N.C. 649, 146 S.E. 571 (1929).

Court's inadvertent comment that defendant's testimony was incredible and therefore defendant should not be considered a credible witness was a violation of this section. State v. Hopson, 265 N.C. 341, 144 S.E.2d 32 (1965).

Characterizing Statutory Inference as "Deep Presumption". — In characterizing the permissible inference raised by § 18-11 as "a deep presumption," the trial judge expressed an opinion as to the strength of the evidence. Such an expression is prohibited by this section. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Charge of Court Amounting to Erroneous Appraisal and Evaluation of Opinion Testimony.—See In re Will of Tatum, 233 N.C. 723, 65 S.E.2d 351 (1951).

d. Miscellaneous Remarks.

Instruction Not Based on All Elements.—An instruction which states that, if the jury find certain facts grouped in the instruction, there was no negligence, is objectionable, unless all the material elements of the case are included. Ruffin v. Atlantic & N.C.R.R., 142 N.C. 120, 55 S.E. 86 (1906).

Inference from Evidence. — An instruction charging the jury that, if they believed the evidence, they should find certain evidential facts to be true and that thereupon, certain other facts must be true, is error. Kinney v. North Carolina R.R., 122 N.C. 961, 30 S.E. 313 (1898).

Instruction as to Uncorroborated Testimony in Perjury Trial.—While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as

failing to comply with this section. State v. Hill, 223 N.C. 711, 28 S.E.2d 100 (1943).

Charge Based on Contradicted Witness. —It is error in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. State v. Rogers, 93 N.C. 523 (1885).

On Conflicting Evidence. — Where the evidence was conflicting, an instruction, "if the jury believe the evidence, the answer to the first issue should be no," is a violation of this section. Leak v. Covington, 99 N.C. 559, 6 S.E. 241 (1888); Rickert v. Southern Ry., 123 N.C. 255, 31 S.E. 497 (1898).

Where the case is tried upon special issues, an instruction that plaintiffs are not entitled to recover if the jury believe the evidence is improper. Baker v. Brem, 103 N.C. 72, 9 S.E. 629 (1889); Jones v. Balsley, 154 N.C. 61, 69 S.E. 827 (1910). See Cauley v. Dunn, 167 N.C. 32, 83 S.E. 16 (1914).

Assumption of Conflicting Fact.—Where defendant railway claimed that decedent found on its tracks was already dead when struck by the train, and the evidence on this point was in sharp conflict, an instruction which assumed that decedent was killed by the train was erroneous under this section. Hunsinger v. Carolina, C. & O. Ry., 194 N.C. 679, 140 S.E. 608 (1927).

Remark That "We Are Not Informed". —Where there is any evidence to the contrary, it is erroneous in the judge to say, "We are not informed" of the fact upon which it is for the jury to pass. Powell v. Wilmington & W.R.R., 68 N.C. 395 (1873).

Degree of Crime.—Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895).

When No Presumption at Law.—A trial judge cannot say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. National Bank v. Gilmer, 116 N.C. 684, 22 S.E. 2 (1895).

Arguing Law to Jury. — For the judge to charge that a case cited by counsel for plaintiff, and relied on to establish his position, was an authority directly against that position, and that counsel knew or ought to have known it, was held to be error. Perry v. Perry, 144 N.C. 328, 57 S.E. 1 (1907).

Trial for Attempted Rape.—On a trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six-year-old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" State v. Dancy, 78 N.C. 437 (1876).

Insurance.—A requested charge that, if insured was more than 55 years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, was properly refused as an expression of opinion upon the facts. Tillery v. Royal Benefit Soc'y, 165 N.C. 262, 80 S.E. 1068 (1914).

Regarding Duty of Railroad to Build Culvert.—It was held error in a trial judge to instruct the jury that it was the duty of a railroad company to build a culvert over a certain ravine, and it was also held error to express the opinion that the said branch, regarding which there was conflicting evidence, was not a natural watercourse. Fleming v. Wilmington & W.R.R., 115 N.C. 676, 20 S.E. 714 (1894).

Effect of Easement on Adjoining Land. —In a proceeding to assess compensation for the taking of an easement over respondent's land for a high voltage transmission line, where the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land outside the easement, it was held that the remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of this section. Nantahala Power & Light Co. v. Carringer, 220 N.C. 57, 16 S.E.2d 453 (1941).

Validity of Lien.—In an action involving the validity of a lien on certain crops, an instruction that the lien is void, because it was recorded in one county, while the debtor resided in another, involves an expression of opinion as to the facts of the case. Weisenfield v. McLean, 96 N.C. 248, 2 S.E. 56 (1887).

Bills and Notes.—In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the evidence they should find that the payee knew that defendant signed as a surety. Harris v. Carrington, 115 N.C. 187, 20 S.E. 452 (1894).

Title to Land. — Plaintiffs and defendant claimed the locus under respective State grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the locus. The court held that an instruction that by the two grants introduced in evidence title had been shown out of the State, must be held for error as an expression of opinion that the grant under which plaintiffs' claim was valid and that it had been located to cover the land in question. Davis v. Morgan, 228 N.C. 78, 44 S.E.2d 593 (1947).

Value of Property. — In an action for damages plaintiff testified that the property destroyed was worth a specified sum, and defendant introduced as a witness the tax lister who testified that plaintiff stated that a much lower valuation was too high for purposes of taxation, it was held, that instructions that the jury had the uncontradicted evidence of plaintiff as to the value of the property destroyed was erroneous, as withdrawing from the consideration of the jury the testimony of the tax lister. Dodson v. Southern Ry., 132 N.C. 900, 44 S.E. 593 (1903).

Reference to Hospital Bill. — In Cummings v. Queen City Coach Co., 220 N.C. 521, 17 S.E.2d 662 (1941), the trial judge committed prejudicial error by referring to a hospital bill for $118.00 in the charge to the jury when there was no evidence in the record of any such bill. Kuyrkendall v. Clark's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

Statement as to Violation of Statute.— In prosecution charging resisting lawful arrest in violation of § 14-223, statement of the trial court during the instructions that "the offense charged here was committed in violation of § 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Remarks Made in Interrogating Prospective Jurors as to Scruples against Capital Punishment.—Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions the jurors that he did not mean to compare the case at issue with the other cases. State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954).

Regarding Duty to Furnish Additional Help. — The crucial question in this case was whether an employer was negligent in failing to provide an employee with additional help to perform the task which the employee was assigned to do alone. An instruction that if more than one person is required for the safe performance of a certain duty, "such as the one in question in this case," was held prejudicial error as an expression of opinion that the job in question required more than one man for its safe performance. Miller v. Norfolk S. Ry., 240 N.C. 617, 83 S.E.2d 533 (1954).

An instruction utilizing the expression "the defense of drunkenness is one which is dangerous in its application" is clearly an expression of opinion by a judge in giving a charge to a petit jury, which is prohibited by this section. State v. Oakes, 249 N.C. 282, 106 S.E.2d 206 (1958).

Instructions in Prosecutions for Driving under Influence of Intoxicating Liquors Held Prejudicial Where Defendant Stated to Be Driver. — See State v. Swaringen, 249 N.C. 38, 105 S.E.2d 99 (1958).

Instruction as to Result of Failure to Convict.—In a prosecution for driving a vehicle on a public highway while under the influence of intoxicating liquor, an instruction to the effect that the State contended the statute was enacted to protect life and property and if the jury should fail to "convict on this evidence, then the law or statute commonly referred to as 'the drunken driving' statute, would have no purpose and no effect" was held prejudicial as an expression of opinion by the court on the evidence. State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964).

In a prosecution for violations of the liquor laws the court, in explaining its ruling admitted testimony of a witness that he saw intimacies between girls and men on the occasion he purchased liquor at defendant's house, stated that "they both go hand in hand." The statement of the court was held prejudicial as intimating that evidence of the intimacy of the girls and men was direct proof of liquor dealings by defendant. State v. Williamson, 250 N.C. 204, 108 S.E.2d 443 (1959).

Quotations on Nagging Women in Divorce Action.—Where the court, charging the jury in a divorce action upon the nagging of a wife as constituting such indignity to the husband as to warrant a divorce a mensa et thoro, quoted a picturesque philippic on nagging and ended with a quotation from Proverbs on the difficulty of living with a brawling woman, the instruction, which must have been under-

stood by the jury as a description of the wife's behavior, violated this section and constituted prejudicial error. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

For cases involving prejudicial comment, see Belk v. Schweizer, 268 N.C. 50, 149 S.E.2d 565 (1966).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

Editor's Note. — When the Supreme Court in Hinshaw v. Raleigh & A. Air Line R.R., 118 N.C. 1047, 24 S.E. 426 (1896), overruled Emry v. Raleigh & G.R.R., 109 N.C. 589, 14 S.E. 352 (1891), and modified the broad rule laid down in State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889), in a series of adjudications that followed it, it was not intended that the jury should be left to grope in utter darkness, unless counsel were sufficiently diligent to draw fire from the court by prayers for instruction. McCracken v. Smathers, 119 N.C. 617, 26 S.E. 157 (1896).

The Object of Instructions.—The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Bird v. United States, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570 (1901). See State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict, and this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957); Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966); Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

One of the most important purposes of the charge is the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and to thereby let the jury understand and appreciate the precise facts that are material and determinative. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A prime purpose of the charge is to eliminate irrelevant matter or allegations not supported by evidence so that the jury may understand and appreciate the precise facts that are material and determinative. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

The purposes of the court's charge to the jury are the clarification of the issues, the elimination of extraneous matters, and the declaration and explanation of the law arising on the evidence in the case. North Carolina State Highway Comm'n v. Thomas, 2 N.C. App. 679, 163 S.E.2d 649 (1968).

A charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953); Finch v. Ward, 238 N.C. 290, 77 S.E.2d 661 (1953); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Instructions Must Be Sufficiently Definite.—It is incumbent upon the trial judge to give the jury sufficiently definite instructions to guide them to an intelligent determination of the question. Kuyrkendall v. Clark's Disct. Dept. Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

But the trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Thacker, 5 N.C. App. 197, 267 S.E.2d 879 (1969).

Benefits to Be Derived from Charge.—The principal benefit to be derived from a charge to the jury is not a statement of law but the elimination of irrelevant matters. Irvin v. Southern Ry., 164 N.C. 5, 80 S.E. 78 (1913).

Theory as to Evidence. — Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a proper application of this section. Under our system the trial court, during the production of the evidence, must necessarily proceed upon the theory that the jury has a right to find as true all the evidence submitted by either party. Hunt v. Eure, 189 N.C. 482, 127 S.E. 593 (1925).

Charge Must Be Considered as a Whole.—The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so considered, it presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. Gilliland v. Board of Educ., 141 N.C. 482, 54 S.E. 413 (1906); In re Will of Hardee, 187 N.C. 381, 121 S.E. 667 (1924).

The charge must be considered contextually and not disjointedly. Riverview Milling Co. v. State Highway Comm'n, 190 N.C. 692, 130 S.E. 724 (1925).

In determining whether a charge comes up to the statutory requirements it must be considered as a whole. Gore v. City of Wilmington, 194 N.C. 450, 140 S.E. 71 (1927). See State v. Moore, 197 N.C. 196, 148 S.E. 29 (1929).

The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge this section, it will not be held for error on appeal. Harrison v. Metropolitan Life Ins. Co., 207 N.C. 487, 177 S.E. 423 (1934).

Where it appears that the charge, when read contextually as a whole, was not prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions thereof, will not be sustained. Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936).

When the charge of the trial court was considered contextually as a whole, as the appellate court is required to do, it was held to be clear that the trial judge declared and explained the law arising on all phases of the evidence. Nance v. Long, 250 N.C. 96, 107 S.E.2d 926 (1959).

A charge is not subject to the objection that the court failed to explain the law on a particular aspect of the case when the charge, considered contextually and in connection with an immediately prior instruction upon a related aspect, adequately states the evidence to the extent necessary to explain the application of the law upon the aspect in question. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expressed the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the nisi prius judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto. Jackson v. Jones, 2 N.C. App. 441, 163 S.E.2d 31 (1968).

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since it cannot be known which instruction was followed by the jury. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Charge Failing to Submit an Essential Element of Offense. — Where defendant testifies that he drove a vehicle on the highways of the State on the afternoon in question, then drank some wine and whiskey and became drunk about midafternoon, but denies that he drove a vehicle after becoming intoxicated, a charge to the effect that defendant admitted that he was drunk and that the only question for the jury was whether he drove his vehicle at any time on the afternoon in question, must be held for prejudicial error in failing to submit to the jury the essential element of the offense of whether defendant, while intoxicated, drove on a highway of the State, and in charging that an essential element of the offense had been fully or sufficiently proven when defendant's testimony was not sufficiently broad or comprehensive to constitute an admission of this fact. State v. Hairr, 244 N.C. 506, 94 S.E.2d 472 (1956).

Charge on Matters Not Raised in Pleadings or Supported by Evidence Is Erroneous.—It is error for the judge to charge the jury as to matters materially affecting the issues but not raised in the pleadings or supported by the evidence in the case.

Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963).

Charges Held Not to Impinge on This Section.—See State v. Hester, 209 N.C. 99, 182 S.E. 738 (1935); State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936); State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Matters Stricken from Complaint.—Requested instructions as to matters stricken from the complaint as to which the evidence had been withdrawn from the jury should be refused. Tilghman v. Seaboard Air Line Ry., 167 N.C. 163, 83 S.E. 315 (1914).

Application of Instructions to Case.—It is not error for the court to refuse to give instructions which, though correct in the abstract, are not applicable to the case. McMillan v. Baxley, 112 N.C. 578, 16 S.E. 845 (1893).

The refusal to instruct as to a point not material to the verdict is not prejudicial error. Mendenhall v. North Carolina R.R., 123 N.C. 275, 31 S.E. 480 (1898).

However, the giving of an instruction not strictly applicable to the material questions to be determined is not ground for reversal, where no prejudice is shown and it appears the jury could not have been misled thereby. Evans v. Howell, 84 N.C. 461 (1881).

Arguments of Counsel.—It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence on the issues. Clark v. Wilmington & W.R.R., 109 N.C. 430, 14 S.E. 43, 14 L.R.A. 749 (1891).

Unauthorized Charge. — A judge cannot make a charge not authorized by the pleadings. Thus in an action for a debt barred by the statute of limitation, where the statute is not pleaded, the judge cannot charge that the debt is barred although requested to make such a charge. Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891).

Inconsistent or Contradictory Instructions. — An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is error. Patterson v. Nichols, 157 N.C. 406, 73 S.E. 202 (1911); Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913). See Oakley v. National Cas. Co., 217 N.C. 150, 7 S.E.2d 495 (1940).

Erroneous Instruction Not Cured by Correct Instruction. — An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

When Charge Contains a "Powerful Summing up".—Where the trial judge in his general charge gives "every reasonable contention of the State," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the State. State v. McDowell, 129 N.C. 523, 39 S.E. 840 (1901).

The use of the words "you want to find" in charging the jury as to the elements of the offense charged, construing the charge as a whole, merely placed the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942).

The use of the words "the State has offered evidence which tends to show" in a charge to the jury does not constitute an expression of opinion in violation of this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Contentions Not Necessarily a Part of Instructions.—The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. State v. Whaley, 191 N.C. 387, 132 S.E. 6 (1926).

A statement of contentions by the judge is not required. State v. Watson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Taking More Time in Stating State's Contentions.—That the court necessarily takes more time in stating the State's contentions than in stating the defendant's contentions is not ground for objection. State v. Sparrow, 244 N.C. 81, 92 S.E.2d 484 (1956).

The equal stress which this section requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

In a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962).

Requiring Jury to Be Satisfied.—An instruction requiring the jury to be "satisfied" as to the facts of justification relied on to defeat an action for false arrest and imprisonment does not require too great a degree of proof to establish justification. Sigmon v. Shell, 165 N.C. 582, 81 S.E. 739 (1914).

Weight of Defendant's Testimony.—The testimony of defendant if accepted as true

by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924).

Instructions Should Be Restricted to Answers Expected. — Where the case is submitted for a special verdict, the jury should only be instructed on questions which they are to answer, and it is error to inform them as to the effect their answers will have on the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion. Bottoms v. Seaboard & R.R.R., 109 N.C. 72, 13 S.E. 738 (1891); Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904).

Defendants cannot complain that the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court correctly applies the law of negligence and contributory negligence to the facts of the case. Blackwell v. Lynchburg & D.R.R., 111 N.C. 151, 16 S.E. 12, 17 L.R.A. 729, 32 Am. St. R. 786 (1892).

Where Charge Favorable to Appellant. —The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. State v. Pritchett, 106 N.C. 667, 11 S.E. 357 (1890).

Requests for Instructions Must Be Timely. — A party desiring more specific instructions than those given in the general charge must ask for them in apt time. A complaint of the charge, made after verdict, is too late. Simmons v. Davenport, 140 N.C. 407, 53 S.E. 225 (1906). See State v. Brady, 107 N.C. 822, 12 S.E. 325 (1890).

Where the charge presents all substantive phases of the law arising upon the evidence, a party desiring instructions upon a subordinate feature must aptly tender a request therefor. Hennis Freight Lines v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957).

Presumption That Court Correctly Instructed Jury.—When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. State v. Sears, 235 N.C. 623, 70 S.E.2d 907 (1952); State v. Faison, 246 N.C. 121, 97 S.E.2d 447 (1957).

Appellant Must Show Error and Prejudice.—The burden is upon the appellant not only to show error in the action of the court concerning instructions but also to make it appear that the result was materially affected thereby to his hurt. And while the form and manner in which the instructions were given may be open to criticism, the appellate court will not intervene unless the appellant was prejudiced thereby. Garland v. Penegar, 235 N.C. 517, 70 S.E.2d 486 (1952).

Broadside Exception Untenable.—An exception that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence" is untenable as a broadside exception. State v. Triplett, 237 N.C. 604, 75 S.E.2d 517 (1953).

Assignment of error that the judge failed "to explain and apply or correlate the law and highway safety statutes to the different phases of the evidence as provided in § 1-180" is too general and indefinite to present any question for decision. Unpointed, broadside exceptions will not be considered. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

An argument in an appellate brief that the court failed to charge "as to the contentions of the defendant in accordance with § 1-180" is a broadside exception which is not sufficient. State v. McCaskill, 270 N.C. 788, 154 S.E.2d 907 (1967).

Exception Must Be Specific.—An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by this section may be disregarded as a broadside exception. State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising thereon as required by this section is ineffective as a "broadside" exception, it being necessary that an exception to the charge specifically refer to the particular point claimed to be erroneous. Arnold v. State Bank & Trust Co., 218 N. C. 433, 11 S.E.2d 307 (1940).

An exception that the trial judge "failed to state in a plain and correct manner the evidence, and declare and explain the law arising thereon as required in this section," is too general and cannot be sustained. Jackson v. Ayden Lumber Co., 158 N.C. 317, 74 S.E. 350 (1912). See Baird

v. Baird, 223 N.C. 729, 28 S.E.2d 225 (1943).

Objection to a charge for not complying with this section must state specifically how the charge failed to measure up to the requirements of this section. Steele v. Coxe, 225 N.C. 726, 36 S.E.2d 288 (1945).

And Based on Proper Assignment of Error.—An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949).

Exception and Assignment of Error. — An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945).

The Supreme Court will not go "on a voyage of discovery" to ascertain wherein the judge failed to explain adequately the law in the case. State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963).

Specific Prayers for Instruction.—When the charge is in substantial compliance with the requirements of this section, if a party desires further elaboration or explanation, he must tender specific prayers for instruction. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Errors Should Be Pointed Out before Verdict.—Any omission to state the evidence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight. Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944).

Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946).

Objections to the statement of contentions should be brought to the trial judge's attention in order that a misstatement can be corrected by the trial judge before verdict; otherwise they are deemed to have been waived. State v. Wilson, 1 N.C. App. 250, 161 S.E.2d 159 (1968).

Error Cured by Verdict—Where there are several counts of an indictment, and the charge was correct upon those on which a conviction has been had, the verdict cures the error committed in not giving the principles of law arising from the evidence upon the count which the appealing defendant was acquitted. State v. Church, 192 N.C. 658, 135 S.E. 769 (1926).

Same—Failure to Call Judge's Attention to Error.—The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so, as an exception after verdict comes too late to be considered on appeal. State v. Beavers, 188 N.C. 595, 125 S.E. 258 (1924); State v. Harvey, 214 N.C. 9, 197 S.E. 620 (1938); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938).

Evidence towards Which Instruction Directed Must Appear. — The law requires the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The function of the appellate court on review is to determine whether this has been adequately done, and it cannot perform that office in the absence of the evidence toward which the instruction was directed. Shepherd v. Dollar, 229 N.C. 736, 51 S.E.2d 311 (1949).

Where Record Shows Charge Was Correct and No Objection Made.—Where it was stipulated in the record that the court correctly charged the jury on all phases of the case in compliance with this section, and the issues submitted were not objected to by defendants, it was held that the verdict of the jury must be upheld. Ward v. Smith, 223 N.C. 141, 25 S.E.2d 463 (1943).

Assignment of Error Held Insufficient.—See Price v. Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951).

B. Explanation Required.

I. In General.

Rule Stated.—It is the duty of the court to state the evidence "to the extent necessary" and to declare and explain the law as it relates to the pertinent aspects of the testimony offered. Chambers v. Allen, 233 N.C. 195, 63 S.E.2d 212 (1951); Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

The chief object contemplated in this section is for the court to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issued involved. Stern Fish Co. v. Snowden, 233 N.C. 269, 63 S.E.2d 557 (1951).

It is the duty of the judge, under the

provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. State v. Owenby, 226 N.C. 521, 39 S.E.2d 378 (1946).

It is the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. State v. Rogers, 93 N.C. 523 (1885), citing State v. Dunlop, 65 N.C. 288 (1871); State v. Jones, 87 N.C. 547 (1882). See Guyes v. Council, 213 N.C. 654, 197 S.E. 121 (1938); State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943).

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be a true one. State v. Matthews, 78 N.C. 523 (1878).

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. State v. Fulford, 124 N.C. 798, 32 S.E. 377 (1899).

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. State v. Graham, 194 N.C. 459, 140 S.E. 26 (1927). See State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to instruct the jury as to the application of the law to the substantial features of the case, the charge is insufficient to meet the requirements of this section and a new trial will be awarded. Commissioner of Banks v. Florence Mills, 202 N.C. 509, 163 S.E. 598 (1932).

In criminal causes under this section, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. He should state in a plain and correct manner the evidence in the case and explain the law arising thereon, and a failure to do so, when properly presented, shall be held for error. Mebane Graded School Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937), citing State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916). See McNeill v. McNeill, 223 N.C. 178, 25 S.E.2d 615 (1943).

Where evidence is in the record defendant is entitled to have the law arising thereon explained and applied by the judge. State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942).

It is the duty of the court to explain the law and apply it to the testimony in the case. Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949).

It is the duty of the trial court to apply the law to all substantial features of the case arising on the evidence. Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957); Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959).

This section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all substantial features of the case. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

The statute requires the judge to point out the essentials to be proved on the one side or the other, and to bring into focus the relations of the different phases of the evidence to the particular issues involved. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966). See Western Conference of Original Free Will Baptists v. Miles, 259 N.C. 1, 129 S.E.2d 600 (1963).

This section is complied with where the court fully instructs the jury as to the evidence and the contentions of the parties and defines the law applicable thereto. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

It is the duty of the court to state the evidence "to the extent necessary to explain the application of the law" arising thereon. In criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954). See State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

A statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient to meet the requirements of the provi-

sions of this section. It is imperative that the law be declared, explained, and applied to the evidence bearing on the substantial and essential features of the case. Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953).

Under this section, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959); Lester Bros. v. J.M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The duty of a trial judge with respect to instructions to jurors is that "he shall declare and explain the law arising on the evidence." Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

The court is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof. When its recital of the evidence does not correctly reflect the testimony of the witness in any particular respect, it is the duty of the counsel to call attention thereto and request a correction. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

This section requires the trial judge to apply the law to the various factual situations presented by the conflicting evidence, thus where defendant's testimony, if the jury found it to be true, would entitle him to a verdict of not guilty, he was entitled to have the legal effect of his evidence explained to them. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Where the court failed to explain and declare the law arising on the evidence presented by the defendant, this constituted prejudicial error. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969).

The judge may not escape the duty imposed upon him by this section, either by specific waiver of the parties or by attempting to place the burden upon counsel to make such a request. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The parties are not required to make a request that the judge comply with the provisions of this section. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Discretion of the Court.—The manner in which the trial judge shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. Van Gelder Yarn Co. v. Mauney, 228 N.C. 99, 44 S.E.2d 601 (1947).

In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1935).

Scope of Instruction.—The court should instruct the jury on all the issues presented by the pleadings and the evidence. Patterson v. North Carolina Lumber Co., 145 N.C. 42, 58 S.E. 437 (1907).

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it is error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. Bowen v. Schnibben, 184 N.C. 248, 114 S.E. 170 (1922).

Where Facts Are Simple.—The section does not require the judge to charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute. Duckworth v. Orr, 126 N.C. 674, 36 S.E. 150 (1900), citing State v. Grady, 83 N.C. 643 (1880); State v. Reynolds, 87 N.C. 544 (1882); Holly v. Holly, 94 N.C. 96 (1886).

Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear

to have misled the jury, the error in this respect will not be held as reversible. Craig v. Stewart, 163 N.C. 531, 79 S.E. 1100 (1913).

Compliance Necessary to Assure Verdict under Law and on Evidence.—Unless the mandatory provision of this section is complied with, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

Contention of Parties. — It is not required by this section, or other statute, that the contentions of the litigants be stated at all although it is found to be a convenient method of integrating and presenting to the jury the subjects for consideration; and there is no rule making it mandatory. When, however, the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant. In re Will of West, 227 N.C. 204, 41 S.E.2d 838 (1947).

Although it is not required by this section that the trial judge should state the contentions of the parties to the jury, the practice has grown up in North Carolina courts as a helpful and accepted procedure, and a fair statement of the contentions of a party will not be held for error upon exception. Rocky Mount Sav. & Trust Co. v. Aetna Life Ins. Co., 204 N.C. 282, 167 S.E. 854 (1933).

It is error simply to state the contentions of the parties, both as to the facts and as to the law and not declare and explain the law applicable to the facts as the jury might find them from the evidence. Nichols v. Champion Fibre Co., 190 N.C. 1, 128 S.E. 471 (1925); Parker v. Thomas, 192 N.C. 798, 136 S.E. 118 (1926). See Fowler v. Champion Fibre Co., 191 N.C. 42, 131 S.E. 380 (1926).

Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. State v. Wilcox, 213 N.C. 665, 197 S.E. 156 (1938).

A trial judge is not required by law to state the contentions of litigants to the jury. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); In re Will of Wilson, 258 N.C. 310, 128 S.E.2d 601 (1962); Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964); Key v. Merritt-Holland Welding Supplies, 273 N.C. 609, 160 S.E.2d 687 (1968).

Where court gave the State's contentions on every phase of the testimony at great length and in detail, but gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all, the pertinent contentions arising from the defendant's evidence were not given as required by the provisions of this section. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Whether a case on appeal discloses that the trial judge devoted more words, as shown by the number of printed lines, in stating contentions of plaintiff than in stating those of defendants, is not the test. It is a question whether the judge gives "equal stress" to the contentions of the plaintiff and of the defendant. Edgewood Knoll Apts., Inc. v. Braswell, 239 N.C. 560, 80 S.E.2d 653 (1954).

The equal stress, which this section requires be given to the contentions of the plaintiff and defendant in a civil action, does not mean that the statement of contentions of the respective parties must be equal in length. For instance, in a trial where the evidence of one party is very short, or he may have chosen not to introduce any evidence at all, his contentions will naturally be very few in contrast with the other party who may have introduced a great volume of testimony. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954).

An exception by the defendant charging that the judge gave unequal stress to the contentions of the State and the defendant, where the defendant offered no evidence, was held to be unfounded. State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953).

Where the judge in his charge stated that it had taken longer to give a summary of the State's evidence than the defendants' but the jury were to attach no significance to that, and he gave equal stress to the contentions of the State and of the defendants, this was held not error. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Where the evidence of each party is approximately equal, a charge of the court which states the contentions of one party in grossly disproportionate length must be held for prejudicial error. Pressley v. Godfrey, 263 N.C. 82, 138 S.E.2d 770 (1964).

Where the court stated fully the contentions of the State but stated no contentions of defendant, the charge does not

meet the requirement of this section as interpreted and applied in our decisions. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

The trial judge failed to comply with the provisions of this section in that, after stating fully the contentions of the State, he failed to give equal stress to the contentions of defendant, and particularly to his contention that the State's evidence did not show any felonious intent to commit larceny. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

Failure of the court to state the contention of defendant that the State's evidence completely failed to show that he had a felonious intent to commit larceny was highly prejudicial to defendant. State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964).

A charge gave proper balance to the contentions of the parties, although it was somewhat out of the ordinary in that, instead of reciting the evidence and applying the law thereto, the court interlaced and combined into one fabric the ultimate facts which, according to the contention of each party, the evidence established, and then applied the law thereto. Davis v. Parnell, 262 N.C. 616, 138 S.E.2d 285 (1964).

Where the court gives the contentions of the State and then states that it does not know what defendant contends, the instructions must be held prejudicial as contravening this section. State v. Robbins, 243 N.C. 161, 90 S.E.2d 322 (1955).

Explanation of Subordinate Features of Case.—The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. State v. Ellis, 203 N.C. 836, 167 S.E. 67 (1933).

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure. And where this is not done, objection may not be raised for the first time after trial. Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955); State v. Davis, 246 N.C. 73, 97 S.E.2d 444 (1957).

The court is not required to instruct on subordinate features of the case without a proper request therefor. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

Duty Cannot Be Omitted.—The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. State v. Clark, 134 N.C. 698, 47 S.E. 36 (1904).

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case. Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955).

An instruction does not constitute an adequate charge on contributory negligence where, in essence, it is a statement of the contentions of the parties with respect thereto and not a declaration and explanation of the law arising on the applicable evidence as contemplated by this section. Dixon v. Wiley, 242 N.C. 117, 86 S.E.2d 784 (1955).

Failure to Charge on Concurring Negligence.—See Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955).

Failure to Instruct as to Corporate Liability.—The liability of a corporate defendant arising through the agency of a servant is a substantive feature of law arising on the evidence, and is not a simple or self-explanatory principle of law, and the failure of the court to instruct the jury, as required by this section, constitutes reversible error. Robinson v. Standard Transp. Co., 214 N.C. 489, 199 S.E. 725 (1938).

Where in an action against a corporate and an individual defendant the trial court charged the jury as although the corporate defendant was the sole party sued, it was held that the individual defendant is entitled to a new trial for failure of the charge to declare and explain the law arising upon the evidence as it related individually to him and involving his contentions. Robinson v. Standard Transp. Co., 214 N.C. 489, 199 S.E. 725 (1938).

Salutation of Instruction. — The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." State v. Green, 134 N.C. 658, 46 S.E. 761 (1904); State v. Seaboard Air Line R.R., 145 N.C. 570, 59 S.E. 1048 (1907).

But where instructions consisting of several clauses contain at the beginning the words, "If the jury find from the evidence," it is not necessary to repeat such words in each clause. Wilkie v. Raleigh & C.F.R.R., 127 N.C. 203, 37 S.E. 204 (1900), rehearing in 128 N.C. 113, 38 S.E. 289 (1901).

2. Statement of Evidence.

In General. — Under this section the judge is not required to state the evidence given in the case "except to the extent necessary to explain the application of the law thereto." Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

The court is required to state the evidence to the extent necessary to explain the law applicable thereto and to give equal stress to the respective contentions of the parties. Martin Flying Serv. v. Martin, 233 N.C. 17, 62 S.E.2d 528 (1950).

All that is required of a charge by this section is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932); In re Beale, 202 N.C. 618, 163 S.E. 684 (1932).

By virtue of this section where the charge of a trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded. Myers v. Foreman, 202 N.C. 246, 162 S.E. 549 (1932).

A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

This section requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

The trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

This section requires a statement of the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

In reviewing the evidence, the trial court is not required to give a verbatim recital of the testimony, but only to the extent necessary to explain the application of the law thereto. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Duty of Counsel to Request Correction. —If the trial court's statement of the evidence in condensed form does not correctly reflect the testimony of the witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

When Facts Are Simple. — This section sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law, though the decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949).

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1930).

Failure to charge the jury as to the degree of circumstantial proof required to convict is not error, charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946).

Repetition of Testimony Insufficient. — This duty is not performed by simply repeating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. State v. Boyle, 104 N.C. 800, 10 S.E. 696 (1889).

Possibilities of Fact. — Where there are several possibilities of fact, different from

the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. State v. Clara, 53 N.C. 25 (1860).

Restricting Evidence to Purpose for Which Admissible. — It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. Burton v. Wilmington & W.R.R., 84 N.C. 193 (1881). See State v. Ballard, 79 N.C. 627 (1878).

Recapitulation Unnecessary.—The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. State v. Gould, 90 N.C. 658 (1884); Boon v. Murphy, 108 N.C. 187, 12 S.E. 1032 (1891); State v. Thompson, 226 N.C. 651, 39 S.E.2d 823 (1946).

Nor is the judge required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962).

The court is not required to recapitulate the evidence, witness by witness. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965).

In the instructions to the jury, recapitulation of all the evidence is not required, but the trial judge is required to state the evidence to the extent necessary to explain the application of the law thereto. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Recapitulation of all the evidence is not required, and the statute is complied with in this respect by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the judge of the duty under this section to state the evidence of the respective parties to the extent necessary to enable him to explain the application of the law thereto. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Second Recapitulation Not Required. — The trial judge is not required to recapitulate the testimony a second time, although one of the parties may request it to be done. Aston v. Craigmiles, 70 N.C. 316 (1874).

Judge May Omit Testimony. — Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may with propriety, decline to comply with a request to do so. Findly v. Ray, 50 N.C. 125 (1857).

Agreement of Counsel.—The failure of a judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. Wiseman v. Penland, 79 N.C. 197 (1878).

Effect of a "Slip of the Tongue". — A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. State v. Sinodis, 189 N.C. 565, 127 S.E. 601 (1925).

Where no evidence is stated except in the contentions of the parties, that does not meet the requirements of this section. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962).

Contentions of Parties.—Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. State v. Durham, 201 N.C. 724, 161 S.E. 398 (1931).

A statement of the evidence only in the form of contentions in a complicated case where the evidence is conflicting is not a sufficient compliance with the requirements of this section. Eastern Carolina Feed & Seed Co. v. Mann, 258 N.C. 771, 129 S.E.2d 488 (1963).

Where Parties Waive Recapitulation of Evidence.—Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Reviewing State's Evidence.—The portion of the charge devoted to reviewing the evidence for the State cannot be held for

error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. State v. Jessup, 219 N.C. 620, 14 S.E.2d 668 (1941). See State v. Johnson, 219 N.C. 757, 14 S.E.2d 792 (1941).

Where Judge under Impression Certain Material Facts Were in Evidence.—Where the court in its charge called material facts to the attention of the jury, supported by the statement of the court, as well as of counsel, that it was under the impression that they were introduced in evidence, and they were not withdrawn but were to be rejected and not considered only in the event the jury did not so recall, it was held that this was not a statement "in a plain and correct manner," of "the evidence given in the case." Curlee v. Scales, 223 N.C. 788, 28 S.E.2d 576 (1944).

Special Request to Present Subordinate Feature of Evidence. — Where, in stating the evidence and explaining the law arising thereon, the court deals with all substantial and essential features of the evidence, an objection thereto on ground that the charge failed to comply with this section cannot be sustained, it being the duty of the objecting party if he desired some subordinate feature to have been presented to the jury to have aptly tendered request for special instructions thereon. Metcalf v. Foister, 232 N.C. 355, 61 S.E.2d 77 (1950).

3. Explanation of Law.

In General.—This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. Williams v. Eastern Carolina Coach Co., 197 N.C. 12, 147 S.E. 435 (1929), citing Blake v. Smith, 163 N.C. 274, 79 S.E. 596 (1913); Bowen v. Schnibben, 184 N.C. 248, 114 S.E. 170 (1922); State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924); Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925); Van Gelder Yarn Co. v. Mauney, 228 N.C. 99, 44 S.E.2d 601 (1947); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954); McNeill v. McDougald, 242 N.C. 255, 87 S.E.2d 502 (1955); Westmoreland v. Gregory, 255 N.C. 172, 120 S.E.2d 523 (1961).

As was said in State v. Matthews, 78 N.C. 523 (1878), the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. Williams v. Eastern Carolina Coach Co., 197 N.C. 12, 147 S.E. 435 (1929); Van Gelder Yarn Co. v. Mauney, 228 N.C. 99, 44 S.E.2d 601 (1947); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. State v. Herbin, 232 N.C. 318, 59 S.E.2d 635 (1950); Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952).

The failure of the presiding judge to declare and explain the law arising upon the evidence is error. Howard v. Carman, 235 N.C. 289, 69 S.E.2d 522 (1952); Toler v. Brink's, Inc., 1 N.C. App. 315, 161 S.E.2d 208 (1968).

The Supreme Court has consistently ruled that this section imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to meet the statutory requirement. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957); Rowe v. Fuquay, 252 N.C. 769, 114 S.E.2d 631 (1960); Byrnes v. Ryck, 254 N.C. 496, 119 S.E.2d 391 (1961); Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963); Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537 (1966).

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Where the trial court states the contentions of the parties, but inadvertently fails to explain and declare the law arising on the evidence, assignment of error to the charge must be sustained. Keith v. Lee, 246 N.C. 188, 97 S.E.2d 859 (1957).

A mere statement of the contentions of the parties does not suffice. Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965).

Where the court did not state any of the evidence except in the form of contentions, this does not comply with the requirement of this section that the judge "shall declare and explain the law arising on the evidence given in the case." Faison v. T

& S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The judge must explain and apply the law to the specific facts pertinent to the issue involved. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966); Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

A mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of the statute. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

When the judge fails to declare and explain the law and apply it to the evidence bearing on the issue involved, the jurors, unfamiliar with legal standards, are left without benefit of such legal standards or standards necessary to guide them to a right decision on the issue. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request, and to apply the law to the various factual situations presented by the conflicting evidence. This requirement obtains as respects both the statutory law and the common law when both are applicable. A charge which fails to submit one of the material aspects of the case presented by the allegation and proof, is prejudicial. Overman v. Saunders, 4 N.C. App. 678, 167 S.E.2d 536 (1969).

A statement of what the parties contend the law to be is not sufficient. Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

This section requires the trial judge to declare and explain the law arising on the evidence in the case. This is not done by the judge stating the contentions of the parties. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

The judge is required by this section to charge the law on the substantial features of the case arising on the evidence given in the case, and give equal stress to the contentions of the parties. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

The judge is required to declare and explain the law arising on the evidence without being requested to do so. State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

This section imposes upon the trial judge the duty to declare and explain the law arising on the evidence as to all substantial features of the case. Tate v. Golding, 1 N.C. App. 38, 259 S.E.2d 276 (1968).

A failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

The provisions of this section are mandatory. A failure to comply is prejudicial error. Godwin v. Hinnant, 250 N.C. 328, 108 S.E.2d 658 (1959).

If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. Saunders v. Warren, 267 N.C. 735, 149 S.E.2d 19 (1966).

It confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error, and this is true even without prayer for special instructions. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962); Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966).

The trial judge has the positive duty of instructing the jury as to the law upon all of the substantial features of the case. Lester Bros. v. J.M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

The duty of the court to declare and explain the law arising on the evidence remains unchanged by the present provisions of this section as rewritten by the General Assembly in 1949. Chambers v. Allen, 233 N.C. 195, 63 S.E.2d 212 (1951).

Court Must Explain Law Arising on Evidence in Particular Case.—This section requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. State v. Street, 241 N.C. 689, 86 S.E.2d 277 (1955); State v. Campbell, 251 N.C. 317, 111 S.E.2d 198 (1959).

Even though the parties waive a recapitulation of the evidence, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

It is prejudicial error to instruct in regard to law not presented by the evidence. White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963).

Absence of Request for Special Instructions.—The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. Spencer v. Brown, 214 N.C. 114, 198 S.E. 630 (1938); Van Gelder

Yarn Co. v. Mauney, 228 N.C. 99, 44 S.E.2d 601 (1947); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950); Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954); Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955); McNeill v. McDougald, 242 N.C. 255, 87 S.E.2d 502 (1955); Williamson v. Clay, 243 N.C. 337, 90 S.E.2d 727 (1956); Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959); Lester Bros. v. J.M. Thompson Co., 261 N.C. 210, 134 S.E.2d 372 (1964).

It is the duty of the trial court without request for special instructions to declare and explain the law arising upon the evidence in the case, which duty is not discharged by general definitions or abstract discussions of the law, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative and under which it should be answered in the negative, and the failure of the court to comply substantially with the mandate of this section impinges a substantial legal right of the party aggrieved entitling him to a new trial. Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941).

Under this section it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect. State v. Brady, 236 N.C. 295, 72 S.E.2d 675 (1952).

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. Melton v. Crotts, 257 N.C. 121, 125 S.E.2d 396 (1962).

Failure to charge the law on a substantive feature of case arising on defendant's pleading, even in the absence of special request for such instruction, is prejudicial error for which defendant is entitled to a new trial. Correll v. David L. Hartness Realty Co., 261 N.C. 89, 134 S.E.2d 116 (1964).

The trial court is required to charge the law upon all substantial features of the case arising on the evidence, even though there is no request for special instructions. King v. Britt, 267 N.C. 594, 148 S.E.2d 594 (1966).

It is the duty of the court, without request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case and to apply the law to the various factual situations presented by the conflicting evidence. Smart v. Fox, 268 N.C. 284, 150 S.E.2d 403 (1966).

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948); State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

An abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

It is error for the court to charge upon an abstract prinicple of law which is not presented by the allegations and evidence. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964); Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964); Nance v. Williams, 2 N.C. 345, 163 S.E.2d 47 (1968).

In charging the jury, the stating of abstract principles of law is not sufficient. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

It has been held to be error to charge on an abstract principle of law not supported by the evidence. Kuyrkendall v. Clarke's Disct. Dep't Store, 5 N.C. App. 200, 167 S.E.2d 833 (1969).

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

Charge Containing Only Declarations of Abstract Principles.—The court is required to charge the law arising on the evidence given in the case, and a charge containing declarations of abstract principles of law without relating them to the evidence, is insufficient. Collingwood v. Winston-Salem Southbound Ry., 232 N.C. 724, 62 S.E.2d 87 (1950).

It is error for the court to charge on abstract principles of law not supported by any view of the evidence. Jordan v. Eastern Transit & Storage Co., 266 N.C. 156, 146 S.E.2d 43 (1966).

Declaration of legal principles in anticipation that they will arise on the evidence may conceivably lead to serious error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

Judge Must Explain Law as It Relates to Testimony. — The judge must declare and explain the law as it relates to the various aspects of the testimony offered.

By this it is meant that this section requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948). Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957).

Implicit in the meaning of this statute is the requirement that the judge must declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952); Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956); Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

This section requires the presiding judge to declare and explain the law as it relates to the different aspects of the evidence on each side of the case, so as to bring into focus the relations between the different phases of the evidence and the applicable principles of law. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

This section requires the trial judge, when instructing the jury, to relate and apply the law to the variant factual situations having support in the evidence. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

Where the court in charging the jury with reference to issues of negligence stated the principles of law in general terms and thereafter merely stated to the jury some of the testimony and some of the contentions of the parties and failed and neglected to state to the jury the application of the principles of law as to the facts arising from the evidence or any of the several possible findings of fact by the jury, it thereby failed to declare and explain the law arising on the evidence given in the case as required by this section. Brooks v. Honeycutt, 250 N.C. 179, 108 S.E.2d 457 (1959).

The judge is required to relate and apply the law to the variant factual situations supported by the evidence and based upon allegations in the pleadings. Clayton v. Prudential Ins. Co. v. America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

And Must Declare and Explain Statutory as Well as Common Law.—The positive duty of the judge, required by this section, to declare and explain the law arising upon the evidence in the case means that he shall declare and explain the statutory law as well as the common law arising thereon. Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961); Greene v. Harmon, 260 N.C. 344, 132 S.E.2d 683 (1963); Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

The failure to give an instruction applying the statutory law to the evidence constitutes prejudicial error for which defendant is entitled to a new trial. Correll v. Gaskins, 263 N.C. 212, 139 S.E.2d 202 (1964).

A bare declaration of the law in general terms and a statement of the contentions of the parties are not sufficient to meet the statutory requirement. Bulluck v. Long, 256 N.C. 577, 124 S.E.2d 716 (1962).

It is error to give the jury carte blanche to speculate and apply to the case their individual notions as to what might constitute negligence in any other way which the court might not have specifically mentioned. Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963).

An instruction about a material matter not based on sufficient evidence is erroneous. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Charge of Breach of Law or Duty Must Be Supported by Allegation and Proof.—Before a breach of a particular law or duty may be submitted for jury determination, there must be both allegation and proof of such breach. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

The court is not justified in giving instructions with respect to a principle of law not applicable to the evidence, merely because a breach of such law has been pleaded. Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This "calls for instructions as to the law upon all substantial features of the case." State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949), citing Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948); State v. Fain, 229 N.C. 644, 50 S.E.2d 904 (1948).

The court need not read a statute to the jury in order to comply with the requirements of this section, a simple explanation of the law without the involvement of the technical language of a statute being preferable. Batchelor v. Black, 232 N.C. 314, 59 S.E.2d 817 (1950); Kennedy v. James, 252 N.C. 434, 113 S.E.2d 889 (1960).

The court is not required to read a stat-

ute to the jury; a simple explanation of the law is generally preferable. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

And it is not sufficient merely for the court to read a statute bearing on the issues in controversy and leave the jury unaided to apply the law to the facts. Chambers v. Allen, 233 N.C. 195, 63 S.E.2d 212 (1951).

The action of the trial court in reading pertinent statutes regulating the operation of motor vehicles upon the public highways, wihout applying the law to the evidence in the case fails to comply with this section. Chambers v. Allen, 233 N.C. 195, 63 S.E.2d 212 (1951).

Ordinarily and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts. Citizens Nat'l Bank v. Phillips, 236 N.C. 470, 73 S.E.2d 323 (1952).

It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954); Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962); Eastern Carolina Feed & Seed Co. v. Mann, 258 N.C. 771, 129 S.E.2d 488 (1963).

It is not sufficient merely for the court to read a statute bearing on the issue in controversy and leave the jury unaided to apply the law to the facts. State v. Coggin, 263 N.C. 457, 139 S.E.2d 701 (1965).

The evidence was all offered by the plaintiff and was not in dispute. When the court, therefore, charged again as to the laws it was its duty to do more than read from the book. It was its duty to apply the law, as given, to the evidence in the case. Ammons v. North Am. Accident Ins. Co., 245 N.C. 655, 97 S.E.2d 251 (1957).

If the pertinent law is statutory, a mere reading of the statute without applying the law to the evidence is insufficient. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Ordinarily, the reading of the pertinent statute, without further explanation, is not sufficient. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

It is error for a trial court to read a statute to the jury without giving an explanation thereof in connection with the evidence, where such explanation is patently necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. Toler v. Brink's, Inc., 1 N.C. App. 315, 161 S.E.2d 208 (1968).

When the judge has correctly instructed the jury upon the law applicable to the various acts of negligence upon which the pleadings and evidence require a charge, there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts. If, however, he undertakes to do so, this section requires him to tell the jury what facts, which they might find from the evidence, would constitute reckless driving. It is not sufficient for the judge to read the statute and leave it to the jury to apply the law to the facts and to decide for themselves what plaintiff did, if anything, which constituted reckless driving. Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Nance v. Williams, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

Simple Explanation without Technical Language May Be Preferable.—While the court must apply the law to the evidence, this is often better accomplished by a simple explanation without the involvement of the technical language of the statute. Pittman v. Swanson, 255 N.C. 681, 122 S.E.2d 814 (1961).

But Reading Statute and Pointing Out Material Parts Is Proper.—In a prosecution for conspiracy to defraud the Welfare Department, the act of the court in reading the statute upon which the indictment was based and pointing out the material parts which applied to the charge against the defendants did not amount to a peremptory instruction of guilt, and the instruction was in keeping with the court's duty to declare and explain the law of the case. State v. Butler, 269 N.C. 733, 153 S.E.2d 477 (1967).

Judge Not Relieved of Duty by Remarks of Solicitor.—The solicitor's statement at the beginning of the trial that he would ask for a verdict of guilty of rape with a recommendation of life imprisonment, or guilty of an attempt to commit rape, did not relieve the court of its mandatory duty under this section to declare and explain to the jury the law arising on the evidence given in the case. State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957).

Removal of Doubt Engendered by Conflicting Statements of Counsel. — That counsel are permitted to argue the legal aspects of the case serves to emphasize the necessity of compliance with the provisions of this section. When counsel avail themselves of this right the court should explain and apply the law so as to remove any doubt in respect thereto which may have been engendered by conflicting statements of counsel. The duty to set at rest any question as to the law of the case rests upon the judge and not the jury. Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949).

Trial by jury vouchsafed in the Constitution contemplates a verdict of the jury rendered upon the evidence guided by correct instructions as to the law applicable thereto in conformity with this section. Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941).

When Party Must Request Further Matters of Instruction.—Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with this section, such further matters of instruction as the appellant may desire should be offered by special requests for instructions. Gore v. City of Wilmington, 194 N.C. 450, 140 S.E. 71 (1927); Murphy v. Carolina Power & Light Co., 196 N.C. 484, 146 S.E. 204 (1929). See Graham v. State, 194 N.C. 459, 140 S.E. 26 (1927); Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944).

Where the court in its charge substantially complies with this section, if defendant desires further elaboration and explanation, he should tender prayers for instructions; otherwise, he cannot complain. State v. Gordon, 224 N.C. 304, 30 S.E.2d 43 (1944); Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954).

Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of this section when he has not submitted in apt time correct special prayers for instruction to such effect. Planters Bank & Trust Co. v. Yelverton, 185 N.C. 314, 117 S.E. 299 (1923).

The rule stated in First Nat'l Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927), that "where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it," applies to subordinate elaboration, but not substantive, material and essential features of the charge. McCall v. Gloucester Lumber Co., 196 N.C. 597, 146 S.E. 579 (1929).

It is the duty of the court in charging the jury to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error. Ryals v. Carolina Contracting Co., 219 N.C. 479, 14 S.E.2d 531 (1941).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. Acme Mfg. Co. v. McPhail, 179 N.C. 383, 102 S.E. 611 (1920); Riverview Milling Co. v. State Highway Comm'n, 190 N.C. 692, 130 S.E. 724 (1925); State v. Johnson, 193 N.C. 701, 138 S.E. 19 (1927); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939).

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. State v. Caudle, 208 N.C. 249, 180 S.E. 91 (1935).

If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. State v. Gore, 207 N.C. 618, 178 S.E. 209 (1935).

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935).

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

An exception for failure of the court

to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. State v. Brooks, 228 N.C. 68, 44 S.E.2d 482 (1947).

Where defendant relies in large measure upon what he contends are circumstances of acute emergency, the failure to comply with this section by applying the applicable legal principles to defendant's evidence in regard thereto must be regarded as prejudicial. Williamson v. Clay, 243 N.C. 337, 90 S.E.2d 727 (1956).

Waiver of Recapitulation of Evidence Does Not Relieve Court of Duty to Explain Law.—Though the parties waive a recapitulation of the evidence by the court, such waiver does not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. Brannon v. Ellis, 240 N.C. 81, 81 S.E.2d 196 (1954).

Judge Must Instruct as to Burden of Proof. — This section places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. And it is error for him to discuss the facts and give the contentions of the parties without any reference to the burden of proof. Tippite v. Atlantic Coast Line R.R., 234 N.C. 641, 68 S.E.2d 285 (1951).

This section requires that the judge "shall declare and explain the law arising on the evidence given in the case," which places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. Watt v. Crews, 261 N.C. 143, 134 S.E.2d 199 (1964); Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the term "greater weight of the evidence" in the absence of a prayer for special instructions. Hardee v. York, 262 N.C. 237, 136 S.E.2d 582 (1964).

This section places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. King v. Bass, 273 N.C. 353, 160 S.E.2d 97 (1968).

The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. King v. Bass, 273 N.C. 252, 160 S.E.2d 97 (1968).

Effect of Failure to Request Special Instructions.—A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Where the trial court substantially complies with plaintiff's oral request for instructions in respect to evidence of previous statements made by plaintiff tending to contradict plaintiff's evidence on the stand, the failure to give more particular instructions on this aspect will not be held for error. Grant v. Bartlett, 230 N.C. 658, 55 S.E.2d 196 (1949).

Explanation Must Cover Any Authorized Finding.—It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. State v. Jones, 87 N.C. 547 (1882); Lawton v. Giles, 90 N.C. 374 (1884).

Law on Facts and Inferences. — It is necessary to state the law arising on the various phases of the evidence, and on all facts which the jury should find from the evidence, when such facts constitute a part of the basis for the answers to the issues. Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925).

Instructions Based on Assumption. — When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the question so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence. State v. Dunlop, 65 N.C. 288 (1871).

But where a prayer for instructions assumes certain facts to be in proof, and in the opinion of the judge there is no evidence tending to prove them, he ought to say so, and thus not embarrass the jury by the consideration both of the assumed facts and of the questions of law predicated

on their assumption. State v. Dunlop, 65 N.C. 288 (1871).

Instruction Necessary to Reach Verdict.—Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to charge the law thus arising without a request for special instruction. Jacob Stove Works v. Boyd, 191 N.C. 523, 132 S.E. 273 (1926).

Substantial Compliance with Request Sufficient.—The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. State v. Booker, 123 N.C. 713, 31 S.E. 376 (1898).

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. State v. Wilcox, 132 N.C. 1120, 44 S.E. 625 (1903).

Instruction as to Statutory Provisions.—In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the motor vehicle law arising upon the evidence and a charge embracing only general provisions of the common law is not sufficient. Barnes v. Teer, 219 N.C. 823, 15 S.E.2d 379 (1941).

Charge Covering Subordinate Features.—When a judge has followed this section and charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but on the substantive features of the case arising on the evidence, the judge is required to give a correct charge concerning it. Acme Mfg. Co. v. McPhail, 179 N.C. 383, 102 S.E. 611 (1920); Mebane Graded School Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937); Headen v. Bluebird Transp. Corp., 211 N.C. 639, 191 S.E. 331 (1937).

Refusal to Correct Special Request for Instructions.—Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case and all of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. Williams v. Hedgepeth, 184 N.C. 114, 113 S.E. 602 (1922).

Objection as to Fullness of Statement.—An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the evidence, as required by this section and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. Tatham v. Andrews Mfg. Co., 180 N.C. 627, 105 S.E. 423 (1920).

Failure to Charge on Defense Not Presented.—Defendants denied the contract declared on, offered evidence that they did not enter into the contract, but did not object to plaintiff's parol evidence in support of the contract alleged. In making up the case on appeal, defendants excepted to the charge for that the court failed to charge the law relative to the statute of frauds and contended on appeal that plaintiff's evidence disclosed a contract to answer for the debt or default of another. It was held that defendants' exception to the charge could not be sustained, the court having had no notice that defendants would rely upon the statute, and that defendants had waived the defense of the statute by failing to properly present such defense. Allison v. Steele, 220 N.C. 318, 17 S.E.2d 339 (1941).

Charge on Degrees of Crime.—Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. State v. Hardee, 192 N.C. 533, 135 S.E. 345 (1926), citing State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923); Wilson v. Wilson, 190 N.C. 819, 130 S.E. 834 (1925); Watson v. Sylva Tanning Co., 190 N.C. 840, 130 S.E. 833 (1925); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926).

Where the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. State v. Grier, 209 N.C. 298, 183 S.E. 272 (1936).

Instruction Should Apply Law to Facts Adduced.—An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of this section, and a new trial will be awarded on appellant's exception. Smith v. Safe Bus Co., 216 N.C. 22, 3 S.E.2d 362 (1939).

A charge defining negligence and proximate cause and stating the contentions of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, will be held for error as failing to comply with this section since the application of the law to the facts as the jury may find them to be from the evidence, is a substantive feature of the charge which must be given even in the absence of a prayer for instruction. Mack v. Marshall Field & Co., 218 N.C. 697, 12 S.E.2d 235 (1940).

Waiver of Error.—A failure to comply with this section is error which is not waived by failure to request special instructions, where there is no charge applicable to the facts given in evidence. Nichols v. Champion Fibre Co., 190 N.C. 1, 128 S.E. 471 (1925).

The failure of the court to explain the law arising on the evidence favorable to defendant is error, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it would not recapitulate the evidence is not a waiver of the substantial rights conferred by this section. Carruthers v. Atlantic & Y. Ry., 215 N.C. 675, 2 S.E.2d 878 (1939).

Any Substantial Error Is Material.—Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. Templeton v. Kelley, 216 N.C. 487, 5 S.E.2d 555 (1939).

Failure to Instruct as to Law of Self-Defense.—See State v. Thornton, 211 N.C. 413, 190 S.E. 758 (1937); State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937); State v. Greer, 218 N.C. 660, 12 S.E.2d 238 (1940).

Failure to Charge on Second Degree Murder.—See note under § 15-172.

Instruction Presenting Erroneous View of Law or Incorrect Application Thereof.—It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it. Blanton v. Carolina Dairy, Inc., 238 N.C. 382, 77 S.E.2d 922 (1953); Harris v. White Constr. Co., 240 N.C. 556, 82 S.E.2d 689 (1954); Lookabill v. Regan, 245 N.C. 500, 96 S.E.2d 421 (1957).

An instruction which presents an erroneous view of the law upon a substantive phase of the case is prejudicial error. White v. Phelps, 260 N.C. 445, 132 S.E.2d 902 (1963); Parker v. Bruce, 258 N.C. 341, 128 S.E.2d 561 (1962).

Correcting Erroneous Instruction.—Where a judge has erroneously instructed the jury, he undoubtedly has the right, in fact, it is his duty, when the error is called to his attention, to correct it by accurately informing the jury what the law is. If the subsequent instruction is sufficient to clearly point to the error previously committed and state the law in such manner that the jury cannot be under any misapprehension as to what the law is, the error previously committed will not warrant a new trial. Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

Cited in State v. Weston, 197 N.C. 25, 147 S.E. 618 (1929).

C. Illustrative Cases.

Negligence and Proximate Cause.—The following charge did not comply with the requirement of this section since it placed upon the jury the duty imposed on the judge: "If you find from the evidence and by its greater weight that the death of plaintiff's intestate was proximately caused by the negligence of the defendant as alleged in the complaint, applying these rules of law to the facts in the case, then it would be your duty to answer this issue 'Yes.' If you fail to so find, then it would be your duty to answer it 'No.'" Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

A peremptory instruction to answer the issue in favor of the plaintiff if the jury should find by the greater weight of the evidence that the defendant drove onto the shoulder to his left, and there struck the plaintiff standing on the shoulder, whether he saw or should have seen the plaintiff or not, with no explanation whatever of the meaning of negligence or of proximate cause, does not satisfy the requirement of this section. Jackson v. McBride, 270 N.C. 367, 154 S.E.2d 468 (1967).

Age and Chastity of Prosecutrix in Prosecution for Carnal Knowledge. — Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of this section, and an exception thereto will be sustained. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Alibi.—Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. State v. Sutton, 230 N.C. 244, 52 S.E.2d 921 (1949).

Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence, it was held to be error. State v. Melton, 187 N.C. 481, 122 S.E. 17 (1924).

Circumstantial Evidence.—The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the State relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

Concurrent Negligence. — Where the theory of trial in the lower court was that the negligence of defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of concurrent negligence cannot be sustained. Smith v. Bonney, 215 N.C. 183, 1 S.E.2d 371 (1939).

Contributory Negligence. — Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff under the provisions of this section. Lipscomb v. Cox, 197 N.C. 64, 147 S.E. 683 (1929).

Instruction as to contributory negligence of 8½ year old child, held to fully comply with this section, where the judge explained that the degree of care required of a child is that he exercise care and prudence equal to his capacity. Leach v. Varley, 211 N.C. 207, 189 S.E. 636 (1937).

Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing on an issue involving contributory negligence, it is the duty of the trial judge to give the general definition of ordinary care. McCracken v. Smathers, 119 N.C. 617, 26 S.E. 157 (1896).

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence and without explaining the law applicable to the facts in evidence, constitutes prejudicial error. Therrell v. Freeman, 256 N.C. 552, 124 S.E.2d 522 (1962).

Damages.—Where the principal denies that he made any contract with plaintiff broker for the sale of lumber and denies he had received any orders through plaintiff, the burden is on plaintiff not only to prove the brokerage contract but to prove each order upon which he asserts his right to commission and it is error for the court to charge on the issue of damages that there was no controversy as to the amount and that if the jury should find the plaintiff's evidence to be true to answer that issue in the sum demanded by plaintiff. Haines v. Clark, 230 N.C. 751, 55 S.E.2d 693 (1949).

The court must give sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue. North Carolina State Highway Comm'n v. Thomas, 2 N.C. App. 679, 162 S.E.2d 649 (1968).

Where the trial court did not give an instruction as to the burden of proof on the issue of damages, this omission violated a substantial right of defendant and was prejudicial error. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Instructions which tend to bolster the witnesses for the State, and to impair the effect of defendant's plea of not guilty, are violative of this section. State v. Shinn, 234 N.C. 397, 67 S.E.2d 270 (1951).

Where court did not state rule for admeasurement of damages, a new trial was granted. Adams v. Beaty Serv., Co., 237 N.C. 136, 74 S.E.2d 332 (1953).

Intersections of Streets and Making Left Turn.—When the failure to explain the law so the jury could apply it to the facts is specifically called to the court's attention by a juror's request for information, it should tell the jury how to find the intersection of the streets as fixed by § 20-38 and how, when the motorist reaches the intersection, he is required to drive in making a left turn. Pearsall v.

Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Duty of Driver of Overtaking Vehicle. —Where the uncontroverted evidence supports a finding that the driver of the defendant's car violated § 20-149 (a) as to the duty of the driver of an overtaking vehicle, but there is neither allegation nor evidence that such violation was a proximate cause of the collision, an instruction based on § 20-149 (a) is erroneous and prejudicial. McGinnis v. Robinson, 252 N.C. 574, 114 S.E.2d 365 (1960).

Maximum Speed in Business District.— Where there was no evidence that the scene of an accident was within a business district as defined in § 20-38, a charge as to the maximum speed in a business district was prejudicial error since charge was on an abstract principle of law not supported by any evidence. Parlier v. Barnes, 260 N.C. 341, 132 S.E.2d 684 (1963).

Negligence in Regard to Turn Signals and Excessive Speed.—Where there is no evidence that defendant driver failed to give the signal for a left turn, as required by § 20-154, and no evidence that she was traveling at excessive speed at the time, it is error for the court to instruct the jury upon the issue of the driver's negligence in regard to turn signals and excessive speed. Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 '1963).

Failure to Instruct as to Duty of Motorist to Avoid Injuring Children. — See Hawkins v. Simpson, 237 N.C. 155, 74 S.E.2d 331 (1953).

Failure to State That Intentional Killing Must Be Shown to Raise Implication of Malice. — See State v. Bright, 237 N.C. 475, 75 S.E.2d 407 (1953).

Necessity of Proving Prerequisite Evidential Fact beyond Reasonable Doubt.— Where proof of a particular evidential fact beyond a reasonable doubt is obviously a prerequisite to the establishment of the defendant's guilt, if the circumstantial evidence in its entirety is deemed sufficient to withstand a defendant's motion for judgment as in case of nonsuit, an application of the law to the facts arising on the evidence as provided in this section requires that the presiding judge instruct the jury that proof of such fact beyond a reasonable doubt is a prerequisite to a verdict of guilty. State v. Chavis, 270 N.C. 306, 154 S.E.2d 340 (1967).

Failure to Define Words "Reasonable" and "Doubt". — Where no request was made to define the term "reasonable doubt," the failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The failure to define the words "reasonable" and "doubt" does no violence to this section. State v. Bailiff, 2 N.C. App. 608, 163 S.E.2d 398 (1968).

Failure to Instruct on Law Applicable to Evidence Offered in Support of Defense.—See State v. Sherian, 234 N.C. 30, 65 S.E.2d 331 (1951).

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussel over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

Self-Defense. — Where State's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the failure of court to instruct the jury upon the right of self-defense was not error. State v. Deaton, 226 N.C. 348, 38 S.E.2d 81 (1946).

Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. State v. Riddle, 228 N.C. 251, 45 S.E.2d 366 (1947).

Instruction omitting reference to self-defense held prejudicial error. See State v. Messimer, 237 N.C. 617, 75 S.E.2d 540, 884 (1953).

Instruction on law of self-defense held not required under evidence. See State v. Porter, 238 N.C. 735, 78 S.E.2d 910 (1953).

In a prosecution for murder it was held that it was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law of self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the

case arising upon the evidence. State v. Poplin, 238 N.C. 728, 78 S.E.2d 777 (1953).

An instruction on self-defense that defendant could use no more force than was reasonably necessary is erroneous, the correct rule being that defendant could use such force as was reasonably or apparently necessary. State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

Degrees of Crime.—Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by this section. State v. Ardrey, 232 N.C. 721, 62 S.E.2d 53 (1950).

Disregard of Previous Inconsistent Instructions.—The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. State v. Jackson, 228 N.C. 656, 46 S.E.2d 858 (1948).

Duty Required of Automobile Driver.—Plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car. It was held that it was not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a crossroad, if he charged correctly upon the general law arising from the evidence. Fisher v. Deaton, 196 N.C. 461, 146 S.E. 66 (1929), distinguishing Bowen v. Schnibben, 184 N.C. 248, 114 S.E. 170 (1922).

Failure to Define "Conspiracy".—Where the court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that the court did not define "conspiracy," it was held that the exception could not be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Failure to Give Elaborate Definition of Slander.—In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with this section, and it appeared that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander. Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943).

Fornication and Adultery.—Upon trial in the superior court, after appeal by the male defendant only from a conviction of fornication and adultery in the recorder's court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that the defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with this section in the absence of request for further instructions. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

Force Used in Defense of Home—Eviction of Trespassers.—When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. State v. Spruill, 225 N.C. 356, 34 S.E.2d 142 (1945); State v. Goodson, 235 N.C. 177, 69 S.E.2d 242 (1952).

Rights of Person on Whom Murderous Assault Is Made.—In a murder prosecution, where self-defense is relied upon, the failure of the trial court to instruct the jury in accordance with a settled principle of law, under which are fixed the rights of a person upon whom a murderous assault is made, undoubtedly weighed heavily against the defendant and constituted error. State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951).

Forcible Trespass. — In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. State v. Lawson, 98 N.C. 759, 4 S.E. 134 (1887).

Fraud in Instrument. — Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the factum and in the treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the factum is error. Parker v. Thomas, 192 N.C. 798, 136 S.E. 118 (1926).

Fraud Necessary to Violate Deed. — It is not required to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. Williams v. Hedgepeth, 184 N.C. 114, 113 S.E. 602 (1922).

Though the charge is correct as a general essay on homicide, and its propositions taken generally are supported by the authorities, still it is not a full compliance with this section. State v. Dunlop, 65 N.C. 288 (1871).

Illegality of Contract.—Where in an action upon a contract there is evidence that the contract was a wagering one, the judge should explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No," is insufficient. Orvis Bros. & Co. v. Holt-Morgan Mills, 173 N.C. 231, 91 S.E. 948 (1917).

Instruction that jury should be guided by the law as argued by counsel if not inconsistent with rules of law laid down by the court, but to follow the instructions given by the court if argument of counsel was inconsistent therewith, must be held for reversible error. Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949).

Instruction to "Settle Case as Between Man and Man".—Where there is much conflicting evidence, it is error for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case. Blake v. Smith, 163 N.C. 274, 79 S.E. 596 (1913).

Legal Status of Party. — The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that §§ 20-146 and 20-149 applied. Defendant contended that intestate was a pedestrian and was required by § 20-174 (d) to push the handcart along the extreme left-hand side of the highway. It was held that an instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of this section. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Negligence.—An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence" instead of "would constitute negligence," was held not an expression of opinion in violation of this section, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency. Hoke v. Atlantic Greyhound Corp., 227 N.C. 412, 42 S.E.2d 593 (1947).

Same—Injury to Passenger.—In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of this section and constitutes reversible error. Williams v. Eastern Carolina Coach Co., 197 N.C. 12, 147 S.E. 435 (1929).

Note. — Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder of a note had elected to sue the original payee instead of the maker, under the provisions of this section it is the duty of the trial judge to charge the jury upon the phase of the case, material to the determination of the controversy upon the principles of law applying thereto, without a prayer for special instructions. Darden v. Baker, 193 N.C. 386, 137 S.E. 146 (1927).

Obligations of Counsel, Court and Jury. —An instruction that "it is the business of

counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

Presumption of Good Character.—Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. State v. Pugh, 183 N.C. 800, 111 S.E. 849 (1922).

Processioning Proceedings. — Instruction in processioning proceedings held insufficient. Bradshaw v. Warren, 215, N.C. 442, 2 S.E.2d 375 (1939).

Reckless Driving. — An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient, in a prosecution under § 20-140, to meet the requirements of this section since it fails to explain the law or apply the law to the facts as the jury should find them to be. State v. Flinchem, 228 N.C. 149, 44 S.E.2d 724 (1947).

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of this section. State v. Vanhoy, 230 N.C. 162, 52 S.E.2d 278 (1949).

Recommendation of Life Imprisonment. —In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949).

Respondeat Superior. — In Webb v. Statesville Theater Corp., 226 N.C. 342, 38 S.E.2d 84 (1946), it was held that the failure of court to charge jury upon the principle of respondeat superior was not error as failing to declare and explain the law arising on the evidence where defendant admitted the relationship of master and servant and the case was tried throughout on that theory.

Specific Intent in Robbery.—In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. State v. Lunsford, 229 N.C. 229, 49 S.E.2d 410 (1948).

Where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Speed Regulations. — The mere reading of the statutory speed regulations, laid down in § 20-141, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions to the evidence adduced, is insufficient to meet the requirements of this section. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948).

Subordinate Features.—In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

Title in Replevin Action. — In action in replevin to recover possession of an automobile judge charged jury that if they were satisfied by the greater weight of the evidence of the truth of it, they should find in favor of the plaintiff or answer the first issue as to ownership "Yes." It was held that charge inadvertently ignored the fact that title to the ownership of car was still at issue, and may be taken as assuming the fact that it was sufficiently proved or as expressing an opinion on the weight and sufficiency of the evidence. James v. James, 226 N.C. 399, 38 S.E.2d 168 (1946).

Violation of Traffic Signal.—In civil action for damages resulting from collision between vehicles of plaintiff and defendant at street intersection, where the city maintained traffic signals, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering intersection on a red light, it was held that court erred, in its charge to

jury, by failing to state in a plain and concise manner the evidence offered as to right-of-way between the parties and to declare and explain the law applicable thereto. Stewart v. Yellow Cab Co., 225 N.C. 654, 36 S.E.2d 256 (1945).

Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. Acme Mfg. Co. v. McPhail, 179 N.C. 383, 102 S.E. 611 (1920).

Where defendant was seeking a monetary recovery of plaintiff the burden of proving the right to such recovery was upon defendant, and failure to instruct jury as to this issue was error. Crain v. Hutchins, 226 N.C. 642, 39 S.E.2d 831 (1946).

Instruction as to "Highway" and "Intersection".—Since the terms "highway" and "intersection" are not technical terms and are commonly understood, if additional instructions as to those terms are desired, a request must be made. Payne v. Lowe, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Section Complied with. — See State v. Thompson, 227 N.C. 19, 40 S.E.2d 620 (1946); Glosson v. Trollinger, 227 N.C. 84, 40 S.E.2d 606 (1946); Hodges v. Malone & Co., 235 N.C. 512, 70 S.E.2d 478 (1952); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Section Not Complied with. — See Childress v. Johnson Motor Lines, 235 N.C. 522, 70 S.E.2d 558 (1952); Spencer v. McDowell Motor Co., 236 N.C. 239, 72 S.E.2d 598 (1952); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); Widenhouse v. Yow, 258 N.C. 599, 129 S.E.2d 306 (1963).

Applied in State v. Fain, 229 N.C. 644, 50 S.E.2d 904 (1948).

Cited in Mulholland v. Brownrigg, 9 N.C. 349 (1823); Currie v. Clark, 90 N.C. 355 (1884); Fry v. Currie, 91 N.C. 436 (1884); Dupree v. Virginia Home Ins. Co., 92 N.C. 418 (1885); State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889); McMillan v. Baxley, 112 N.C. 578, 16 S.E. 845 (1893); State v. Kale, 124 N.C. 816, 32 S.E. 892 (1899); Gates v. Max, 125 N.C. 139, 34 S.E. 266 (1899); Davis v. Blevins, 125 N.C. 433, 34 S.E. 541 (1899); Neal v. Carolina Cent. R.R., 126 N.C. 634, 36 S.E. 117 (1900); State v. Edwards, 126 N.C. 1051, 35 S.E. 540 (1900); Kearns v. Southern Ry., 139 N.C. 470, 52 S.E. 131 (1905); State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914); Ball Thrash Co. v. McCormack, 172 N.C. 677, 90 S.E. 916 (1916); Futch v. Atlantic Coast Line R.R., 178 N.C. 282, 100 S.E. 436 (1919); State v. Cline, 179 N.C. 703, 103 S.E. 211 (1920); State v. Alston, 215 N.C. 713, 3 S.E.2d 11 (1939); State v. Buchanan, 216 N.C. 709, 6 S.E.2d 521 (1940); State v. McManus, 217 N.C. 445, 8 S.E.2d 251 (1940); Greene v. Greene, 217 N.C. 649, 9 S.E.2d 413 (1940); Barnes v. Teer, 218 N.C. 122, 10 S.E.2d 614 (1940); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940).

§ 1-180.1. Judge not to comment on verdict.—In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any term of court, upon any verdict rendered at such term of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticise any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the term of any action remaining to be tried during that week at such term of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3.)

Cross Reference.—For similar provisions regarding civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — The 1967 amendment added "In criminal actions" at the beginning of the first sentence, and substituted "upon motion of a defendant or upon motion of the State" for "upon motion of any party to any such action, plaintiff or defendant, or upon motion of the solicitor for the State" at the end of such sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

A trial judge in his discretion has the power to discharge a jury from service.

State v. Hiatt, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

And He Need Not Do So in Absence of Other Jurors Summoned for Session.—This section does not require the trial judge to exercise his prerogative of discharging a jury from further service in the absence of other jurors summoned for the session. State v. Hiatt, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

§ 1-181. Requests for special instructions.—(a) Requests for special instructions to the jury must be—

(1) In writing,

(2) Entitled in the cause, and

(3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same. (C. C. P., s. 239; Code, s. 415; Rev., s. 538; C. S., s. 565; 1951, c. 837, s. 6.)

Cross Reference. — For similar provisions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Section Mandatory.—Failure to grant an instruction not asked for in writing is not ground for exception. Marshall v. Stine, 112 N.C. 697, 17 S.E. 495 (1893). And the trial judge may disregard oral requests. State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888); Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936).

It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by this section. State v. Spencer, 225 N.C. 608, 35 S.E.2d 887 (1945).

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

Where counsel's request that the judge define "reasonable doubt" was not in writing and was first made after the court had concluded its charge to the jury, whether to comply with the request was a matter resting in the sound discretion of the judge. State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

A party must aptly tender written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. Woods v. Roadway Express, Inc., 223 N.C. 269, 25 S.E.2d 856 (1943).

A party desiring more particular instructions on a subordinate feature of the case must aptly tender request therefor. McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941).

For other cases relating to "apt time" for tendering written requests, see Merrill v. Whitmire, 110 N.C. 367, 15 S.E. 3 (1892); Ward v. Albemarle & R.R.R., 112 N.C. 168, 16 S.E. 921 (1893).

Failure to Give Proper Instruction Is Reversible Error.—When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, the failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. Calhoun v. State Highway & Pub. Works Comm'n, 208 N.C. 424, 181 S.E. 271 (1935).

Failure to Sign—Discretion of Court.—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. Avery County Bank v. Smith, 186 N.C. 635. 120 S.E. 215 (1923).

Court Need Not Use Exact Words of Instruction.—Where a party prays for an instruction to which he is entitled, it is error to refuse it. The court, however, is not required to adopt the words of the instruction prayed for, but it is error to change its sense or to so qualify it as to weaken its force. Brink v. Black, 77 N.C. 59 (1877); Lloyd v. Bowen, 170 N.C. 216, 86 S.E. 797 (1915); Coral Gables, Inc., v. Ayres, 208 N.C. 426, 181 S.E. 263 (1935).

Party Cannot Complain of Favorable Instructions.—The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but in their favor. State v. Freeman, 122 N.C. 1012, 29 S.E. 94 (1898).

Instruction on Matters Arising Only on Verdict.—It is not error in the judge to

omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. Dupree v. Virginia Home Ins. Co., 92 N.C. 417 (1885).

Oral Exception. — Where the judge in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for. Lee v. Williams, 112 N.C. 510, 17 S.E. 165 (1893).

Assignment of Error.—Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by the Supreme Court. Taylor v. Plummer, 105 N.C. 56, 11 S.E. 266 (1890); Marshall v. Stine, 112 N.C. 697, 17 S.E. 495 (1893).

Exceptions to the refusal of the court to grant a prayer for instructions, or in granting a prayer, or to instructions generally, cannot be taken for the first time in the Supreme Court; they should be made on a motion for a new trial, but it is sufficient if they are assigned in the statement of the case on appeal. Lee v. Williams, 111 N.C. 200, 16 S.E. 175 (1892).

The appellant is entitled to have his assignments of error for refusing or granting special instructions, if set out by him in his statement of the case on appeal, incorporated by the judge in the case settled. If they are omitted, certiorari will lie. Lowe v. Elliott, 107 N.C. 718, 12 S.E. 383 (1890).

Judge's Statement of Oral Instructions Binding. — A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Conflicting Evidence. — The trial judge commits reversible error in failing to give substantially a material instruction duly requested under this section embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting. Parks v. Security Life & Trust Co., 195 N.C. 453, 142 S.E. 473 (1928).

The Supreme Court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945).

Applied in Appliance Buyers Credit Corp. v. Mason, 271 N.C. 427, 156 S.E.2d 689 (1967); Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936).

Cited in Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Jackson v. Jones, 2 N.C. App. 441, 163 S.E.2d 31 (1968); Pleasants v. Raleigh & A. Air-Line R.R., 95 N.C. 195 (1886); Lowe v. Elliott, 107 N.C. 718, 12 S.E. 383 (1890); State v. Macon, 198 N.C. 483, 152 S.E. 407 (1930); Penland v. French Broad Hosp., 199 N.C. 314, 154 S.E. 406 (1930); Lane v. Paschall, 199 N.C. 364, 154 S.E. 626 (1930); Pyatt v. Southern Ry., 199 N.C. 397, 154 S.E. 847 (1930); State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938); Clarke v. Martin, 217 N.C. 440, 8 S.E.2d 230 (1940).

§ 1-181.1. View by jury.—The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain, or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation. (1965, c. 138.)

§ 1-182. Instructions in writing; when to be taken to jury room.—The judge, at the request of any party to a criminal action on trial, made at or before the close of the evidence, before instructing the jury on the law must put his instructions in writing and read them to the jury. He shall then sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court. (C. C. P., s. 238; Code, s. 414; 1885, c. 137; Rev., ss. 536, 537; C. S., s. 566; 1967, c. 954, s. 3.)

Cross Reference.—As to instructions in civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note.—The 1967 amendment inserted "criminal" preceding "action" in the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge. As what he may tell the jury in matters of law for their information and guidance must be written and read, so he is not permitted to add to, take from, modify or explain what he delivers as his charge, for this would be to change perhaps the meaning which would otherwise be ascribed to the writing and produce the very mischief intended to be remedied. But the act, upon any reasonable interpretation of its terms, does not go further and put an interdict upon every oral utterance which is in precise accord with what is written and affects it in none of the suggested particulars, at the peril of a venire de novo if he does thus speak. Currie v. Clark, 90 N.C. 355 (1884). See State v. Crowell, 116 N.C. 1052, 21 S.E. 502 (1895).

Section Mandatory. — The requirements of this section are mandatory in criminal cases and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered. Currie v. Clark, 90 N.C. 355 (1884); State ex rel. Drake v. Connelly, 107 N.C. 463, 12 S.E. 251 (1890). The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. State v. Black, 162 N.C. 637, 78 S.E. 210 (1913).

The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time. Jenkins v. Wilmington & W.R.R., 110 N.C. 438, 15 S.E. 193 (1892).

Applies to Later Instructions. — It is error to charge the jury orally upon any point when they return into court for instructions, when counsel has requested written instructions. State v. Young, 111 N.C. 715, 16 S.E. 543 (1892).

"Instructions" Defined. — The word "instructions" as used in this section, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issue. State v. Dewey, 139 N.C. 556, 51 S.E. 937 (1905).

Recapitulation of Evidence. — A request to give instructions in writing, under this section, does not require that the recapitulation of evidence be in writing. Dupree v. Virginia Home Ins. Co., 92 N.C. 417 (1885); Phillips v. Wilmington & W.R.R., 130 N.C. 582, 41 S.E. 805 (1902).

Request Must Be Specific. — A request that the trial judge "charge the jury in writing, and as follows" is a request solely to deliver those instructions to the jury, and is not a request to put the entire charge in writing. Phillips v. Wilmington & W.R.R., 130 N.C. 582, 41 S.E. 805 (1902).

But where the defendant at the close of the evidence requested the court "to put the charge to the jury in writing and in part to charge the jury as follows," and the whole charge on the law was not put in writing, this was held to be error. Sawyer v. Lumber Co., 142 N.C. 162, 55 S.E. 84 (1906).

Oral Instructions Same as Written. — Where the court gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. Currie v. Clark, 90 N.C. 355 (1884).

Exception.—An exception to the failure of the judge to put his charge in writing, when asked "at or before the close of the evidence," is taken in time if first set out in appellant's "case on appeal." Sawyer v. Lumber Co., 142 N.C. 162, 55 S.E. 84 (1906). The headnote to Phillips v. Wilmington & W.R.R., 130 N.C. 582, 41 S.E. 805 (1902), is not the holding of that case but is merely dicta.

An exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. State v. Adams, 115 N.C. 775, 20 S.E. 722 (1894).

Effect of Violation. — When it appears from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by the Supreme Court. State ex rel. Drake v. Connelly, 107 N.C. 463, 12 S.E. 251 (1890).

Judge's Statement of Oral Instructions Controlling.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902); Cameron v. Power Co., 137 N.C. 99, 49 S.E. 76 (1904).

Request of Juror.—It is proper for the court to permit the jury to carry the charge with them on retiring to the jury room, at the request of one of the jurors. Gaither

v. Carpenter, 143 N.C. 240, 55 S.E. 625 (1906).

Request Made after Charge in Hands of Jury. — Where the trial judge, having at the request of plaintiff put his charge in writing, read and handed it to the jury and allowed them to carry it to the jury room, the plaintiff objected upon the ground that the court had not been requested to hand the written charge to the jury. There upon, and after his Honor had offered to withdraw the written charge from the jury in whose possession it had been about five minutes, the defendant requested that the jury be permitted to keep the written charge, it was held that it was not error upon such request of the defendant to permit the jury to retain the written charge. Little v. Carolina Cent. R.R., 119 N.C. 771, 26 S.E. 106 (1896).

Special Prayers Given but Not Handed to Jury.—Where the charge of the court was taken to the jury room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error, where his counsel were present in the courtroom and did not then, or at any time before verdict, call the matter to the attention of the court. Gaither v. Carpenter, 143 N.C. 240, 55 S.E. 625 (1906).

Data Other than Charge.—It is error for the trial judge, over objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations. Nicholson v. Eureka Lumber Co., 156 N.C. 59, 72 S.E. 86 (1911). This also applies to plaintiff's estimate of damages, Burton v. Wilkes, 66 N.C. 604 (1872); an account rendered, Watson v. Davis, 52 N.C. 178 (1859); depositions read on trial, Lafoon v. Shearin, 95 N.C. 391 (1886); and papers read as evidence, Williams v. Thomas, 78 N.C. 47 (1878).

Cited in Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Powell v. Wilmington & W.R.R., 68 N.C. 395 (1873); Lowe v. Elliott, 107 N.C. 718, 12 S.E. 383 (1890); Merrill v. Whitmire, 110 N.C. 367, 15 S.E. 3 (1892); Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905); Craddock v. Barnes, 142 N.C. 89, 54 S.E. 1003 (1906); Barringer v. Deal, 164 N.C. 246, 80 S.E. 161 (1913).

§ **1-183**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—As to dismissal of actions, see Rule 41 of the Rules of Civil Procedure (§ 1A-1). As to motion for directed verdict, see Rule 50 of the Rules of Civil Procedure (§ 1A-1).

§ **1-183.1. Effect on counterclaim of nonsuit as to plaintiff's claim.** —The granting of a motion by the defendant for judgment of nonsuit as to the plaintiff's cause of action shall not amount to the taking of a voluntary nonsuit on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. 1-137. (1959, c. 77.)

Applied in Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

§ **1-184**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 39 of the Rules of Civil Procedure (§ 1A-1).

§ **1-185**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to findings of fact and conclusions of law by court, see Rule 52 of the Rules of Civil Procedure (§ 1A-1).

§ **1-186. Exceptions to decision of court.**—(a) For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

(b) Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (C. C. P., s. 242; Code, s. 418; Rev., s. 542; C. S., s. 570.)

Editor's Note.—In Green v. Castlebury, 70 N.C. 20 (1874), which since its decision has been cited as the case par excellence on this section, it was held that the right of appeal, and not the mere matter of making up the case, was the subject of this section.

In that case it was also decided that "case or exceptions" was a correct print and an attempt to point out that this section should read "case on exceptions" was erroneous.

Purpose of Section.—The main object of this section is to declare that the trial by the court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. Green v. Castlebury, 70 N.C. 20 (1874).

Exceptions Necessary.—Where the decision of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. Chastain v. Coward, 79 N.C. 543 (1878).

When a trial by jury is waived, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. Exceptions to such findings must be taken within the time allowed by this section. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Since no exceptions were taken to the findings of fact or the conclusions of law, the exception to the refusal to grant the appellant's motion for judgment as of nonsuit presents no question for review with respect to the findings of fact or the conclusions of law. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

If one wishes to have the Supreme Court review an affirmance by the superior court of findings by a referee or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge in the time and manner prescribed by this section. Clark Equip. Co., v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal, does not meet the requirements of this section. Nationwide Homes of Raleigh N.C., Inc., v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Broadside Exception. — An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this section and Rules of Practice in the Supreme Court. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

Presumption Where Exceptions Not Taken. — Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Exception to the signing of a judgment presents these questions: (1) Do the facts found support the judgments, and (2) does any error of law appear upon the face of the record? City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

§ 1-187: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 20.

Reference.

§ 1-188: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see section (a), Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-189**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-190**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-191 to 1-193**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed sections, see Rule 53 of the Rules of Civil Proccedure (§ 1A-1).

§ **1-194**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

§ **1-195**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 53 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 21.

Issues.

§§ **1-196 to 1-199**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-200**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 22.

Verdict and Exceptions.

§ **1-201**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§ **1-202. Special controls general.**—Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (C. C. P., s. 234; Code, s. 410; Rev., s. 552; C. S., s. 586.)

Cross Reference. — For similar provisions, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note.—It is well settled by the reported cases in other states, construing provisions of their codes similar to this section, that a general verdict should stand unless the special findings are necessarily repugnant to it. To be inconsistent with the general verdict it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify the court in setting aside the general verdict on the ground that it is inconsistent with such findings the conflict must be clear and irreconcilable. See 69 Ohio State Reports 101.

§ 1-203: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For present provisions as to general and special verdicts, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-204, 1-205: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross reference.—As to entry of judgment, see Rule 58 of the Rules of Civil Procedure (§ 1A-1).

§ 1-206: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 46 of the Rules of Civil Procedure (§ 1A-1).

§ 1-207: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to new trials, see Rule 59 of the Rules of Civil Procedure (§ 1A-1).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-208: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross reference.—For provisions similar to those of the repealed section, see Rule 54 of the Rules of Civil Procedure (§ 1A-1).

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.— The clerks of the superior courts are authorized to enter the following judgments:

(1) All judgments of voluntary nonsuit.

(2) All consent judgments.

(3) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court.

(4) All judgments by default final and default and inquiry as are authorized by Rule 55 of the Rules of Civil Procedure, and in this section provided.

(5) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders dis-

bursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days' notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of § 105-414 in which there is filed no answer which seeks to prevent entry of judgment of sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of the said clerk, ratified and confirmed. (1919, c. 156; C. S., s. 593; Ex. Sess. 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1; 1967, c. 954, s. 3.)

Local Modification.—Vance: 1941, c. 139, s. 1.

Editor's Note. — The 1967 amendment substituted "Rule 55 of the Rules of Civil Procedure" for "§§ 1-211, 1-212, 1-213" in subdivision (4).

Session Laws 1969, c. 803, amends Session Law 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Constitutionality. — This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. Thompson v. Dillingham, 183 N.C. 566, 112 S.E. 321 (1922).

An Enabling Act. — This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments, and the jurisdiction of a judge in term to render judgments upon voluntary nonsuits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by the provision of this section. The authority of the clerk is concurrent with and additional to that of the judge in term. Young v. Davis, 182 N.C. 200, 108 S.E. 630 (1921); Hill v. Huffines Hotel Co., 188 N.C. 586, 125 S.E. 266 (1924); Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); 1 N.C.L. Rev. 16, 282; Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

The clerk of the superior court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. Weaver v. Hampton, 204 N.C. 42, 167 S.E. 484 (1933).

Judgment by default may be entered only when defendant has not answered, and therefore when answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. Bailey v. Davis, 231 N.C. 86, 55 S.E.2d 919 (1949).

Judgment by Default When Plaintiff Fails to Answer.—Where the parties are properly before the court and the subject matter of the action is also jurisdictional in the superior court, the clerk, having authority under the provisions of this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. Finger v. Smith, 191 N.C. 818, 133 S.E. 186 (1926).

Tax Foreclosure Proceedings.—To put at rest any question as to the power of the clerk in tax foreclosure proceedings, the 1929 legislature gave clerks of the superior court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. The substance of this statute now appears as the last paragraph of this section. Travis v. Johnston, 244 N.C. 713, 95 S.E.2d 94 (1956).

Default Judgment May Be Entered in Action for Breach of Contract to Pay Sum. —See Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Judgment of Voluntary Nonsuit.—While a plaintiff, in cases where nothing more than costs can be recovered against him, may elect to be nonsuited, the nonsuit must be effected by a judgment of the clerk of superior court, under this section, or by the judge at term. McFetters v. McFetters, 219 N.C. 731, 14 S.E.2d 833 (1941).

Under this section, conferring on the clerks of the superior court authority to enter judgments of nonsuit, the authority is limited to judgments of voluntary nonsuit. Moore v. Moore, 224 N.C. 552, 31 S.E.2d 690 (1944).

In wife's action against husband for separate maintenance and counsel fees, judgment entered by clerk, upon findings of fact that parties had resumed marital relations, dismissing the action as of voluntary nonsuit, was a nullity and void upon its face, as it was manifestly not voluntary. Moore v. Moore, 224 N.C. 552, 31 S.E.2d 690 (1944).

Effect of Judgments Entered by Clerk.—Judgments entered by the clerk, as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

A judgment of voluntary nonsuit may be entered before the clerk of superior court at anytime, or before the judge at term. In re Burton, 257 N.C. 534, 129 S.E.2d 581 (1962).

Judgment Entered without Authority May Be Set Aside.—A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. Cook v. Bradsher, 219 N.C. 10, 12 S.E.2d 690 (1941).

When a clerk of superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Where Complaint Does Not Allege Sufficient Facts.—The clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. Freeman v. Hardee's Food Sys., Inc., 267 N.C. 56, 147 S.E.2d 590 (1966).

Consent Judgment May Be Set Aside for Fraud, Mistake or Lack of Consent.—Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

But Entire Judgment Must Be Set Aside.—It is a general rule that in a case where a consent judgment may be set aside for cause, it must be set aside in its entirety. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

The court has the power to set aside a consent judgment, as a whole, but not to eliminate from it that part which affects some of the parties only. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Lack of Consent Renders Judgment Void.—The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

And Inoperative in Its Entirety.—A consent judgment rendered without the consent of a party will be held inoperative in its entirety. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

And It Will Be Vacated without Showing of Meritorious Defense.—When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Findings on Consent Supported by Evidence Are Binding.—When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause. And when the question is raised, the court, upon motion, will determine the question. The findings of fact made by the trial judge in making such determination, where there is some supporting evidence are final and binding on the appellate court. Overton v. Overton, 259, N.C. 31, 129 S.E.2d 593 (1963).

Action to Cancel Deed of Trust and Surrender Notes Secured Thereby.—The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. Cook v. Bradsher, 219 N.C. 10, 12 S.E.2d 690 (1941).

Appeals from Clerk to Judge.—There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is

erroneous. It would seem that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the appellate court. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

In Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927), cited in Howard v. Queen City Coach Co., 211 N.C. 329, 190 S.E. 478 (1937), it was said that in the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the superior court of any county in his district, rendered pursuant to the provisions of this section, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor.

Applied in Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961).

Stated in County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934).

Cited in Pate v. R.L. Pittman Hosp., 234 N.C. 637, 68 S.E.2d 288 (1951); Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); Scott v. Scott, 259, N.C. 642, 131 S.E.2d 478 (1963); Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927); Baker v. Corey, 195 N.C. 299, 141 S.E. 892 (1928); State ex rel. Standard Supply Co. v. Vance Plumbing & Elec. Co., 195 N.C. 629, 143 S.E. 248 (1928); Beaufort County v. Bishop, 216 N.C. 211, 4 S.E.2d 525 (1939); Keen v. Parker, 217 N.C. 378, 8 S.E.2d 209 (1940); Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945).

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.—In all condemnation proceedings authorized by G.S. 40-2 or by any other statute, the clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding. (1957, c. 400, s. 1.)

Cited in North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.—The petitioner in all condemnation proceedings authorized by G.S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit (1957, c. 400, s. 2.)

Right to Take Nonsuit Recognized Prior to Enactment of Section.—The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit, at any time prior to the vesting of title in condemnor, had been judicially recognized prior to the enactment of this section. North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

This section does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor. North Carolina State Highway Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-210. Return of execution; order for disbursement of proceeds.—In all executions issued by the clerk of the superior court upon judgment before the clerk of the superior court, under § 1-209, and execution issued thereon, the sheriff shall make his return to the clerk of the superior court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided, that any interested party may appeal to the superior court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§ 1-211: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ 1-212: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ 1-213: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ 1-214: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ 1-215: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-215.1. Judgments or orders not rendered on Mondays validated. —In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

Legislature Cannot Validate Void Judgment.—This section was directly intended to validate judgments not rendered on Monday as required by the former statute. However, it is well understood that the legislature has no power to validate a void judgment. Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

§ 1-215.2. Time within which judgments or orders signed on days other than Mondays may be attacked.—From and after the 30th day of September, 1951, no action shall be brought or no motion in the cause shall be made to attack any judgment or order of any clerk of the superior court by reason of such judgment or order having been signed by such clerk of the superior court on any day other than Monday. (1951, c. 895, s. 1.)

§ 1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.—From and after the 30th day of September, 1951, any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the order or confirmation of sale was made on a day other than Monday is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1951, c. 895, s. 2.)

§ 1-216: Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated. — In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the superior court of any county in this State on a day other than Monday, contrary to §§ 1-215

and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in § 1-220 other than for irregularity as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.—In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, the said judgments or decrees shall not be invalidated by reason of the fact that the summons, although designated an alias or pluries summons, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.—In every case where prior to the 1st day of April, 1956, a judgment by default final has been entered by the clerk of the superior court of any county in this State in an action to remove cloud from title to real estate the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628.)

§§ 1-218, 1-219: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-220: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 60 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-221, 1-222: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-223. Against married women.—In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate. (Rev., s. 563; C. S., s. 603.)

Cross Reference. — As to statutes concerning married persons generally, see § 52-1 et seq.

Where the Wife Can Sue and Be Sued Alone.—It is not required that the wife, as such, prosecute or defend an action concerning the lands by guardian or next friend. Craddock v. Brinkley, 177 N.C. 125, 98 S.E. 280 (1919).

Same — Husband, When Joined, Is the Agent of the Wife. — The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purpose of the suit. Craddock v. Brinkley, 177 N.C. 125, 98 S.E. 280 (1919).

Judgment by Consent Not Binding on the Wife. — Where a married woman, pending an appeal by her from a personal judgment rendered against her husband on notes given for property bought by her husband and secured partly by a mortgage on her land, consented to withdraw the appeal and to allow a compromise judgment to be entered against her husband for a certain amount payable in installments, it was held, that she had no power to consent to such judgment, and it had no binding force on her although she was personally present and represented by counsel of her own selection at the time of its rendition. McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898).

§§ 1-224 to 1-226: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-227: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to judgment divesting title of one party and vesting it in others, see Rule 70 of the Rules of Civil Procedure (§ 1A-1).

§ 1-228. Regarded as a deed and registered.—Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R. C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev., ss. 567, 568; C. S., s. 608.)

Section Is Partially Superseded by § 47-27. — The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded, as to judgments in eminent domain proceedings, by the later enactment of c. 148, Public Laws of 1917 (§ 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947). See also note to § 40-19.

Consent Decrees Convey Title.—A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. Morris v. Patterson, 180 N.C. 484, 105 S.E. 25 (1920).

Same—Agreement in Divorce Proceedings.—In an action brought by the wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. Morris v. Patterson, 180 N.C. 484, 105 S.E. 25 (1920).

Marginal Cancellation Not Essential but Advisable.—When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890).

Cited in Town of Ayden v. Lancaster, 197 N.C. 556, 150 S.E. 40 (1929).

§ 1-229. Certified registered copy evidence.—In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the registerer's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (1850, c. 107, s. 3; R. C., c. 32, s. 26; 1874-5, c. 17, s. 3; Code, s. 428; Rev., s. 569; C. S., s. 609.)

§ 1-230. In action for recovery of personal property.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (C. C. P., s. 251; Code, s. 431; Rev., s. 570; C. S., s. 610.)

Cross Reference. — As to the provisional remedy of claim and delivery for personal property, see § 1-472 et seq.

In General. — Where the defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its deten-

tion. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Or after Regaining Possession He May Recover Damages in Another Action. — While plaintiff could have had his damages assessed in a former action of claim and delivery brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another, by virtue of this section, he was not required to take this course, but, after regaining possession could, in another action, recover damages for the injury done thereby. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907).

Measure of Damages When Property Cannot Be Returned. — The measure of damages for the wrongful taking of a tractor-trailer which cannot be returned is the value at the time of taking by the sheriff, with interest. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

Judgment Should Be Alternative. — In claim and delivery the judgment should be for the delivery of the property or its value, Oil Co. v. Grocery Co., 136 N.C. 354, 48 S.E. 781 (1904); Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913); and this is true of a judgment on a forthcoming bond in claim and delivery proceedings. Grubbs v. Stephenson, 117 N.C. 66, 23, S.E. 97 (1895).

Same—When Judgment for Defendant. —When the pleadings, in an action to declare valid a sale of property under mortgage, raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. Penny v. Ludwick, 152 N.C. 375, 67 S.E. 919 (1910).

Applicability of Doctrine of Res Judicata.—Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property it does not estop the plaintiff from bringing an independent action to recover such damages. Woody v. Jordan, 69 N.C. 189 (1873); Moore v. Edwards, 192 N.C. 446, 135 S.E. 302 (1926).

Same — Where Judgment Unsatisfied. — Where the plaintiff, who had recovered judgment in an action of claim and delivery in which he was defendant for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff, in such action for damages for the conversion of the property, it was held that he was entitled to recover. Asher v. Reizenstein, 105 N.C. 213, 10 S.E. 889 (1890).

Same—Applicable Only as to Matters Litigated Upon.—The fundamental reasons for the application of the doctrine of res adjudicata are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of the defendant's property as allowed by this section and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of res adjudicata has no application. Ludwick v. Penny, 158 N.C. 104, 73 S.E. 228 (1911).

Where Counterclaim Filed.—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. Ludwick v. Penny, 158 N.C. 104, 73 S.E. 228 (1911).

Measure of Damages When Property Beyond Control of Court.—In an action of claim and delivery, where it appears that the defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities will be adjusted and judgment rendered against the defendant for the balance of the purchase money, with interest from the date of purchase. Hall v. Tillman, 115 N.C. 500, 20 S.E. 726 (1894).

Estimation of Interest.—When the ver-

dict of the jury has only established that the plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be amended and affirmed. Penny v. Ludwick, 152 N.C. 375, 67 S.E. 919 (1910).

Where Additional Item Allowed by Consent.—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal. Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913).

Liability of Surety.—Where the plaintiff is successful in his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; or second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N.C. 542, 132 S.E. 466 (1926).

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with the provisions of the statute. Orange Trust Co. v. Hayes, 191 N.C. 542, 132 S.E. 466 (1926).

Issues and Judgment Should Cover Whole Case.—Where the action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied, the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

Cited in Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); Harrell v. Tripp, 197 N.C. 426, 149 S.E. 548 (1929); Green v. Carroll, 205 N.C. 459, 171 S.E. 627 (1933).

§ **1-231. What judge approves judgments.**—In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51; Code, s. 432; Rev., s. 571; C. S., s. 611.)

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. Corbin v. Berry, 83 N.C. 28 (1880).

Restraining orders must be made returnable before the judge in the district in which the action is pending. Galbreath v. Everett, 84 N.C. 546 (1881).

§ **1-232. Judgment roll.**—Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (C. C. P., s. 253; Code, s. 434; Rev., s. 572; C. S., s. 612.)

Section Directory. — The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together"

the papers did not vitiate the judgment which was entered of record and regular in form. See Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916), in spite of the holding in Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891), to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."

Cited in Williams v. Trammell, 230 N.C. 575, 55 S.E.2d 81 (1949).

§ 1-233. Docketed and indexed; held as of first day of term.—Every judgment of the superior court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, for the purpose only of establishing equality of priority as among such judgments. (Sup. Ct. Rule VIII; C. C. P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C. S., s. 613; 1929, c. 183; 1943, c. 301, s. 4½.)

Local Modification. — Durham: 1929, c. 88.

Editor's Note.—For article on Names—Married Women—Change of Names by Legal Process—Notice, see 16 N.C.L. Rev. 187.

Strict Compliance Necessary.—The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required. Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

Clerk Liable upon Failure to Index Judgment. — An action of tort will lie against the clerk upon his failure to index a judgment, such neglect resulting in damage to the plaintiff. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Same — Duty of Judgment Creditor to See Judgment Properly Docketed. — It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment. Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

Where Judgment Docketed in Foreign County.—Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed but must be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891); Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

Contents of the Index and Purpose Thereof. — When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891); Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

Initials in Index Valid. — "J. Mizell" or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." Valentine v. Britton, 127 N.C. 57, 37 S.E. 74 (1900).

One Cross-Indexing Not Sufficient for Two Judgments. — One cross-indexing is insufficient for two judgments, though they appear on the same page and include the same parties, and only the first judgment on its page will constitute a lien. Valentine v. Britton, 127 N.C. 57, 37 S.E. 74 (1900).

Judgment Signed Out of Term. — The provisions of this section that judgments relate to the first day of the term, apply

when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time perscribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. Conestee Chem. Co. v. Long, 184 N.C. 398, 114 S.E. 465 (1922).

Consent Judgments.—The provisions of this section that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall be of equal priority, do not apply to judgments by consent. Hood v. Wilson, 208 N.C. 120, 179 S.E. 425 (1935).

Judgment against Corporations. — A judgment against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute, who had in the meantime been appointed. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Cited in Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928); Henry v. Sanders, 212 N.C. 239, 193 S.E. 15 (1937).

§ 1-234. Where and how docketed; lien.—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (C. C. P., s. 254; Code, s. 435; Rev., s. 574; C. S., s. 614.)

Cross Reference.

As to docketed judgment for a fine constituting a lien, see § 15-185.

I. IN GENERAL.

Editor's Note.—See 11 N.C.L. Rev. 365, 367.

Liens on Real Estate and Personalty Distinguished. — A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Applicable to Legal and Equitable Estates. — This section is sufficiently comprehensive to include equitable as well as legal estates. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905). The principle is equally applicable when the sale to satisfy the judgment is made by an administrator. Mannix v. Ihrie, 76 N.C. 299 (1877).

Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. McKeithan v. Walker, 66 N.C. 95 (1872).

A judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant had in real estate,

whether it be such as can be seized under execution or not. Hoppock, Glenn & Co. v. Shober, 69 N.C. 154 (1873).

A lien is a right of property, and not a mere matter of procedure. So far as it relates to lands, it is a technical term, that means a charge upon the lands running with them, and incumbering them in every change of ownership. Ingles v. Bringhurst, 1 U.S. (1 Dall.) 341, 1 L. Ed. 167 (1788).

Property converted from its original nature, as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county, which by construction of this court embraced both legal and equitable estates. Clifton v. Owens, 170 N.C. 607, 87 S.E. 502 (1916), citing Dixon v. Dixon, 81 N.C. 323 (1879).

Liability of Trustee. — A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. Barrett v. Barnes, 186 N.C. 154, 119 S.E. 194 (1923).

Requirement That Clerk to Docket Judgment Mandatory. — A judge cannot, under this section, validly issue an order to the clerk not to docket a judgment pending the fullfillment of a conditional order directed to the parties. Hopkins v. Bowers, 111 N.C. 175, 16 S.E. 1 (1892). See also § 1-233 and note thereto.

Order of Resale of Realty Does Not Prolong Life of Lien.—Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, was raised and resales were ordered successively under the provision of former § 45-28 by which the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of the lien of the judgment within the provisions and meaning of this section. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943). For comment on this decision, see 22 N.C.L. Rev. 146. For present provisions covering the subject matter of former § 45-28, see § 45-21.27 et seq.

Applied in Dillard v. Walker, 204 N.C. 67, 167 S.E. 632 (1933); Equitable Life Assurance Soc'y of the United States v. Russos, 210 N.C. 121, 185 S.E. 632 (1936); McCollum v. Smith, 233 N.C. 10, 62 S.E.2d 483 (1950).

Stated in Dula v. Parsons, 243 N.C. 32, 89 S.E. 797 (1955).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960); Jones v. Rhea, 198 N.C. 190, 151 S.E. 255 (1930); Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936); Edmonds v. Wood, 222 N.C. 118, 22 S.E.2d 237 (1942).

II. CREATION OF LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter the purchaser takes subject to the statutory lien given by this section. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895); Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946). The mere rendition of the judgment will not constitute a lien, Alsop v. Mosely, 104 N.C. 60, 10 S.E. 124 (1889); nor does the execution fix the lien. Pasour v. Rhyne, 82 N.C. 149 (1880).

A judgment for a fine, duly docketed, constitutes a lien on realty under § 15-185, and attaches immediately upon the docketing of the judgment under the provisions of this section. Osborne v. Board of Educ., 207 N.C. 503, 177 S.E. 642 (1935).

In other words, the section specifies two requisites as conditions precedent to the fixing of the lien, namely (1) rendition and (2) docketing; when these two requirements are met the lien attaches as of the date of rendition.—Ed. note.

Same — Subsequent Purchasers. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893). See post, this note, "Priorities" II, B.

Same—Not Essential to Issuing an Execution.—Docketing is not a condition precedent to the enforcement of the judgment by final process. Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898). See also Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889), where it was said, "under the present system no lien is acquired upon land

in the absence of an execution and levy, until the judgment had been docketed."

Strict Compliance with Requirement as to Docketing.—To constitute a lien on real estate, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is situate. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937); Norman Lbr. Co. v. United States, 223 F.2d 868 (4th Cir. 1955).

Docketing First in County of Rendition.—A judgment rendered in one county cannot be docketed in another without having been first docketed in the county where it was rendered. McAden v. Banister, 63 N.C. 479 (1869); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Transcript Sent to Foreign County.—In Wilson v. Patton, 87 N.C. 318 (1882), it was held that the transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. Lee v. Bishop, 89 N.C. 256 (1883).

2. Personalty.

Levy Necessary to Constitute Lien on Personalty. — There is no lien upon personal property, except from the levying. Selby v. Dixon, 11 N.C. 424 (1826); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894); Summers Hdwe. Co. v. Jones, 222 N.C. 530, 23 S.E.2d 883 (1943).

No lien attaches to personalty by reason of the docketing of the judgment. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

B. Priorities.

Record as Notice. — A plaintiff will be charged with notice of judgment entered at a regular term of court as of the time of the entry. Sluder v. Graham, 118 N.C. 835, 23 S.E. 924 (1896).

Consent judgments, under this section, have priority in accordance with priority of docketing, since the provisions of § 1-233 are not applicable to consent judgments. Hood v. Wilson, 208 N.C. 120, 179 S.E. 425 (1935).

Between Judgments. — If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. Perry v. Morris, 65 N.C. 221 (1871).

Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Between Judgment and Attachment.—Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

A judgment creditor who attached the personalty of his debtor is entitled to priority over a judgment creditor who did not attach such property. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937).

Between Docketed Judgment and Unrecorded Deed. — 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).

Where there is a lien by judgment under this section against the holder of an equitable title to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judg-

ment lien, and equity will remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905); Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921).

An adverse holder of land under § 1-40, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Between Judgment and Previous Conveyance.—A judgment is not a lien upon the lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929).

Between Judgment and Subsequent Mortgage.—A docketed judgment has priority over a subsequently recorded mortgage. Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946).

Where after the recordation of a judgment, the judgment debtor executes a mortgage on certain of his land, and the land is foreclosed under prior mortgages antedating the judgment, and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the subsequent mortgage made. Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928).

Between Lien and Subsequent Purchaser. — Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, under this section, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. Moses v. Major, 201 N.C. 613, 160 S.E. 890 (1931).

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. Byrd v. Pilot Fire Ins. Co., 201 N.C. 407, 160 S.E. 458 (1931).

When an heir acquires land or property to be treated as realty subsequent to docketing of several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. Linker v. Linker, 213 N.C. 351, 196 S.E. 329 (1938).

Execution Sale under Prior Judgment.—A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929).

Subject to Homestead.—A lien on the lands of the judgment debtor is subject to the homestead interest as provided by N.C. Const., Art. X, § 2. Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929).

Purchaser at Execution Sale. — Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921).

Sale under Junior Judgment. — The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment; and the effect of a sale under both is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. Cannon v. Parker, 81 N.C. 320 (1879).

Same—Priorities Must Be Observed.—The sheriff must observe these priorities, of which he has notice upon the face of the execution, in paying out the money to the respective creditors. Cannon v. Parker, 81 N.C. 320 (1879).

Merger.—Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. Springs v. Pharr, 131 N.C. 191, 42 S.E. 590 (1902).

As to Bona Fide Purchasers.—Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title, and in such case the law will take notice of fractions of a day in favor of such a purchaser, and receivers of the debtor should be classed as a purchaser. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Bona fide purchasers are also protected where there is a great delay in making mo-

tion to revive the lien, and execution being issued after the lapse of the ten-year period. See post this note, analysis line IV, "Issuing Execution," catchline "Motion to Revive."

Judgment Creditor Prior to Debtor's Homestead.—The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtors allotted homestead, and therefore, the proceeds of the sale of such land should be applied first to the payment of the judgment debt. Gulley v. Thurston, 112 N.C. 192, 17 S.E. 13 (1893). But see post this note, analysis line III, "Property Subject to the Lien."

Interlocutory Judgment. — An interlocutory judgment, containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, and the land was not sold, does not affect the rights of the parties. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed.

In General.—A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. King v. Portis, 77 N.C. 26 (1877), but it gives no peculiar lien upon any particular parcel of land. Bryan v. Dunn, 120 N.C. 36, 27 S.E. 37 (1897).

The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946).

A judgment is a lien upon the lands of the judgment debtor that he may own in the county at the time the judgment was docketed. Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929).

The lien of a judgment is no more than that which is provided by the statute, and is effective only against "the real property in the county where the same is docketed of every person against whom any such judgment is rendered." Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938).

Title to Standing Timber. — An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. Fowle v. McLean, 168 N.C. 537, 84 S.E. 852 (1915).

Property converted from its original nature, see note of Clifton v. Owens, ante this note, analysis line I, "In General."

Homestead Not Subject to Judgment Lien.—The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

Same—Reversionary Interest May Be Subjected.—The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. Vanstory v. Thornton, 112 N.C. 196, 17 S.E. 566 (1893).

A judgment upon individual debt against holder of mere legal title held in trust for another has no lien upon the land so held. Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

B. After-Acquired Property.

In General.—Under this section the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895).

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939). See also Durham v. Pollard, 219 N.C. 750, 14 S.E.2d 818 (1941).

Judgment by Confession. — Though a judgment by confession is given out of the ordinary course of procedure nevertheless, it at once, when docketed, becomes a lien upon the judgment debtor's real property. Sharp v. Danville, M. & S.R.R., 106 N.C. 308, 11 S.E. 530 (1890); Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

Judgments against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. Stern Bros. v. Lee, 115 N.C. 426, 20 S.E. 736 (1894).

Successive Transfers of Different Tracts. —Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding, 170 N.C. 253, 86 S.E. 1010 (1915).

Attaches upon Conveyance to Judgment Debtor.—The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchie Bros., 169 N.C. 21, 85 S.E. 40 (1915).

C. Nature of Right Acquired.

No Estate Vested.—The lien created by docketing a judgment does ont vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches. Bruce v. Nicholson, 109 N.C. 202, 13 S.E. 790 (1891).

Title to Property in Third Party. — A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title is taken in the name of some third person. Dixon v. Dixon, 81 N.C. 323 (1879).

Same—Remedy of Creditor. — In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. Dixon v. Dixon, 81 N.C. 323 (1879).

Persons Entitled to Enforce.—In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it was no concern of the defendants that the person in whose name the judgments were taken was not the beneficial owner of the judgments, as defendants would be protected by payment to the plaintiff of record. Brown v. Harding, 170 N.C. 253, 86 S.E. 1010 (1915), rehearing denied, 171 N.C. 686, 89 S.E. 222 (1916).

Where Equitable Execution and Accounting Necessary.—Where there was a conflict as to the priorities of the secured creditors the plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution but had to resort to an action in the nature of an equitable execution where an account could be taken. Trimble v. Hunter, 104 N.C. 129, 10 S.E. 291 (1889).

Same—Reason for the Rule.—As it (the resulting trust) could not be levied on or sold by the common law to satisfy the execution, no lien arose from its issuing or what the sheriff calls its levy. For as the lien arises or is created as a means to the end, it would be in vain for the law to raise it when the end could not be attained. McKeithan v. Walker, 66 N.C. 95 (1872).

IV. ISSUING EXECUTION.

Cross Reference.—See the analysis line immediately following in this note.

Purpose.—The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. Pasour v. Rhyne, 82 N.C. 149 (1880).

Time Allowed.—Leave to issue execution upon a docketed judgment may be granted at any time within ten years from the docketing. Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890).

Same—Appeal.—The motion for leave to issue execution is made in apt time, though the ten years expired pending the appeal and though no undertaking is given; this is true because the time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed. Adams v. Guy, 106 N.C. 278, 11 S.E. 535 (1890).

Motion to Revive.—Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who bona fide bought the

land during the ten years. Lilly v. West, 97 N.C. 276, 1 S.E. 834 (1887); Pipkin v. Adams, 114 N.C. 201, 19 S.E. 105 (1894). The same principle applies where the execution is levied before the expiration of the lien but the sale does not take place until after the expiration of the lien. Spicer v. Gambill, 93 N.C. 378 (1885).

Failure to Docket Judgment.—If a party who obtains judgment below neglects to docket it in any county, then upon obtaining judgment in the appellate court, he will have no lien prior to the teste of his execution from that court. Rhyne v. McKee, 73 N.C. 259 (1875).

V. LOSS OF THE LIEN.

In General. — The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment; and this is so notwithstanding execution has been issued within the ten years. Pasour v. Rhyne, 82 N.C. 149 (1880); Lyon v. Russ, 84 N.C. 588 (1881).

The lien of a judgment, created upon real estate by the provisions of this section, is for a period of ten years from the date of the rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

The life of the lien of a judgment is ten years from the date of its rendition in the superior court, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and proceeding on the judgment. Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941).

Lien Is Lost if Sale Not Made in Ten Years.—This section and § 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

Deduction from Ten-Year Period.—The period during which a judgment debtor is in the bankrupt court and his property in custodia legis should be deducted from the ten-year period as provided in this section. First-Citizens Bank & Trust Co. v. Parker, 232 N.C. 512, 61 S.E.2d 441 (1950).

Appeal as Stopping Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten-year statute of limitations. Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

When Mandate to Sell the Land Expires.—A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than forty days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. Jeffreys v. Hocutt, 193 N.C. 332, 137 S.E. 177 (1927).

Cancellation of Judgment to Remove Cloud.—Where a deed of trust to secure certain bonds contains the provision that the bonds may be sold in part by the trustor with the consent of the trustee who is to receive and apply the purchase price on the bonds, and a judgment has been docketed against the trustor, after he has sold a part of said land under the agreement but without the joinder of the trustee and before the purchaser has registered his deed, the purchaser is entitled to have the judgment canceled as a cloud on his title since the purchase of the land was, in reality, through the trustee who received the money and not the trustor. Boyd v.

Bristol Typewriter Co., 190 N.C. 794, 130 S.E. 858 (1925).

In What Court Judgment Impeachable.—A justice's judgment docketed in the superior court is for the purpose of execution there, and that court has no power to set it aside, unless the cause be carried up by appeal or writ of recordari. A judgment can be vacated only by the court which rendered it. Morton v. Rippy, 84 N.C. 611 (1881).

Effect of Former § 45-28.—An execution sale held less than ten days before the expiration of ten years after the rendition of the judgment was held ineffective, since under former § 45-28, the sale under execution could "not be deemed to be closed under ten days," in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the ten-year period. The contentions that the sheriff's deed related back to the day of the sale, and that delay on the part of the sheriff in executing the deed or making formal return could not adversely affect the rights of the purchaser, were inapposite. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948). For present provisions covering the subject matter of former § 45-28, see § 45-21.27 et seq.

Cited in Scales v. Scales, 218 N.C. 553, S.E.2d 569 (1940).

§ 1-235. Of appellate division docketed in superior court; lien.—It is the duty of the appropriate clerk of the appellate division, on application of the party obtaining judgment in one of the courts of that division, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the appellate court otherwise directs. (1881, c. 75, ss. 1, 4; Code, s. 436; Rev., s. 575; C. S., s. 615; 1969, c. 44, s. 2.)

Editor's Note. — The 1969 amendment substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" near the beginning of the section, substituted "one of the courts of that division" for "that court" in the first sentence and substituted "appellate court" for "Supreme Court" in the last sentence.

The foundation of the purpose of the enactment of this section is to be found in the great importance attached to the requirement that every judgment, to constitute a lien, must be docketed, the imperativeness of which has been dealt with in § 1-234. Hence, by the very provisions of this section the substantial elements of a final judgment rendered by the appellate court must be transmitted to the various superior courts and when docketed (and not until then) in the proper county the judgment forms a lien upon the real estate of the debtor situated therein. See Alsop v. Moseley, 104 N.C. 60, 10 S.E. 124 (1889).

Rendition Does Not Perfect Lien.—The simple rendition of a judgment will not constitute a lien upon the judgment debtor's land until "docketed" in the county where the land lies, as required by the statute. Alsop v. Moseley, 104 N.C. 60, 10 S.E. 124 (1889).

Issuing Execution Prior to Docketing.—See note of Bernhardt v. Brown, under § 1-234.

Judgment of Appellate Court Applied to Docketed Lower Court Judgment. — The defendant, by a decree in the appellate court, had recovered from the plaintiffs a sum of money; while the execution was in the hands of the sheriff the plaintiffs recovered from the defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the appellate court. These latter judgments were docketed, and executions were taken out upon them and returned nulla bona; the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant applied to their

judgments and it was held that they were entitled to such relief. Hogan v. Kirkland, 64 N.C. 250 (1870).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937).

§ 1-236. Fees for filing transcripts of judgments by clerks of superior courts.—The fee for filing, docketing and indexing transcripts of judgments in the offices of the several clerks of the superior court in North Carolina shall be the same fee charged for filing, docketing and indexing transcripts of judgments in the office of the clerk of the superior court of the county from which the transcript of judgment is sent to said county. (1933, c. 435, s. 1.)

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated. — Each transcript of judgment from the original docket of the superior court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11.)

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.—Judgments and decrees rendered in the district courts of the United States within this State may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, recorded, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this State, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the State law to the requirements of the act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the act of August first, one thousand eight hundred and eighty-eight, chapter seven hundred and twenty-nine. (1889, c. 439; Rev., s. 576; C. S., s. 616; 1943, c. 543.)

Judgment Rendered in District Court. — Judgment rendered by federal district and circuit courts, in order to be liens must be docketed as required by the State laws, and, since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the ten-year limitation contained in this statute. United States v. Minor, 235 F. 101 (4th Cir. 1916).

Date of Docketing Fixes the Lien.—Under the act of Congress as to docketing judgments of federal courts, and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this State for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. Riley v. Carter, 165 N.C. 334, 81 S.E. 414 (1914).

A condemnation judgment in favor of the United States need not be recorded in the county where the land lies, and cross indexed in order to protect its ownership in land that it has acquired. United States v. Norman Lumber Co., 127 F. Supp. 518 (M.D.N.C. 1955).

Whether docketing and cross indexing of federal judgments of condemnation with State court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far Congress has not seen fit to take action with regard to the matter. Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937).

§ **1-238**: Repealed by Session Laws 1943, c. 543.

§ **1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor.**—(a) The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied."

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided, further, that the attorney of record may waive said notice, and said moneys shall be paid by the clerk of superior court, by signing the judgment docket. (1823, c. 1212, P. R.; R. C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C. S., s. 617; 1967, c. 1067; 1969, c. 18.)

Editor's Note. — The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

The 1969 amendment added the last proviso in subsection (b).

Payment Made to Clerk.—A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment. Sugg v. Bernard, 122 N.C. 155, 29 S.E. 221 (1898).

A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the superior court in whose office the judgment is docketed, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. Dalton v. Strickland, 208 N.C. 27, 179 S.E. 20 (1935).

Same—Where Execution Is in the Hands of Sheriff.—A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. Bynum v. Barefoot, 75 N.C. 576 (1876).

Clerk Is Agent of Owner of Judgment.—The effect of this section is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment. Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967).

The effect of this section is to make the clerk the statutory agent of the owner of a judgment, and it is the clerk's duty to pay money received thereunder to the party entitled thereto. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

There is no duty on the party making payment to require the clerk to make an entry on the judgment docket. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Clerk Receiving Depreciated Currency.—Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff has done acts from which such an au-

thority may fairly be implied. Purvis v. Jackson, 69 N.C. 474 (1873)

Misappropriation of Payment by Clerk.—Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the superior court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. Gilmore v. Walker, 195 N.C. 460, 142 S.E. 579 (1928).

Liability for Loss.—The clerk of the superior court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. Dalton v. Strickland, 208 N.C. 27, 179 S.E. 20 (1935).

The clerk and his surety would be liable to the owner of the judgment for any loss which he might suffer because of the clerk's failure to perform his statutory duty. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Applied in United States v. Atlantic Coast Line R.R., 237 F.2d 137 (4th Cir. 1956).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

§ 1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.—In all cases where the governing authority of any county has caused the instruments or documents filed for record in the office of the clerk of the superior court of such county to be recorded by any system involving the use of microfilm or by the use of any microphotographic system or by any system of photographic recording, it shall be lawful for the clerk of the superior court to keep a record or docket book for the purpose of entering on same payment or payments, credit or satisfaction, assignments or releases in whole or in part of any judgment which has heretofore been recorded by any photographic process above mentioned. For this purpose, the form of such docket or record book shall be substantially as follows:

"..... Superior Court Cancellation, Assignment, Transfer or Release of Judgments, etc.

I (We) ..... do hereby certify that that certain judgment docketed in Judgment Docket ....., at page ....., filed .... day of ....., 19.., Case No. ....., wherein ..... is (are) Plaintiff(s) and ..... is (are) Defendant(s) has been fully satisfied, released and discharged together with all costs, and interest,

.....

.....

Signed in the presence of ....

Assistant-Deputy Clerk of the Superior Court of ..... County ....

Any entries of payment, credits or satisfaction made on such record or docket book, in substantially the form above mentioned, shall be good and valid payments, credits or satisfactions in all respects as if the same had been duly entered on the original judgment docket before the recording of same by the photographic process or system above mentioned. The clerk of the superior court shall have the authority to forward certificates to the clerk of the superior court of each county to whom a transcript of said judgment has been sent to the same extent and for all the purposes provided in G.S. 1-239, and all payments, credits or satisfactions entered in said docket book or record shall be valid to the same extent as if the same had been entered in the regular judgment docket in accordance with the provisions of G.S. 1-239. (1951, c. 774.)

§ **1-240:** Repealed by Session Laws 1967, c. 847, s. 2, effective January 1, 1968.

Cross References. — For present provisions as to contribution, see chapter 1B. As to third-party practice, see Rule 14 of the Rules of Civil Procedure (§ 1A-1).

§ **1-241. Clerk to pay money to party entitled.**—The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (1823, c. 1212, s. 2, P. R.; R. C., c. 31, s. 128; Code, s. 439; Rev., s. 578; C. S., s. 619.)

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Applied in United States v. Atlantic Coast Line R.R., 135 F. Supp. 600 (4th Cir. 1955), aff'd, 237 F.2d 137 (E.D.N.C. 1956).

§ **1-242. Credits upon judgments.**—Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, a transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of. (1903, c. 558; Rev., s. 579; C. S., s. 620.)

Parol Agreement to Convey Land Not within Section.—Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose, such is not in the purview of the statute, and not enforceable by him under the statute of frauds. Brown v. Hobbs, 154 N.C. 544, 70 S.E. 906 (1911).

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—Where some of defendants, sued as joint tort-feasors, pay plaintiff a sum in consideration of a covenant not to sue, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendants against whom judgment was entered are entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to execution, the motion coming within the spirit if not the letter of this section. Brown v. Norfolk S.R.R., 208 N.C. 423, 181 S.E. 279 (1935); Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961).

§ **1-243. For money due on judicial sale.**—The Supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (R. C., c. 31, s. 129; Code, s. 941; Rev., s. 1524; C. S., s. 621.)

Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. Ex parte Cotten, 62 N.C. 79 (1867).

Motion Proper Method to Enforce Contract.—An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale

will not be entertained if objection be made in apt time; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888), but this matter is within the control of the court and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time —in this case, sixty days. Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

Same — When Independent Action Allowed.—If the objection is not made at the proper time the court may proceed with the independent action. Such objection will not be entertained when made for the first time in the appellate court. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888).

Failure of Purchaser to Comply with His Bid.—If a purchaser at a judicial sale fails to comply with his bid, the court may either decree, first, that he specially perform his contract, or, second, that the land be resold and the purchaser released, or third, that without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. Hudson v. Coble, 97 N.C. 260, 1 S.E. 688 (1887).

Ten Days' Notice Required.—Any court, which orders a judicial sale, has the power to make a decree for the money after ten days' notice thereof. Ex parte Cotten, 62 N.C. 79 (1867).

Waiver of Right to Jury Trial.—Although the defendant under this section is entitled to have the issue, where the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned he fails to appear and answer, he waives that right. Durham v. Wilson, 104 N.C. 595, 10 S.E. 683 (1889).

Sale by Administrator.—A sale of land for assets, made by an administrator, pursuant to a judgment in a probate court, in a proceeding instituted for that purpose, is a judicial sale, and the provisions of this section are applicable thereto. Mauney v. Pemberton, 75 N.C. 219 (1876); Chambers v. Penland, 78 N.C. 53 (1878).

When Court May Reopen Case.—Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

Petition by Commissioner.—A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited. It was held, upon demurrer, that the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

§ **1-244. Applicable to justices' courts.**—This article applies, wherever appropriate, to proceedings in courts of justices of the peace. (Code, s. 389; Rev., s. 562; C. S., s. 622.)

§ **1-245. Cancellation of judgments discharged through bankruptcy proceedings.**—When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind.

For the filing of said instrument or certificate and making new notations the

clerk of the superior court shall be paid a fee of one dollar ($1.00). (1937, c. 234, ss. 1-4.)

Editor's Note.—It appears that the effect of filing the certificate as provided by this section is to give notice of the inefficacy of the judgment to attach as a lien after the bankruptcy; not to give notice that the judgment is no lien at all, for it may have become a lien before the bankruptcy. 15 N.C.L. Rev. 336.

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.—No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Editor's Note.—For comment on this section, see 19 N.C.L. Rev. 462.

Article 24.

Confession of Judgment.

§ 1-247: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

§ 1-248: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

§ 1-249: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

Article 25.

Submission of Controversy without Action.

§§ 1-250 to 1-252: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Article 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in

form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Cross Reference.—See note to § 118-18.

Editor's Note.—See 12 N.C.L. Rev. 57, for note on this section.

This valuable legislation is passed in substantially the form of the Uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, the variations from that standard being to adjust it more effectively to local procedure. See the explanation and comments in 9 N.C.L. Rev. 20.

One has only to look at the state of the law in North Carolina as disclosed in the case of Hicks v. Greene County, 200 N.C. 73, 156 S.E. 164 (1930), by way of contrast to appreciate the improvement which the Declaratory Judgment Act brings to procedure in this State. 9 N.C.L. Rev. 352.

This and subsequent sections applied in Edgerton v. Hood, 205 N.C. 816, 172 S.E. 481 (1934), to determine the rights and duties of the parties with respect to the administration of assets of the Rutherford Bank under the provisions of c. 344, Public-Local Laws, 1933.

In General. — This article does not extend to the submission of the theoretical problem or a mere abstraction, and it is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936), citing Poore v. Poore, 201 N.C. 791, 161 S.E. 532 (1931); Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56 (1933); Branch Banking & Trust Co. v. Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953); Competitor Liasion Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955).

While proceedings under this article have been given a wide latitude, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947).

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills. Farthing v. Farthing, 235 N.C. 634, 70 S.E.2d 664 (1952); Bennett v. Attorney General, 245 N.C. 312, 96 S.E.2d 46 (1957).

The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

The Uniform Declaratory Judgment Act does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

This article does not authorize the adjudication of mere abstract or theoretical questions. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Common Law.—It would appear that declaratory relief was unknown at common law, inasmuch as the common-law conception of courts was that they were a branch of the government created to redress private wrongs and punish the commission of crimes and misdemeanors. The courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

The Declaratory Judgment Act is to be liberally construed and administered. Nationwide Mut. Ins. Co. v. Roberts, 261

N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Specific Reference to Statute Not Required.—It is not error if an action instituted under this section fails to make specific reference to the statute in the complaint. It is the facts alleged that determine the nature of the relief to be granted. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

An ex parte proceeding to determine petitioner's racial status is not within the scope of this article. Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936), citing In re Eubanks, 202 N.C. 357, 162 S.E. 769 (1932).

The purpose of this article is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Employment Security Law involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under this article to determine the question. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Necessity for a Controversy.—If it does not appear that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations, the action will be dismissed as not coming within the provisions of this and the following sections. Wright v. McGee, 206 N.C. 52, 173 S.E. 31 (1934).

This article does not authorize courts to give advisory opinions or academic legal guidance, but actions for declaratory judgments will lie for an adjudication of rights, status or other legal relations only when there is an actual or existing controversy between the parties. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

The court acquires jurisdiction to render a declaratory judgment as to those matters concerning which it can be inferred from a liberal interpretation of the pleading that there is an actual or existing controversy between the parties. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

The broad terms of this article do not confer upon the court an unlimited jurisdiction; and the court will not entertain an ex parte proceeding or a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

It need not be alleged and shown by plaintiff that the question is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utility of the defendant, without a declaration in the complaint of plaintiff's intent to exercise its rights under the franchise contract, does not constitute a controversy. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

An action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

While the Uniform Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Actions for a declaratory judgment under the provisions of this section will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Branch Banking & Trust Co.

v. Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953).

Jurisdiction under this and the sections following may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).

When a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises. Haley v. Pickelsimer, 261 N.C. 293, 134 S.E.2d 697 (1964).

The superior court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a complaint in a proceeding for a declaratory judgment stated a justiciable controversy, a demurrer should have been overruled, and after the filing of an answer a decree containing a declaration of right should have been entered. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

This article was not intended to require the court to give advisory opinions when no genuine controversy presently exists between the parties. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

This section is broad in its terms, but it has been consistently held that under it, the court will not entertain a proceeding which lacks the essentials of an actual controversy. The presence of a genuine controversy is a jurisdictional necessity. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

To constitute an actual controversy there need not exist an actual right of action in one party against the other in which consequential relief might be granted. But a mere fear or apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment; before granting such relief, the court must be convinced that litigation sooner or later appears to be unavoidable. Consequently, where it appears that the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Same—Failure of Adverse Party to Demur. — A litigant seeking a declaratory judgment must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties, but the adverse party cannot confer jurisdiction on the court by failing to demur to an insufficient pleading. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

Facts held insufficient to present controversy under the Declaratory Judgment Act. Competitor Liasion Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955).

The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

General Principles Govern Demurrers.— The use and determination of demurrers in declaratory judgment actions are controlled by the same principles that apply in other cases. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A demurrer is rarely an appropriate pleading for a defendant to file to a petition for declaratory judgment. Where the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether

plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect to the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

The general rule is that where plaintiff's pleading, in an action for a declaratory judgment, sets forth an actual or justiciable controversy, or a bona fide justiciable controversy, it is not subject to demurrer, since it sets forth a cause of action. This is true even though plaintiff is not entitled to a favorable declaration on the facts stated in his complaint, or to any relief, or is wrong in his contention as to his ultimate rights, since, in passing on the demurrer, the court is not concerned with whether he is entitled to a declaration of rights with respect to the matters alleged. Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

When a complaint alleges a bona fide controversy justiciable under the Declaratory Judgment Act, and it does not appear from the complaint that necessary parties are absent from the suit, a demurrer to the complaint should be overruled. The parties are entitled to a declaration of their rights and liabilities and the action should be disposed of only by a judgment declaring them. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

An action is maintainable under the Declaratory Judgment Act only insofar as it affects the civil rights, status and other relations in the present actual controversy between parties. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

Immunity of State Not Waived. — The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Hence, the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

In an action under this section to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with an easement as defined by the court, since no action, except as provided in § 143-291, may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Article Does Not Supersede Rule that State Cannot Be Delayed in Collection of Revenue.—As broad and comprehensive as it is, this article does not supersede the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its existence depends. Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).

Article Does Not Vest in Superior Court Power to Supervise Officials of Inferior Courts. — While the Declaratory Judgment Act is comprehensive in scope and purpose, the legislature, in enacting it did not intend to vest in the superior courts of the State the general power to oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954); City of Henderson v. County of Vance, 260 N.C. 529, 133 S.E.2d 201 (1963).

Failure of Clerk of Local Court to Collect and Account for Moneys.—The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be made the subject of an action instituted under the Declaratory Judgment Act. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954).

A moot question is not within the scope of the Declaratory Judgment Act. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

A proceeding under the Declaratory Judgment Act for a declaration as to how the estate of deceased passed by his purported will must be dismissed when the record of probate of the instrument discloses on its face that the paper-writing had not been proven as required by statute, since in such instance the question of title to property under the paper-writing is moot. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

The validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action un-

der this and sections following; but this may be done only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

Under the broad terms of the Declaratory Judgment Act there was held to be a right to challenge the Firemen's Pension Fund Act, § 118-18 et seq., in the superior court. It did not appear that the instant case was an action against the State and the allegations were sufficient to show the court had jurisdiction of the cause. American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

The Declaratory Judgment Act does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

A declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing, in the absence of a stipulation. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Action to Determine Rights under Testamentary Trust.—An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under this article. Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941).

Litigant May Not Receive Advice as to Procedure in a Pending Case from Another Judge.—This article does not confer upon one judge the authority to advise a litigant upon a matter of procedure in another trial before another judge. Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

Sales of Interests of Infants in Land.—The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, quaere? Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

Marketability of Land. — The Declaratory Judgment Act does not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

Question of Insurer's Liability.—Insurer who issued liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of Uniform Declaratory Judgment Act to determine whether the truck was being used at time of accident within exception clause of policy. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N.C. 547, 35 S.E.2d 631 (1945).

Generally questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief. Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Where a declaratory judgment action served the dual purpose of determining with finality an insurance company's obligation to defend the insured in a tort action pending against the insured and the company's ultimate liability for any judgment rendered against the insured the case was a perfect one for declaratory judgment. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

Action to Determine Right to Easement.—An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949).

An action to obtain a judicial declaration of plaintiff's right to an easement appurtenant over the lands of defendants is authorized by the Declaratory Judgment Act. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

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 this section, since such suit involves title to realty within the purview of § 41-10.1. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Jurisdiction of Industrial Commission Exclusive in Workmen's Compensation Cases.—In an action instituted in the su-

perior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose an employee-employer relationship exists so as to make the parties subject to the provisions of the Workmen's Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Such as One Involving Right of Insurance Carrier to Subrogation.—The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third party tort-feasor, under the provisions of § 97-10.2, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Question as to Right of Adopted Children to Share in Corpus of Trust.—Where, in an action to construe a will, the parties sought adjudication as to whether the three adopted children of testator's nephew would be entitled to share in the corpus of a trust after the death of the life beneficiaries, it was held that since the question was one of law and presently determinable, and since it was not moot unless all three adopted children should die prior to the death of the survivor of the life beneficiaries, the parties were entitled to a determination of the question. Wachovia Bank & Trust Co. v. Green, 238 N.C. 339, 78 S.E.2d 174 (1953).

Right to Close Alleyway. — Where an alleyway ending in a cul-de-sac was referred to in the respective deeds to contiguous lots, the right to close a part of the alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy as to whether deeds created a fee upon special limitation and as to whether title would revert to grantors upon the threatened happening of the contingency, may be maintained under the Declaratory Judgment Act. Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

The mere threat of an action to rescind a sale of personal property, or to sue for damages, is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

Action to Quiet Title.—A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Applied in Blue Ridge Mem. Park v. Union Nat'l Bank, Inc., 237 N.C. 547, 75 S.E.2d 617 (1953); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); City of Greensboro v. Smith, 239 N.C. 138, 79 S.E.2d 486 (1954); Fuller v. Hedgpeth, 239 N.C. 370, 80 S.E.2d 18 (1954); Hubbard v. Wiggins, 240 N.C. 197, 81 S.E.2d 630 (1954); Julian v. Lawton, 240 N.C. 436, 82 S.E.2d 210 (1954); Mesimore v. Palmer, 245 N.C. 488, 96 S.E.2d 356 (1957); Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957); Wachovia Bank & Trust Co. v. Taliaferro, 246 N.C. 121, 97 S.E.2d 776 (1957); Walker v. Moss, 246 N.C. 196, 97 S.E.2d 836 (1957); Carter v. Davis, 246 N.C. 191, 97 S.E.2d 838 (1957); Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957); Competitor Liasion Bureau of Nascar, Inc. v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957); Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957); Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962); Cline v. Olson, 257 N.C. 110, 125 S.E.2d 320 (1962); Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963); Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963); Worsley v. Worsley, 260 N.C. 259, 132 S.E.2d 579 (1963); Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 262 N.C. 691, 138 S.E.2d 512 (1964); Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964); First Union Nat'l Bank v. Broyhill, 263 N.C. 189, 139 S.E.2d 214 (1964); Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967); Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967); Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967); Harrelson v. City of Fayetteville, 271 N.C. 87,

155 S.E.2d 749 (1967); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); City of Raleigh v. Norfolk S. Ry., 4 N.C. App. 1, 165 S.E.2d 745 (1969); Farnell v. Dongan, 207 N.C. 611, 178 S.E. 77 (1935), with reference to rights in the property of deceased; Carr v. Jimmerson, 210 N.C. 570, 187 S.E. 800 (1936); E.B. Ficklen Tobacco Co. v. Maxwell, 214 N.C. 367, 199 S.E. 405 (1938); Branch Banking & Trust Co. v. Toney, 215 N.C. 206, 1 S.E.2d 538 (1939); Hilton Lumber Co. v. Estate Corp., 215 N.C. 649, 2 S.E.2d 869 (1939); Burcham v. Burcham, 219 N.C. 357, 13 S.E.2d 615 (1941); Moore v. Sampson County, 220 N.C. 232, 17 S.E.2d 22 (1941); Oxford Orphanage v. Kittrell, 223 N.C. 427, 27 S.E.2d 133 (1943); Williams v. Rand, 223 N.C. 734, 28 S.E.2d 247 (1943); Patterson v. Brandon, 226 N.C. 89, 36 S.E.2d 717, 163 A.L.R. 1150 (1946); Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946); First Sec. Trust Co. v. Henderson, 226 N.C. 649, 39 S.E.2d 804 (1946); In re Battle, 227 N.C. 672, 44 S.E.2d 212 (1947); Williams v. Johnson, 228 N.C. 732, 47 S.E.2d 24 (1948); Ward v. Black, 229 N.C. 221, 49 S.E.2d 413 (1948); First Nat'l Bank v. Brawley, 231 N.C. 687, 58 S.E.2d 706 (1950); Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950); Williamson v. Williamson, 232 N.C. 54, 59 S.E.2d 214 (1950).

Quoted in Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961).

Cited in Efird v. Efird, 234 N.C. 607, 68 S.E.2d 279 (1951); North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Taylor v. Taylor, 243 N.C. 726, 92 S.E.2d 136 (1956); Blanchard v. Ward, 244 N.C. 142, 92 S.E.2d 776 (1956); Price v. Davis, 244 N.C. 229, 93 S.E.2d 93 (1956); Town of Farmville v. A.C. Monk & Co., 250 N.C. 171, 108 S.E.2d 479 (1959); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Brown v. Byrd, 252 N.C. 454, 113 S.E.2d 804 (1960); Andrews v. Andrews, 253 N.C. 139, 116 S.E.2d 436 (1960); Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 117 S.E.2d 733 (1961); Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966); Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969); In re Reynolds, 206 N.C. 276, 173 S.E. 789 (1934); Corl v. Corl, 209 N.C. 7, 182 S.E. 725 (1935); Peyton v. Smith, 213 N.C. 155, 195 S.E. 379 (1938).

§ 1-254. Courts given power of construction of all instruments.— Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

Contracts.—When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Statutes. — The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for the determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interests involved therein. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Wills.—A paper-writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the animus testandi, will be declared his will as a matter of law. Rountree v. Rountree, 213 N.C. 252, 195 S.E. 784 (1938).

In action by executor under Declaratory Judgment Act for construction of will and to determine validity of assignment of interest in legacy, motion to dismiss for want of jurisdiction denied where the controversy over the validity of assignment was originally brought into court by executor, as it is entitled to have matter determined in present proceeding. First

Sec. Trust Co. v. Henderson, 226 N.C. 649, 39 S.E.2d 804 (1946).

An action to modify or reform the provisions of a judgment may not be maintained under the Declaratory Judgment Act. Howland v. Stitzer, 231 N.C. 528, 58 S.E.2d 104 (1950).

Release of Prospective Testamentary Benefit.—Where the heart of a case was the determination of the effect, meaning and validity of a release of a testamentary benefit from a prospective testator and the rights of the parties thereunder, there was a real controversy which plaintiffs were entitled to have determined. Stewart v. McDade, 256 N.C. 630, 124 S.E.2d 822 (1962).

Applied in North Carolina State Art Soc'y v. Bridges, 235 N.C. 125, 69 S.E.2d 1 (1952); Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961).

Quoted in Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Bennett v. Attorney General, 245 N.C. 312, 96 S.E.2d 46 (1957); American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

Stated in York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Citizens Nat'l Bank v. Phillips, 235 N.C. 494, 70 S.E.2d 509 (1952); First Sec. Trust Co. v. Henderson, 225 N.C. 567, 35 S.E.2d 694 (1945).

§ 1-255. Who may apply for a declaration.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 102, s. 3.)

Advice as to Taxes.—An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. Wachovia Bank & Trust Co. v. Lambeth, 213 N.C. 576, 197 S.E. 179, 117 A.L.R. 117 (1938).

Invocation of General Equitable Powers.—A proceeding may not be maintained under this and other sections of this article by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947). For comment upon the decision in this case, see 26 N.C.L. Rev. 69.

Applied in Rierson v. Hanson, 211 N.C. 203, 189 S.E. 502 (1937); Citizens Nat'l Bank v. Corl, 225 N.C. 96, 33 S.E.2d 613 (1945); Cunningham v. Brigman, 263 N.C. 208, 139 S.E.2d 353 (1964).

Quoted in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

§ 1-256. Enumeration of declarations not exclusive.—The enumeration in §§ 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in § 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947).

This section enlarges the specific categories mentioned elsewhere in the statute. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

Quoted in Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

§ **1-257. Discretion of court.**—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeeding. (1931, c. 102, s. 5.)

Applied in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

§ **1-258. Review.**—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

This section does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the Declaratory Judgment Act. Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959).

§ **1-259. Supplemental relief.**—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

§ **1-260. Parties.**—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

Language of section is clear and specific. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Absence of Necessary Party.—The latter portion of the first sentence of this section ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. Morganton v. Hutton & Bourbonnais Co., 247 N.C. 666, 101 S.E.2d 679 (1958).

Where it appears in a case involving the construction of a will that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957).

Parties to Action to Determine Right to Close Alleyway.—The owners of the fee in an alleyway in which owners of contiguous lots had an easement were necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the cul-de-sac end might be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open. But a lot owner who had leased her entire interest, and a party agreeing to lease the alleyway only in the event a part of it could be closed, were not necessary parties to the proceeding. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

Applied in Marsden v. Southern Flight Serv., Inc., 192 F. Supp. 418 (M.D.N.C. 1961); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 261 N.C. 716, 136 S.E.2d 124 (1964); North Carolina Tpk. Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Cited in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

§ **1-261. Jury trial.**—When a proceeding under this article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Question of Insurer's Liability.—Where insurer alleged exclusion from liability on policy and insured alleged coverage, and coverage was conceded unless use of ve-

hicle was within exception clause in policy, the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N.C. 547, 35 S.E.2d 631 (1945).

Applied in Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962).

Stated in Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C.), aff'd, 307 F.2d 521 (4th Cir. 1962).

§ 1-262. **Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.**—Proceedings under this article shall stand for trial at a term of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the superior court. If in such case the parties do not agree upon a judge for the hearing, then upon motion of the plaintiff the proceeding may be heard by the resident judge of the district, or the judge holding the courts of the district, or by any judge holding a term of the superior court within the district. Such motion shall be in writing, with ten days' notice to the defendant, and the judge so designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the clerk of the superior court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearing in other civil actions before a judge without a jury. The term "superior court judge" used in this section shall include emergency and special judges of the superior court. (1931, c. 102, s. 10.)

When Court Should Not Consider Evidence and Find Additional Facts.—In an action under the Declaratory Judgment Act when the pleadings do not raise issues of fact, the court is without authority to consider evidence and find additional facts. Thus where the facts were established by defendant's unequivocal admission of all of plaintiffs' factual allegations, the court should not have considered affidavits offered by plaintiffs, and the findings of fact incorporated in the judgment, to the extent that they differed from or went beyond the facts established by the pleadings, would not be considered on appeal. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).

Applied in Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967).

Cited in North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C.), aff'd, 307 F.2d 521 (4th Cir. 1962).

§ 1-263. **Costs.**—In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

Applied in Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

§ 1-264. **Liberal construction and administration.**—This article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

Applied in Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Quoted in American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

§ 1-265. **Word "person" construed.**—The word "person" wherever used in this article, shall be construed to mean any person, partnership, joint-stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13.)

Allegations taken as true for purpose of testing demurrer qualified plaintiff insurance companies as "persons" within meaning of this section. American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

§ **1-266. 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, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ **1-267. Short title.**—This article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

Cited in Atlantic Disct., Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ **1-268. Writs of error abolished.**—Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter. (C. C. P., s. 296; Code, s. 544; Rev., s. 583; C. S., s. 629.)

Editor's Note.—Prior to the adoption of the Code of Civil Procedure writs of error were allowed in proper cases. But in Smith v. Cheek, 50 N.C. 213 (1857), it was held that the Supreme Court had no power to issue a writ of error. Section 296 of the Code of Civil Procedure (§ 1-268) abolished writs of error and substituted appeals therefor. Lynn v. Lowe, 88 N.C. 478 (1883); White v. Morris, 107 N.C. 93, 12 S.E. 80 (1890).

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and not a mere erroneous interpretation of the law, the injured party should proceed by motion in the original cause. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Or Mistaken Interpretation of Law.—To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgment, the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Cited in King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893).

§ **1-269. Certiorari, recordari, and supersedeas.**—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (1874-5, c. 109; Code, s. 545; Rev., s. 584; C. S., s. 630.)

Cross References.

As to writs of certiorari and supersedeas, when and how applied for and notice, see Rule 34 of Rules of Practice in the Supreme Court. As to cash deposit in lieu of bond, see § 109-32.

I. EDITOR'S NOTE.

The original Code of Civil Procedure of 1868, abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari, as was pointed out by the Supreme Court in Marsh v. Williams, 63 N.C. 371 (1869).

Whenever a substantial wrong has been done in judicial proceedings, giving a liti-

gant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court to all courts of the State and the superior courts to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. State v. Tripp, 168 N.C. 150, 83 S.E. 630 (1914).

II. CERTIORARI.

A. Editor's Note.

For regulations of the Supreme Court in regard to the writ of certiorari, see Supreme Court Rule 34. It is very important that appellant's petition should comply with these regulations as the writ will be dismissed for his failure to do so. Where petitioner failed to give the notice required by Supreme Court Rule 34 the writ will not issue. Keerans v. Keerans, 109 N.C. 101, 13 S.E. 895 (1891); Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894). However notice may be waived. Anonymous, 2 N.C. 405 (1796).

The writ of certiorari is an extraordinary remedial writ and lies for two purposes: First, as a writ of false judgment to correct errors of law and, second, as a substitute for an appeal. In either case it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. Williams v. Williams, 71 N.C. 427 (1874). Its object is to prevent an improper deprivation of appeal.

Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed; but upon the principle that all courts have the right to issue any writ necessary to the exercise of their powers. State v. Reid, 18 N.C. 377 (1835).

Where appellant has lost his right to appeal by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. McConnell v. Caldwell, 51 N.C. 469 (1859).

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. Board of Comm'rs v. Smith, 110 N.C. 417, 14 S.E. 972 (1892).

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. McPherson Drug Co. v. Norfolk S. Ry., 173 N.C. 87, 91 S.E. 606 (1917).

It is the only method by which the appellate court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910). Certiorari may issue from the superior courts as well as the appellate court. Rhyne v. Lipscombe, 122 N.C. 650, 29 S.E. 57 (1898).

B. General Consideration.

Substitute for Appeal.—A writ of certiorari to bring up the record in a case is the proper substitute for an appeal. State v. McGimsey, 80 N.C. 377 (1879).

If an appeal is unavoidably lost, certiorari may be granted as a substitute. Anonymous, 2 N.C. 302 (1796); Norwood v. Pratt, 124 N.C. 745, 32 S.E. 979 (1899).

Certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950); In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964).

As no appeal lay, a certiorari as a substitute therefor cannot be granted. State v. Todd, 224 N.C. 776, 32 S.E.2d 313 (1944), quoting State v. Georgia Co., 109 N.C. 310, 13 S.E. 861 (1891).

Discretion of Supreme Court. — The granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924); Peoples Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926); Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

When Certiorari a Matter of Right. — Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. State v. Bill, 35 N.C. 373 (1852); Wiley v. Lineberry 88 N.C. 68 (1883); State v. Bennett, 93 N.C. 503 (1885). Even though the conduct was unintentional. Walton v. Pearson, 83 N.C. 309 (1880).

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." Bledsoe v. Snow, 48 N.C. 100 (1855).

Cannot Be Dispensed with.—Certiorari is a discretionary writ, and counsel may

not dispense with it by agreement. In re McCade, 183 N.C. 242, 111 S.E. 3 (1922); State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

Persons Entitled.—To entitle one to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. Petty v. Jones, 23 N.C. 408 (1841). See Otey v. Rogers, 26 N.C. 534 (1844); Shober v. Wheeler, 119 N.C. 471, 26 S.E. 26 (1896).

When Another Remedy Available. — Certiorari is not a proper remedy where another adequate remedy is available. Petty v. Jones, 23 N.C. 408 (1841); Watson v. Shields, 67 N.C. 235 (1872).

Finality of Determination. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Applicant Must Negative Laches. — He who seeks a certiorari must negative laches. Mitchell v. Baker, 129 N.C. 63, 39 S.E. 633 (1901); Cox v. Kinston Carolina R.R., 177 N.C. 227, 98 S.E. 704 (1919); Peoples Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926).

Negligent Delay.—One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. Suiter v. Brittle, 92 N.C. 53 (1885); In re Brittain, 93 N.C. 587 (1885).

Necessity of Filing Record. — The appellant must aptly file a record proper in the case appealed from as a prerequisite for the appellate court to grant his motion for a certiorari to bring up the case for review. Lindsey v. Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916); Brock v. Ellis, 193 N.C. 540, 137 S.E. 585 (1927).

Necessity of Security. — Since certiorari is but a substitute for an appeal, it can only be allowed on the same security, and justification thereof, as in cases of appeal. Chastain v. Chastain, 87 N.C. 283 (1882).

But the appellate court has the power, in a proper case, to allow the writ to issue without such undertaking. Brittain v. Mull, 93 N.C. 490 (1885). The contrary is apparently held in Weber v. Taylor, 66 N.C. 412 (1872), but this was in reality not a "proper case."

Certiorari Denied when Appeal Waived. —A writ of certiorari will not issue where the right of appeal has been waived. King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924).

Imposition of Terms on Applicant. — When granted the appellant may be laid under terms not to avail himself of a technical advantage. Collins v. Nall, 14 N.C. 224 (1831).

Only Errors Apparent of Record.—Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. Hartsfield v. Jones, 49 N.C. 309 (1857); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

When a criminal action has been brought from an inferior court to the superior court by means of a writ of certiorari, the superior court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record . . . and can only revise the proceedings as to regularity or on questions of law or legal inference. State v. King, 222 N.C. 137, 22 S.E.2d 241 (1942).

Case on Appeal Not Settled.—When for any sufficient cause the case on appeal is not settled in time to have the case docketed at the term of the appellate court to which the appeal should be brought, the appellant should in apt time file a transcript of the record proper and move for a certiorari. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917); Tripp v. Somersett, 182 N.C. 767, 108 S.E. 633 (1921). See Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910).

In such a case if appellant does not apply for certiorari at the first term next after the trial, he is not entitled to certiorari at the next term. Joyner v. Hines, 108 N.C. 413, 12 S.E. 901 (1891); Haynes v. Coward, 116 N.C. 840, 21 S.E. 690 (1895).

Issuance of Successive Writs. — Although a certiorari has once been issued from the Supreme Court, upon a suggestion of a defect of the record, and has been returned, yet the court may, a second time or oftener direct writs of certiorari to issue if it sees reason to think the transcript defective. State v. Munroe, 30 N.C. 258 (1848).

But where the return of a certiorari, substituted for an appeal, shows an imperfect record, and no statement of the case, a new writ of certiorari will not be granted. Skinner v. Badham, 80 N.C. 14 (1879).

Effect of Certiorari. — Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense be bailable, he is entitled to bail. State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887). See Pender v. Mallett, 122 N.C. 163, 30 S.E. 324 (1898).

When issued, the writ of certiorari sus-

pends the authority of the lower court in a case pending the action of the reviewing court. Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964).

Docketing as a Condition Precedent for Certiorari.—All of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. Pittman v. Kimberly, 92 N.C. 562 (1885); Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906); Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910).

Same—Waiver. — Requirement of Supreme Court that on application for certiorari for case on appeal transcript of record proper must be docketed cannot be waived by appellee. Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

Same — When Transcript Cannot Be Docketed.—Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and ask for certiorari for the record proper. Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906). See Burrell v. Hughes, 120 N.C. 277, 26 S.E. 782 (1897); Parker v. Southern Ry., 121 N.C. 501, 28 S.E. 347 (1897); McMillan v. McMillan, 122 N.C. 410, 29 S.E. 361 (1898).

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power or review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. Belk's Dep't Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943), and cases cited therein.

Applied in Hamilton v. Southern Ry., 203 N.C. 468, 166 S.E. 392 (1932); Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Cited in Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954); Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959); In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964); In re Guerin, 206 N.C. 824, 175 S.E. 181 (1934).

C. Illustrative Cases.

Failure to Serve Case on Appeal.—A petition for a writ of certiorari to bring up the case on appeal will not be granted where the appeal was lost by failure to serve the case on appeal. Zell Guano Co. v. Hicks, 120 N.C. 29, 26 S.E. 650 (1897).

Waiver of Statutory Requirements.—When there is an alleged waiver of the statutory requirements in settling case on appeal, a certiorari will issue if the allegations of petitioner's affidavit are not denied. Holmes v. Holmes, 84 N.C. 833 (1881).

Delay of Judge. — Where the delay in prosecuting the appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari, in lieu of an appeal may be granted. Sparks v. Sparks, 92 N.C. 359 (1885); Haynes v. Coward, 116 N.C. 480, 21 S.E. 690 (1895).

Retirement of Judge before Preparing Case.—Where the trial judge goes out of office before preparing a case on appeal, held, that certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. Shelton v. Shelton, 89 N.C. 185 (1883). But where the trial judge has died certiorari will not lie. Taylor v. Simmons, 116 N.C. 70, 20 S.E. 961 (1895).

Loss Caused by Mistake of Clerk.—After a party has prayed an appeal and offered his sureties, if he be defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. Chambers v. Smith, 2 N.C. 366 (1796); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

But not where the clerk fails to send up the transcript. Pittman v. Kimberly, 92 N.C. 562 (1885).

Neglect of Counsel.—Where the appellant's counsel told him that he would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond it was held, no ground for a certiorari. Winborne v. Byrd, 92 N.C. 7 (1885).

Sickness of Appellant.—Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. Howerton v. Henderson, 86 N.C. 718 (1882).

Sickness of Applicant's Attorney.—The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal, and certiorari will lie. Mott v. Ramsay, 90 N.C. 372 (1884).

However the sickness of one of two attorneys is not sufficient although the other is absent from the county. Boyer v. Garner, 116 N.C. 125, 21 S.E. 80 (1895).

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905); Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Failure to File Appeal Bond.—The fact that the appeal was not perfected because of the failure of appellant's counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. Winborne v. Byrd,

92 N.C. 7 (1885); Churchill v. Brooklyn Life Ins. Co., 92 N.C. 485 (1885). Nor for failure to file appeal bond in time. Bowen v. Fox, 99 N.C. 127, 5 S.E. 437 (1888). Nor when justification of sureties is omitted. Turner v. Powell, 93 N.C. 341 (1885).

For a contra case, see Manning v. Sawyer, 8 N.C. 37 (1820), where it was held that where the appellant has failed to bring up the appeal bond along with the transcript, and swears that neither he nor the clerk knew it was his duty to do so, and that he did not intend to abandon his appeal, he shall have a certiorari to bring it up. This case decided at an early day seems to be the only one where a certiorari was allowed because an appeal was lost through the applicant's ignorance as to the requirements of the appeal bond.

Inability to Give Bond.—A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it be shown that the judge below refused to make an order allowing the appeal in forma pauperis. Lindsay v. Moore, 83 N.C. 444 (1880).

Failure to Pay Clerk's Fees.—Certiorari will not be granted where it appears that the petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. Smith v. Lynn, 84 N.C. 837 (1881); Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894). Even though the clerk's fees were exorbitant. Brown v. House, 119 N.C. 622, 26 S.E. 160 (1896).

Omission of Assignment of Errors.—If by accident or inadvertence, without appellant's negligence, an assignment of errors is omitted from the record on appeal appellant may apply to the Supreme Court for certiorari to have such assignments sent up, McDowell v. J.S. Kent Co., 153 N.C. 555, 69 S.E. 626 (1910), and for incorporation of exceptions. Cameron v. Thornton Light & Power Co., 137 N.C. 99, 49 S.E. 76 (1904).

The action of a county board of education in removing a school committeeman from his office may be reviewed in the superior court by certiorari. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950).

When judgment has been entered in the recorder's court upon defendant's plea of guilty certiorari will not lie from the superior court to the recorder's court. State v. Barber, 232 N.C. 577, 61 S.E.2d 714 (1950).

Stenographer's Notes.—The mistake of appellant's counsel in sending up the stenographer's notes on appeal, instead of a properly settled case, does not entitle appellant to a certiorari. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

Noncompliance with Rules Governing Appeals. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963).

Removal of Public Officer or Employee. —If the act of removal of a public officer is executive it is not reviewable on certiorari but if it is on hearing and formal findings, it is reviewable. Stated in another way, the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

When a governmental agency has power to remove a public officer only for cause after hearing, the ouster proceeding is judicial or quasi-judicial in nature, and may be reviewed by certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 367 (1967).

A hearing, pursuant to the provisions of the act creating the civil service board of a city, with respect to the discharge of a classified employee of the city by the civil service board, was held a quasi-judicial function and reviewable upon a writ of certiorari issued from the superior court. In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964); Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

An order entered by the civil service board of a city, dismissing a policeman from the police department, was properly brought up for the superior court's review by writ of certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

Demotion of Policeman.—The order entered by a chief of police demoting a policeman from captain of detectives to patrolman was the administrative act of the chief of police and neither judicial nor quasi-judicial in its nature, hence the order was not reviewable by the superior court on certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

D. Requirements of Application.

Editor's Note.—Under the analysis line "General Consideration," II, B, ante, this note, will be found many cases pertaining to, though not expressly referring to, the application. These cases considering the subject generally should be consulted with reference to the requisites of the application.

Affidavit Required. — The writ of cer-

tiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

Affidavit Must Show Merits.—An application for a writ of certiorari must show a prima facie case of merits. March v. Thomas, 63 N.C. 249 (1869); Short v. Sparrow, 96 N.C. 348, 2 S.E. 233 (1887). For affidavit held sufficient, see Bayer v. Raleigh & A. Air Line R.R., 125 N.C. 17, 34 S.E. 100 (1899).

When Merit in Appeal Need Not Be Shown. — Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. Britt v. Patterson, 31 N.C. 197 (1848).

Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. Collins v. Nall, 14 N.C. 224 (1831); McConnell v. Caldwell, 51 N.C. 469 (1859).

Loss of Papers. — Where an application for certiorari states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894).

Failure to Show Reason for Neglect.— Where a petition for a writ of certiorari did not allege that the adverse party prevented defendants from taking an appeal, and it did not appear that an appeal was ever taken, and no reason was assigned for the neglect, it was held that the writ would not issue. Cox v. Pruett, 109 N.C. 487, 13 S.E. 917 (1891).

Case Inaccurately Made. — When it is suggested that the case on appeal is inaccurately made out, the Supreme Court will award a certiorari, in order that the judge, if he sees proper, may make correction. State v. Gay, 94 N.C. 821 (1886).

Must Show Judge Will Make Corrections.—Where it is sought to have the case as settled by the judge corrected by a certiorari, the petitioner should set out his grounds for believing that the judge would make the corrections if given an opportunity, and not merely that he believes that probably the judge would do so. Porter v. Western N.C.R.R., 97 N.C. 63, 2 S.E. 580 (1887); Allen v. McLendon, 113 N.C. 319, 18 S.E. 205 (1893).

Ability and Willingness to Correct.—The Supreme Court will not, by certiorari, direct the trial court to make changes in the case on appeal where the letter of the trial judge states his opinion that the record is fair and correct; the relief being granted only when the judge by letter indicates that he is willing to make the corrections desired. Slocumb v. Construction Co., 142 N.C. 349, 53 S.E. 196 (1906).

Omitted Matter Must Be Relevant.—A certiorari will be denied where it does not appear that the matter omitted from the case settled is relevant to the exceptions presented on appeal. City Nat'l Bank v. Bridgers, 114 N.C. 107, 19 S.E. 276 (1894); Clark v. Saco-Pettee Mach. Works, 150 N.C. 88, 63 S.E. 153 (1908).

Mistake Must Be Apparent.—Certiorari to correct a mistake stated on appeal will not be granted unless it is probable that the judge below would make the desired correction, or unless it is apparent that there was a mistake. Currie v. Clark, 90 N.C. 17 (1884); Cheek v. Watson, 90 N.C. 302 (1884); Ware v. Nisbet, 92 N.C. 202 (1885); Allen v. McLendon, 113 N.C. 319, 18 S.E. 205 (1893).

Mere Allegation of Fraud Is Insufficient. —In Hunsucker v. Winborne, 223 N.C. 650, 27 S.E.2d 817 (1943), it was held that conceding the complaint to be a petition for writ of certiorari to review the ruling of the municipal board of control in respect to the sufficiency of the signatures to a petition to change the name of a town, it fails to make proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient.

Failure to Pray That Writ of Certiorari Be Issued.—Where a verified petition of a district school committeeman alleges that the county board of education made an order purporting to remove petitioner from his office without notice and an opportunity to be heard, and contains a general prayer for relief in addition to specific prayers, it will not be held inadequate as a petition for certiorari because of its failure to specifically pray that the writ be issued. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950).

E. Time of Application.

When Applied for. — Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown. State v.

Johnson, 93 N.C. 559 (1885); State v. Sloan, 97 N.C. 499, 2 S.E. 666 (1887).

Application Must Be Timely. — An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

Agreement to Waive Time.—To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: First, where the record shows a written agreement of counsel waiving the lapse of time; and secondly, where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. Walton v. Pearson, 82 N.C. 464 (1880).

Tacit Agreement to Waive Delay.— Where there is an undenied tacit agreement to waive delay certiorari will issue. Holmes v. Holmes, 84 N.C. 833 (1881); Willis v. Atlantic & D.R.R., 119 N.C. 718, 25 S.E. 790 (1896).

Denial of Oral Agreement.—A certiorari will not be granted, where an alleged oral agreement between counsel to await the decision of a certain other case is denied. Hutchinson v. Rumfelt, 83 N.C. 441 (1880); Short v. Sparrow, 96 N.C. 348, 2 S.E. 233 (1887); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

Time for Requesting Certiorari.—An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. State v. Harris, 114 N.C. 830, 19 S.E. 154 (1894); State v. Marsh, 134 N.C. 184, 47 S.E. 6 (1903). As to when allowed after argument, see Boyer v. Teague, 106 N.C. 571, 11 S.E. 330 (1890).

F. Issuance of Writ from Superior Court.

Review of Hearing on Lunacy Writ.— Where a writ of lunacy was issued by a county court, and the party found non compos, and a guardian appointed, in the absence of the said party, and without notice, it was held, that the petitioner was entitled to a certiorari, to have the case taken into a superior court. Dowell v. Jacks, 53 N.C. 387 (1861).

Action on Bond. — Where the principal obligor in a bond was called, and, failing to appear, judgment was rendered against his surety, it was held that the fact that the principal was sick, and unable to attend at the term for which he was bound, did not entitle the surety to a certiorari to have the case removed into the superior court. Buis v. Arnold, 53 N.C. 233 (1860).

Failure to Plead and Appeal.—Where a defendant fails to enter a plea and to take an appeal, he is not entitled to a certiorari to bring the case into the superior court. Rule & Hall v. Council, 48 N.C. 33 (1855).

Deprived of Defense by Fraud of Opposite Party. — Where a party is deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which can be made in the superior court as well as in the county court, his proper remedy is by a writ of certiorari. Lunceford v. McPherson, 48 N.C. 174 (1855).

But a mere suggestion of fraud is insufficient. McLaughlin v. McLaughlin, 47 N.C. 319 (1855). See Haddock v. Stocks, 167 N.C. 70, 83 S.E. 9 (1914).

III. RECORDARI.

A. Editor's Note.

The writ of recordari under the former practice, and retained in the new, is used for two purposes: The one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment. King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893).

The adoption of this section of the Code (Acts 1874-75, c. 109) seems to retain this practice. King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893), cites many cases in which the writ of recordari has been used as a writ of false judgment since the adoption of this section by the legislature. It has been said that the writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895).

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

B. General Consideration.

Scope of Recordari. — If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. Ledbetter v. Osborne, 66 N.C. 379 (1872). It is in the na-

ture of an extension of the power of appeal. Webb v. Durham, 29 N.C. 130 (1846).

Writ of False Judgment or Substitute for Appeal.—The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. Caldwell v. Beatty, 69 N.C. 365 (1873); Morton v. Rippy, 84 N.C. 611 (1881); Marler - Dalton - Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909).

The writ of recordari is authorized by this section and recognized by the decisions of this court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893).

The writ of recordari may be used as a writ of false judgment. Parker v. Gilreath, 28 N.C. 221 (1845); Kearney v. Jeffreys, 30 N.C. 96 (1847); Bailey v. Bryan, 48 N.C. 357 (1856).

Lies to Inferior Tribunal Whose Proceedings Are Not Recorded.—The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded. Hartsfield v. Jones, 49 N.C. 309 (1857).

Jurisdiction of Superior Courts. — The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the State Constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the State. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by § 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911); Abell v. Thornton Light & Power Co., 159 N.C. 348, 74 S.E. 881 (1912); L.D. Powell & Co. v. Rogers, 180 N.C. 657, 104 S.E. 70 (1920).

Right to Object to Petition for Recordari Not Waived. — An appellee who does not docket an appeal from justice court not docketed in time by appellant and move for affirmance, does not waive the right to object to appellant's petition to bring up the appeal by recordari. Pickens v. Whitten, 182 N.C. 779, 109 S.E. 836 (1921).

Dismissal for Failure to Docket.—A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed. Johnson v. Reformers, 135 N.C. 385, 47 S.E. 463 (1904).

Review of Judge's Decision.—The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise or excusable negligence. Barnes v. Easton, 98 N.C. 116, 3 S.E. 744 (1887). See Stewart v. Craven, 205 N.C. 439, 171 S.E. 609 (1933).

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the appellate court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. Tedder v. Deaton, 167 N.C. 479, 83 S.E. 616 (1914).

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. Perry v. Whitaker, 77 N.C. 102 (1877).

C. Requirements for Writ.

Issued at Term Following Trial.—The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883); Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

At Earliest Possible Time.—The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application must be satisfactorily accounted for. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

See Koonce v. Pelletier, 83 N.C. 237 (1880), in which it was held that, under the circumstances, a delay of three months in applying for the writ was not unreasonable.

Necessity of Affidavit or Petition. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it

should be issued, is irregular, and will be dismissed upon the hearing. Wilcox v. Stephenson, 71 N.C. 409 (1874).

Averment as to Payment of Costs.—Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. Steadman v. Jones, 65 N.C. 388 (1871).

Excuse for Laches and Meritorious Grounds. — Recordari will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds. Pritchard v. Sanderson, 92 N.C. 41 (1885).

Application Must Negative Laches.—An applicant for recordari must show that he has not been guilty of laches. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909). See March v. Thomas, 63 N.C. 249 (1869); Pritchard v. Sanderson, 92 N.C. 41 (1885); In re Brittain, 93 N.C. 587 (1885).

Sufficient Ground for Recordari Must Be Shown.—It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. Baltimore Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Applicant Must Show Merits.—An applicant for a writ of recordari must show merit. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909).

Failure to Show Meritorious Defense.—It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant, and loss of right to appeal, where there is no showing of a meritorious defense. Hunter v. Atlantic Coast Line R.R., 161 N.C. 503, 77 S.E. 678 (1913).

Effect of Failure to Assign Errors. — Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. Leatherwood v. Moody, 25 N.C. 129 (1842); Sossamer v. Hinson, 72 N.C. 578 (1875).

Supersedeas Should Accompany. — An order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. Steadman v. Jones, 65 N.C. 388 (1871).

D. When Granted.

Loss of Appeal without Fault of Applicant.—A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default. Marsh v. Cohen, 68 N.C. 283 (1873); Pickens v. Whitton, 182 N.C. 779, 109 S.E. 836 (1921).

Party Denied Right of Appeal. — If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. Ledbetter v. Osborne, 66 N.C. 379 (1872); Birdsey v. Harris, 68 N.C. 92 (1873).

Refusal of Appeal on Frivolous Ground. —If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari. Bailey v. Bryan, 48 N.C. 357, 67 Am. Dec. 246 (1956).

Appeal Lost by Excusable Neglect. — Where a party has lost his appeal by excusable neglect he may have relief by a writ of recordari as a substitute for an appeal. Navassa Guano Co. v. Bridgers, 93 N.C. 439 (1885).

Loss by Technical Default. — Where a party has lost his appeal by a technical default the superior court judge can have it brought up by recordari. Suttle v. Green, 78 N.C. 76 (1878).

Loss of Appeal by Misfortune. — The writ of recordari is not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895). See Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883); Davenport v. Grissom, 113 N.C. 38, 18 S.E. 78 (1893).

Erroneous Supposition as to Agreement. —A writ of recordari is properly granted, where the defendant had merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. Carmer v. Evers, 80 N.C. 56 (1879).

Notice of Appeal Not Returned. — On appeal from justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where superior court judge was absent from such next term, to file motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

E. When Denied.

When Appeal Available.—Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895); Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911).

Duty to See That Appeal Is Filed in Time.—It is not enough that parties to a

suit should engage counsel and leave the matter of taking an appeal entirely in his charge, as they should, in addition to this, give to the matter that amount of attention which a man of ordinary prudence usually gives to his important business, and should to that extent see that the appeal was filed in time. Baltimore Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Not Deprived of Appeal by Fraud, Accident or Mistake. — Where a party is not deprived of his appeal by any fraud, accident, surprise, or denial by the court, he is not entitled to the aid of a writ of recordari. Satchwell v. Rispess, 32 N.C. 365 (1849); Hare v. Parham, 49 N.C. 412 (1857).

When Appellant Has Not Perfected Appeal.—A motion for recordari made in the superior court several terms after the judgment has been entered in the justice's court for failure to send up the transcript, should be denied when the appellant has not paid the fees required or taken proper steps to perfect the appeal. Helsabec v. Grubbs, 171 N.C. 337, 88 S.E. 473 (1916).

Appeal Lost through Negligence of Applicant's Attorney.—A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883).

Illness of One Member of Law Firm.—As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court, and thus caused defendant to suffer a default judgment and lose its right of appeal, is not a showing of excusable neglect which will warrant the issuance of a writ of recordari. Hunter v. Atlantic Coast Line R.R., 163 N.C. 281, 79 S.E. 610 (1913).

IV. SUPERSEDEAS.

Editor's Note.—See Supreme Court Rule 34 as to requirements of application for this writ.

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. Section 1-294. Sykes v. Everett, 167 N.C. 600, 83 S.E. 585 (1914).

For supersedeas bond, see § 1-289 et seq., and notes.

Definition and Scope of Writ.—"Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review, and is granted only by court ordering removal of cause, and is regulated by statute. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918); City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

A writ of supersedeas may issue to vacate the order of the lower court. Arey v. Williams, 154 N.C. 610, 70 S.E. 931 (1911); McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913); Page v. Page, 166 N.C. 90, 80 S.E. 1060 (1914); In re Blake, 184 N.C. 278, 114 S.E. 294 (1922); Clegg v. Clegg, 186 N.C. 28, 118 S.E. 824 (1923); 5 N.C.L. Rev. 26.

Authority of Court or Judge.—The superior court cannot supersede the process of an inferior court, unless the writ of supersedeas be auxiliary to the appellate jurisdiction of the former. President & Dirs. v. Stanley, 13 N.C. 476 (1830).

A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918).

The Supreme Court of North Carolina has no power to grant a supersedeas pending a petition to the United States Supreme Court for certiorari. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918).

When Granted—Case of Necessity.—A writ of supersedeas is only granted in case of necessity. McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913).

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913).

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal. Dunn v. Marks, 141 N.C. 232, 53 S.E. 845 (1906).

Review of Clerk's Decision. — A supersedeas is the proper remedy to stay proceedings in a cause, pending the review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. Saulsbury v. Cohen, 68 N.C. 289 (1873).

Injunction. — An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Green v. Griffin, 95 N.C. 50 (1886); Fleming v. Patterson, 99 N.C. 404, 6 S.E. 396 (1888).

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunction. Rey-

burn v. Sawyer, 128 N.C. 8, 37 S.E. 954 (1901).

It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. James v. Markham, 125 N.C. 145, 34 S.E. 241 (1899).

Supersedeas upon Judgment.—An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. Bank of Newbern v. Jones, 17 N.C. 284 (1832).

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to a mother and the husband appealed, and the mother sued out habeas corpus for the custody of the child pending the appeal, the Supreme Court might supersede the order as to custody pending the appeal, by virtue of N.C. Const., Art. IV, § 8, authorizing it to issue remedial writs. Page v. Page, 166 N.C. 90, 81 S.E. 1060 (1914).

§ 1-270. Appeal to appellate division; security on appeal; stay.— Cases shall be taken to the appellate division by appeal, as provided by law. All provisions in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the appellate division. (C. C. P., s. 312; Code, ss. 561, 946; Rev., ss. 595, 1540; C. S., s. 631; 1969, c. 444, s. 3.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in both the first and second sentences.

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-271. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this chapter. A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved. (C. C. P., s. 298; Code, s. 547; Rev., s. 585; C. S., s. 632; 1969, c. 895, s. 15.)

Cross Reference. — For cases in which an appeal lies, see note under § 1-277.

Editor's Note. — The 1969 amendment added the second sentence.

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The Rules of Civil Procedure are found in § 1A-1.

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Some Party Must Be "Aggrieved".—No appeal lies from a judgment until somebody is hurt or "aggrieved" by it. Yadkin County v. City of High Point, 219 N.C. 94, 13 S.E.2d 71 (1941).

And Only the "Aggrieved" May Appeal. —Only the party aggrieved may appeal from the superior court to the appellate court. Watkins v. Grier, 224 N.C. 334, 30 S.E.2d 219 (1944); Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Where no error is found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void will be dismissed, since only the party aggrieved may appeal. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Where both plaintiffs and defendants appeal from judgment in favor of defendants, defendants' appeals will not be considered when no error is found on plaintiffs' appeal since in such instance defendants are not the parties aggrieved by the judgment. Teague v. Duke Power Co., 258 N.C. 759, 129 S.E.2d 507 (1963).

Where order was issued that funds in the custody of the court be turned over to plaintiffs, defendants appealed therefrom on the ground that plaintiffs were not entitled to the funds; but defendants had

no interest in or claim to the funds. It was held that defendants were not the parties aggrieved within the meaning of this section. Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955).

"Party Aggrieved" Defined. — A defendant in a negligent injury action may appeal from the denial of his motion to have a third person joined as a defendant upon allegation that such third person was a joint tort-feasor, since the denial of the motion directly affects a substantial right, and a "party aggrieved" is one whose right has been directly and injuriously affected by the action of the court. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939).

The party aggrieved, within the meaning of this section, is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

For a party to be aggrieved, he must have rights which were substantially affected by a judicial order. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

A party is aggrieved if his rights are substantially affected by judicial order. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

For various definitions of the words "party aggrieved," see In re Applications for Reassignment, 247 N.C. 413, 101 S.E.2d 359 (1958).

Interest in Subject Matter.—A commissioner appointed to make a deed is not a "party to the action," and, having no personal interest in the subject of it cannot appeal from an order of the court requiring him to correct his deed, and his attempted appeal will be dismissed. Summerlin v. Morrisey, 168 N.C. 409, 84 S.E. 689 (1915).

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

Appeals for Purposes of Delay. — One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of this section. Stephenson v. Watson, 226 N.C. 742, 40 S.E.2d 351 (1946).

Parties Whose Only Interest Is Payment of Moneys Secured by Trust Deed. —In an action to restrain a trustee from selling lands under a trust deed, till the determination of plaintiff's interest in the premises, parties whose only interest in the suit is the payment of the moneys secured to them by the trust deed cannot appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. Faison v. Hardy, 118 N.C. 142, 23 S.E. 959 (1896).

Receivers of a corporation cannot appeal from a judgment of instructions because the instructions are, as between two classes of stockholders, prejudicial to one of such classes. Strauss v. Carolina Interstate Bldg. & Loan Ass'n, 117 N.C. 308, 23 S.E. 450 (1895), aff'd, 118 N.C. 556, 24 S.E. 116 (1896).

Parties of Record.—One not a party or privy to the record cannot appeal. Siler v. Blake, 20 N.C. 90 (1838).

Administrators. — Where in proceedings by the administrator to sell lands of the estate to pay debts, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor whose claim has been disallowed, may appeal as a party aggrieved. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

Propounders in Caveat Proceeding.—In a caveat proceeding where the jury found against propounder, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, it was held that the propounders were not the "parties aggrieved" by the order setting aside the verdict and could not appeal. In re Will of Hargrove, 207 N.C. 280, 176 S.E. 752 (1934).

A defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and cannot appeal. Guy v. Aetna Life Ins. Co., 206 N.C. 118, 172 S.E. 885 (1934).

But if defendants are not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affects their interest, they have the right to appeal under this section. Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934).

Application to Be Made a Party Defendant Denied.—If an application to be made a party defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal, under this section. Rollins v. Rollins, 76 N.C. 264 (1877).

Person Denied Right to Intervene. — One whose claim to intervene in a suit has been rejected by the court cannot appeal from the judgment rendered in the suit. Phelps v. Long, 31 N.C. 226 (1848); Evans v. Governor's Creek Transp. & Mining Co., 50 N.C. 332 (1858); Rollins v. Rollins, 76 N.C. 264 (1877).

Interveners for Purpose of Appeal. — Where a judgment for costs is rendered in a claim and delivery proceeding against a person who is not a party thereto, and who does not appear on the record as a party, such person may appeal on a special appearance made for that purpose. Loven v. Parson, 127 N.C. 301, 37 S.E. 271 (1900).

Party Not Served with Process. — One not a party cannot appeal and the entry of a special appearance for one not served with process, though named as a defendant, does not authorize counsel so appearing to appeal from a default judgment against his client. Houston v. Lumber Co., 136 N.C. 328, 48 S.E. 738 (1904).

Submission of Controversy. — Parties to an equity suit, who agree that the judge should find the facts, are precluded from asking the appellate court, on appeal, to review the finding. Runnion v. Ramsay, 93 N.C. 410 (1885).

Joinder. — All parties against whom a joint judgment or decree is rendered must join in an appeal. Mastin v. Porter, 32 N.C. 1 (1848); Kelly v. Muse, 33 N.C. 182 (1850).

Appeal from Joint Verdict and Judgment.—One defendant cannot sustain an appeal from a joint judgment against two or more, when all had joined in the pleadings, and the trial was joint. Hicks v. Gilliam, 15 N.C. 217 (1833).

Where there is a joint judgment against two defendants in the court below, and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal. Smith v. Cunningham, 30 N.C. 460 (1848).

Judgment against One of Two Parties.—Where an action is brought in the county court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one and against the other, the latter may alone appeal from the judgment rendered against him. Stephens v. Batchelor, 23 N.C. 60 (1840).

In assumpsit against two, if the jury find against one and in favor of the other, the former may appeal alone to the appellate court. Sharpe v. Jones, 7 N.C. 306 (1819).

Appeal by Garnishee and Delinquent Taxpayer.—Where a proceeding to garnishee funds in a bank account belonging to a delinquent taxpayer, under § 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," within the meaning of this section and neither may prosecute an appeal. Gill v. McLean, 227 N.C. 201, 41 S.E.2d 514 (1947).

Where defendant was granted new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defendant was not the "party aggrieved" within the meaning of this section. Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946).

Appeal by Justices of County.—Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment is rendered against them, they may appeal, although a minority of the justices refuse to join in the appeal. State ex rel. Kelly v. Justices of Moore County, 24 N.C. 430 (1842).

Appeal by Statutory Receiver. — Objection that the statutory receiver has no right of appeal without the approval of the court is untenable when it appears that the superior court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934).

Refusal to Set Aside Verdict. — Where the trial court enters judgment that plaintiff recover nothing of certain defendants, such defendants may not, upon plaintiff's appeal from the refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since, until a judgment is entered against them, they are not parties aggrieved. Bethea v. Town of Kenly, 261 N.C. 730, 136 S.E.2d 38 (1964).

Interlocutory Order Affecting No Substantial Right.—An appeal from an order requiring the resident father to have the child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, sepa-

rated, but not divorced, is premature and will be dismissed, since the order is interlocutory and affects no substantial right. In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955).

Instruction on Negligence of Codefendant.—In an action against each of two defendants as joint tort-feasors, one defendant cannot be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant, where they were not adversaries inter se. Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Trustor under Senior Deed of Trust. — Where a trustor's equity has been divested by foreclosure of a junior deed of trust on the property, he has no rights in the property, and is not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Parties Enjoined from Cutting Timber. —Where plaintiffs were estopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Corporation. — Where an action is entitled named individuals "t/a" a named corporation, the corporation cannot be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under § 45-37 (5) the right to possession and the right to foreclose were barred. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

Applied in Queen City Coach Co. v. Carolina Coach Co., 237 N.C. 697, 76 S.E.2d 47 (1953); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961); Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964); Martin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964); Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949).

Stated in Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); Simmons v. Andrews, 106 N.C. 201, 10 S.E. 1052 (1890); In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940); Yancey v. North Carolina State Highway & Pub. Works Comm'n, 221 N.C. 185, 19 S.E.2d 489 (1942).

§ 1-272. Appeal from clerk to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C. C. P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C. S., s. 633; 1927, c. 15.)

Cross References. — As to powers of clerks, see § 2-16. As to powers of the judge on appeal, see § 1-276.

Editor's Note.—No notice was required by this section prior to 1927. At that time by Public Laws 1927, ch. 15, the portion relating to "due notice in writing" was added.

By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

This section and §§ 1-274 and 1-275,

regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, E.S. These sections do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

Construed in Pari Materia with § 1-276. —As this section and § 1-276 deal with the same subject matter, they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Appeal Necessary for Jurisdiction of Court.—The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

It is sometimes said that, upon an appeal from an order of the clerk made in the performance of his duties as judge of probate, the jurisdiction of the judge of the superior court is derivative. Such derivative jurisdiction is construed to mean, inter alia (1) 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 paper writing offered for probate is his will; (2) that proceedings to repeal letters of administration must be commenced before the clerk who issued them in the first instance; and (3) that the judge of the superior court has no jurisdiction to appoint or remove an administrator or a guardian. In other words, jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Hearing De Novo.—Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Section Does Not Apply Where Judge and Clerk Have Concurrent Jurisdiction.— This section and §§ 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, have no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948).

Review of Ruling Where Clerk Had Original Jurisdiction. — In order to entitle the judge of the superior court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by this section must be followed. Muse v. Edwards, 223 N.C. 153, 25 S.E.2d 460 (1943).

Clerk Acts for Court.—The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. Brittain v. Mull, 91 N.C. 498 (1884).

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless, all his power is delegated by virtue of his office as clerk of the superior court. Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

Action of Clerk Not Conclusive. — The action of the clerk is not final and conclusive. In a proper case, on appeal it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

Applies to Special Proceedings. — This section applies in special proceedings as well as in civil actions generally. Welfare v. Welfare, 108 N.C. 272, 12 S.E. 1025 (1891).

Order to Sell Land for Debt.—This section applies to an appeal from an order of the clerk to sell lands of decedent to pay debts. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Docketing Tax Not Applicable.—Where an appeal is taken from an order of the clerk of the superior court to the judge

thereof under this section, the judge has jurisdiction by mandate of § 1-276, and no "docketing" in a technical sense is involved, and § 105-93 requiring a tax of two dollars for "docketing" an appeal from a lower court in the superior court does not apply. Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

Sufficiency of Bonds.—The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him, necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk. S. Marsh & Co. v. Cohen, 68 N.C. 283 (1873).

Setting Aside Commissioner's Report. — An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. McMillan v. McMillan, 123 N.C. 577, 31 S.E. 729 (1898).

Removal of Executors.—An appeal will lie to the judge in proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N.C. 4 (1886).

Order Concerning Judgment Debtor. — An appeal lies from an order of the clerk requiring a judgment debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Refusal to Issue Execution. — Where a clerk of the superior court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district. Huntley v. Hasty, 132 N.C. 279, 43 S.E. 844 (1903).

Proceedings Supplemental to Execution. — Where in proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

On appeal from the assessment of damages for lands taken by the State Highway Commission the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

Jurisdiction of Clerk. — Where an equitable proceeding brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the appellate court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. Smith v. Gudger, 133 N.C. 627, 45 S.E. 955 (1903).

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In re Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949).

Laches. — An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. Hicks v. Wooten, 175 N.C. 597, 96 S.E. 107 (1918).

Findings of Fact May Be Reviewed.— To say that the superior court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Applied in Harris v. Harris, 257 N.C. 416, 126 S.E.2d 83 (1962).

Stated in North Carolina State Highway & Pub. Works Comm'n v. Mullican, 243 N.C. 68, 89 S.E.2d 738 (1955).

Cited in In re Hardin, 248 N.C. 66, 102 S.E.2d 420 (1958); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968); Daniel v. Bellamy, 91 N.C. 78 (1884); Edwards v. Cobb, 95 N.C. 4 (1886); Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890); Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890); Holly Shelter R.R. v. Newton, 133 N.C. 136, 45 S.E. 549 (1903).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (C. C. P., s. 115; Code, s. 256; Rev., s. 588; C. S., s. 634.)

Cross Reference. — As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

Rule Stated.—Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a

distinct tribunal, the issues must be transferred to the superior court—another jurisdiction—to be tried. Brittain v. Mull, 91 N.C. 498 (1884).

Special Proceedings.—When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the clerk to place the proceeding on the docket of the trial term, for trial. Jones v. Desern, 94 N.C. 32 (1886).

If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action. In the Matter of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Probate Proceedings. — A clerk of the superior court may probate a will in solemn form, without the verdict of a jury, that is per testes, where interested parties are cited to appear and "see proceedings," or they come in voluntarily to "see proceedings," and such parties raise no issue of fact. But, where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of devisavit vel non, which issue must be tried by a jury. Such procedure is required by this section. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Partition Proceedings.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. Ex parte Beckwith, 124 N.C. 111, 32 S.E. 393 (1899).

Section Governs Appeals from Judgment of Clerk in Dower Proceedings.—In dower proceedings issues of law and of fact were raised on the pleadings which had been filed before the clerk. At the hearing of the proceeding by the clerk, the parties waived a trial by jury of the issues of fact, and filed with the clerk a statement on facts agreed. On these facts the clerk rendered a judgment adverse to the plaintiff. The plaintiff excepted to the judgment, and appealed to the superior court in term time. It was held that this section and not § 1-274, was applicable to plaintiff's appeal from the judgment of the clerk of the superior court, and there was error in the order of the judge dismissing plaintiff's appeal on his finding that plaintiff had failed to perfect her appeal, as required by § 1-274. McLawhorn v. Smith, 211 N.C. 513, 191 S.E. 35 (1937).

Right May Be Waived. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890).

Cited in Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); Vance v. Vance, 118 N.C. 864, 24 S.E. 768 (1896); Sneed v. State Highway Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

§ 1-274. **Duty of clerk on appeal.**—On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision. (C. C. P., s. 110; Code, s. 254; Rev., s. 612; C. S., s. 635.)

Cross References.—See notes to §§ 1-272, 1-273. As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

Absolute Duty of Clerk.—The clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Highway Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

But see Hicks v. Wooten, 175 N.C. 597, 96 S.E. 107 (1918), where it was held that the neglect of the clerk in sending up the appeal would not excuse gross laches of the appellant.

What Statement Should Contain.—This statement should embrace the material facts, copies of necessary paper writings, or such papers themselves so that the judge may review the decision of the clerk appealed from upon its full merits. Brooks v. Austin, 94 N.C. 222 (1886).

Partition Proceedings.—Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the judge. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

When Clerk Does Not Act for Court.—In appeals from the clerk, in that class of cases of which he has jurisdiction, not as and for the court as in special proceedings, but in his capacity as clerk, such as auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N.C. 271 (1886).

Court May Order Statement.—The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Where the clerk has failed to transmit the record to the court on appeal, upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. Sneed v. State Highway Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

No Appeal from Order to Send Up Transcript. — No appeal lies from an order of the superior court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

When Statement Not Required.—It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal. Cape Fear & N.R.R. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903).

Clerk Should Give Reasons.—Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings he may, and should, state his reason for such refusal, even after appeal to the court in term. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

After Retirement of Clerk.—Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. Ex parte Spencer, 95 N.C. 271 (1886).

Rendering Decision Out of District.—In Byrd v. Nivens, 189 N.C. 621, 127 S.E. 673 (1925), the court said, "We do not think that the judge residing in the district or, in his absence, the judge holding the courts for the district, can hear the questions and render a decision out of the district."

Irregular for Judge to Order Docket of Issues.—It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial—it being the duty of the clerk to do this without such order when an issue of fact is joined. Jones v. Desern, 94 N.C. 32 (1886).

Waiver.—Where an appeal from an order of the clerk is noted at the time and is heard without objection at the term of the superior court beginning two days thereafter, but upon failure of the judge to decide the appeal before leaving the district, is placed on the calendar and reached the second term following, at which time without objection the parties appear and argue the matter before the presiding judge, any irregularity in procedure is waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with this section, is untenable. Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941).

Applied in Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

Cited in Lovinier v. Pearce, 70 N.C. 168 (1874).

§ 1-275. Duty of judge on appeal.—It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after such receipt notify the attorneys of the parties of the decision and, on request and the payment of his

legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law. (C. C. P., s. 113; Code, s. 255; Rev., s. 613; C. S., s. 636.)

Full Jurisdiction of Case.—Under this section an appeal in partition action from order of the clerk overruling demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

When Issues of Fact Tried. — When issues of fact are tried the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. Brittain v. Mull, 91 N.C. 498 (1884).

Appeal May Be Heard Outside County.—Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Appeals from the clerk may be heard at chambers at any place in the district. Monroe v. Lewald, 107 N.C. 655, 12 S.E. 287 (1890).

When Notice Not Reasonable.—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. Byrd v. Nivens, 189 N.C. 621, 127 S.E. 673 (1925).

Pending Appeal from Clerk.—A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Presumption as to Proceedings.—Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the clerk of the superior court, was requested in writing to fix a time for the hearing and to give the parties notice, it will be presumed that the proceeding was rightly and regularly conducted. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

May Hear Any Evidence.—Upon an appeal from an order of the clerk to the judge, the latter may hear any evidence that would have been competent before the former, although in fact not introduced. McAden v. Banister, 63 N.C. 479 (1869).

Special Proceedings for Partition. — The controversy involved in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Proceedings to Sell Lands.—A proceeding to sell lands to make assets to pay debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Appeal from Clerk's Decision upon Commissioners' Report. — In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. Ex parte Beckwith, 124 N.C. 111, 32 S.E. 393 (1899).

Proceedings Dismissed by Clerk.—Where clerk of 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).

Issue of Law Joined in Special Proceedings.—When an issue of law is joined in a special proceeding it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. Jones v. Desern, 94 N.C. 32 (1886).

When Clerk Does Not Act for Court.—In appeals in cases in which the clerk does not act for the court, it is the duty of the judges to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury. Ex parte Spencer, 95 N.C. 271 (1886).

§ 1-276. Judge determines entire controversy; may recommit.—Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (1887, c. 276; Rev., s. 614; C. S., s. 637.)

Editor's Note.—By passing this section in 1887, Acts 1887, ch. 276, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in Brittain v. Mull, 91 N.C. 498 (1884). In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law present, and then remand the matter, including his decision, to the clerk.

Because of its beneficial results this section has always received a liberal interpretation. Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

It was not contemplated by the legislature that by the provisions of this section a party who should be coram non judice before the clerk could take advantage of his own mistake or purposely make it in order to obviate a well-grounded objection to the jurisdiction, and secure by indirection what he could not obtain directly. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Construed in Pari Materia with § 1-272.—As this section and § 1-272 deal with the same subject matter they must be construed in pari materia and harmonized to give effect to each. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Jurisdiction. — Whenever a special proceeding begun before the clerk is, for any ground whatever, sent to the superior court before the judge the judge has jurisdiction. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

Even when the proceeding originally had before the clerk is void for want of jurisdiction, the superior court may yet proceed in the matter. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Judge May Determine Entire Controversy.—Under this section, the judge now has final jurisdiction to determine the whole matter in controversy. Lictie v. Chappell, 111 N.C. 347, 16 S.E. 171 (1892); Faison v. Williams, 121 N.C. 152, 28 S.E. 188 (1897); Oldham v. Rieger, 145 N.C. 254, 58 S.E. 1091 (1907); Hall v. Artis, 186 N.C. 105, 118 S.E. 901 (1923); Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, the superior court's jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941). See Ex parte Wilson, 222 N.C. 99, 22 S.E.2d 262 (1942); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941).

Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if originally before him. McDaniel v. Leggett, 224 N.C. 806, 32 S.E.2d 602 (1945).

When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if originally before him. Langley v. Langley, 236 N.C. 184, 72 S.E.2d 235 (1952).

Court May Remand.—The court has the right in its discretion to remand the cause to the clerk for further proceedings. York v. McCall, 160 N.C. 276, 76 S.E. 84 (1912).

Appointment of Administrator.—On appeal from the order of a clerk appointing an administrator the superior court may reverse the order but the case should then be remanded. In re Styers, 202 N.C. 715, 164 S.E. 123 (1932).

Upon appeal from an order of the clerk removing certain executors and adminis-

trators, c.t.a., and appointing others in their place, by virtue of this section, the superior court judge may, in the exercise of his discretional powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the superior court on appeal. Wright v. Ball, 200 N.C. 620, 158 S.E. 192 (1931).

When Judge Cannot Merely Remand.— Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of it on the merits, and had no power to merely reverse the clerk's action and remand the case to him, though there may have been irregularities in the proceedings before the clerk. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Judge May Make Amendments. — The judge has power to make amendments to give jurisdiction. Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Ewbank v. Turner, 134 N.C. 77, 46 S.E. 508 (1903). He may strike out an answer that is irrelevant. Commissioners of Yancey County v. Piercy, 72 N.C. 181 (1875).

Judge May Add Issues. — The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. In re Herring, 152 N.C. 258, 67 S.E. 570 (1910).

Judge May Set Aside Order.—The superior court acquired jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein, and may set aside a previous order of the clerk and substitute therefor an order of its own without finding that the clerk had abused his discretion or committed error of law in signing the order, the clerk being but a part of the superior court. Bynum v. Fidelity Bank, 219 N.C. 109, 12 S.E.2d 898 (1941).

Judge May Set Aside Judgment. — The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. Faison v. Williams, 121 N.C. 152, 28 S.E. 188 (1897).

Clerk without Equity Jurisdiction.—The clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. Southern State Bank v. Leverette, 187 N.C. 743, 123 S.E. 68 (1924).

Proceedings Improperly Brought before Clerk. — When a case properly cognizable in the superior court, but which is erroneously brought before a clerk, gets in the superior court on any ground the judge has jurisdiction to retain and hear the cause as if originally instituted in the superior court. Robeson v. Hodges, 105 N.C. 49, 11 S.E. 263 (1890); Hall v. Artis, 186 N.C. 105, 118 S.E. 901 (1923). See Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917); Spence v. Granger, 207 N.C. 19, 175 S.E. 824 (1934).

When the clerk of the superior court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the whole matter. Bradshaw v. Warren, 216 N.C. 354, 4 S.E.2d 883 (1939).

Establishment of Private Cartway.—See Dailey v. Bay, 215 N.C. 652, 3 S.E.2d 14 (1939).

Agreement That Judge Shall Hear Appeal. — Where the parties agree that the judge shall hear an appeal in term, he acquires jurisdiction of the whole case, and should finally dispose of it on its merits, without remanding it to the clerk. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

Such agreement cures all irregularities. Foreman v. Hough, 98 N.C. 386, 3 S.E. 912 (1887).

Judge Must Hear Controversy although Clerk without Jurisdiction.—Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

Clerk Erroneously Transfers Issues. — Where the clerk of the superior court has erroneously at once transferred the proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom has been taken to the superior court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made for the further determination of the

cause. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

The superior court acquires jurisdiction of any special proceeding sent to it on any ground whatever from the clerk, with discretionary power in the superior court to remand, and a motion in the superior court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket, is untenable. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Appeal from Action of Clerk in Probate Proceedings.—Upon appeal to the superior court from action of the clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and this section does not apply. In re Will of Hine, 228 N.C. 405, 45 S.E.2d 526 (1947).

Thus where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order of the clerk. In re Will of Hine, 228 N.C. 405, 45 S.E.2d 526 (1947).

The jurisdiction of the superior court on appeal from an order of the clerk in removing an administrator and appointing a successor is solely derivative. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Question of Price of Land.—The discretion vested in the superior court judge on appeal from the clerk, by this section, 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, wherein 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).

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Harriss v. Hughes, 220 N.C. 473, 17 S.E.2d 679 (1941).

Proceedings to Sell Land. — A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897); Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920). See Harrington v. Hatton, 129 N.C. 146, 39 S.E. 780 (1901).

In a suit for partition of land the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916).

Proceedings to Subject Lands to Dower. — An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon cannot be had before the clerk and on appeal may be dismissed by the judge for want of jurisdiction. In re Hybart's Estate, 129 N.C. 130, 39 S.E. 779 (1901).

Drainage Assessment Proceedings. — Under this section giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and § 156-29, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken from an order of the clerk to the superior court. Spence v. Granger, 207 N.C. 19, 175 S.E. 824 (1934).

Motion to Retax Bill of Costs.—When a motion to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court is made at the next term after judgment is entered, it is error for the judge to hold that he has no power to entertain it. In re Smith, 105 N.C. 167, 10 S.E. 982 (1890).

Appeal from Order Requiring Surviving Partners to File Bond and Inventory. — Upon the failure or refusal of surviving partners to file the bond required by § 59-74 or the inventory required by § 59-76 the clerk of the superior court may not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquires jurisdiction of the entire proceeding and the appeal is erroneously dismissed in the superior court on the ground of want of

jurisdiction. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Appointment of Receiver for Partnership. — While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under § 59-77 when the surviving partners have failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding does acquire jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Answer Filed Too Late Permitted to Remain of Record.—Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquires jurisdiction of the entire cause and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. Bailey v. Davis, 231 N.C. 86, 55 S.E.2d 919 (1949).

Conflicting Rulings. — Where the superior court ruled that a clerk had no authority under § 28-111 to appoint a referee to hear claim against the estate of a deceased, a further ruling that the referee's report was binding on other grounds is a nullity notwithstanding the broad jurisdiction of the superior court under this section. In re Shutt, 214 N.C. 684, 200 S.E. 372 (1939).

Under the statutes governing probate matters, the superior court, as a mere court of law and equity, has no jurisdiction to determine an issue whether a disputed writing is the last will of a deceased person in an ordinary civil action. However, when an issue of devisavit vel non is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the superior court in term has jurisdiction to determine the whole matter in controversy as well as the issue of devisavit vel non. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

In the appointment and removal of guardians the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appeals under this section are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

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).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, this section, which provides that "whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction" has no application to probate matters. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Applied in Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954); Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941); Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948).

Quoted in Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956); Sharpe v. Sharpe, 210 N.C. 92, 185 S.E. 634 (1936).

Cited in Woody v. Barnett, 235 N.C. 73, 68 S.E.2d 810 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968); Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891); Fowler v. Fowler, 131 N.C. 169, 42 S.E. 563 (1902); Settle v. Settle, 141 N.C. 553, 54 S.E. 445 (1906); Carolina Power & Light Co. v. Reeves, 198 N.C. 404, 151 S.E. 871 (1930); County of Buncombe v. Arbogast, 205 N.C. 745, 172 S.E. 354 (1934); Vann v. Coleman, 206 N.C. 451, 174 S.E. 301 (1934); In re Reynold's Estate, 221 N.C. 449, 20 S.E.2d 348 (1942).

§ 1-277. Appeal from superior court judge.—(a) An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any

subsequent appeal in the cause. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638; 1967, c. 954, s. 3.)

Cross References.

As to appellate jurisdiction of Supreme Court, see N.C. Const., Art. IV, § 8. As to who may appeal, see § 1-271. As to appeals in criminal cases, see § 15-179 et seq. and notes.

I. EDITOR'S NOTE.

The 1967 amendment designated the former provisions of the section as subsection (a) and added subsection (b).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The appellant should be very careful to conform with the rules of the Supreme Court regarding appeals. The penalty for failure to comply with these rules is the dismissal of the appeal. Exceptions which are not brought forth among the assignments of error, are deemed abandoned under Supreme Court Rule 21.

At common law there was no appeal from the decision of any court, and a decision could only be reviewed by a writ of error or writ of false judgment. By North Carolina laws appeals are used as a substitute for those writs. Previous to the adoption of the Code of Civil Procedure an appeal was allowed by the court and the preparation and perfection of it was the act of the court. But the Code of Civil Procedure made a notable change in that particular. Appeals were no longer prayed for but were taken. As said in Campbell v. Allison, 63 N.C. 568 (1869), "The judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone."

Under the provisions of N.C. Const., Art. IV, § 8, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. See Robinson v. J.B. Ivey & Co., 193 N.C. 805, 138 S.E. 173 (1927).

Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much inconvenience and delay are occasioned by the practice of appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings.

Certiorari is the proper substitute for an appeal where the appellant has failed to perfect his appeal through no fault or negligence of his own. See § 1-269 and note thereto.

II. APPEAL IN GENERAL.

A. General Consideration.

Purpose of Appeal.—The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits. Rush v. Halcyon Steamboat Co., 67 N.C. 47 (1872).

Method of Correcting Errors. — Where an adjudication is based on the erroneous application of legal principles, the proper remedy to correct the error is by a proceeding in appeal. Stafford v. Gallops, 123 N.C. 19, 31 S.E. 265 (1898); McLeod v. Graham, 132 N.C. 473, 43 S.E. 935 (1903); Rawls v. Mayo, 163 N.C. 177, 79 S.E. 298 (1913).

Jurisdiction Properly Acquired.—As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. Gordon v. Sanderson, 83 N.C. 1 (1880).

Jurisdiction Not Conferred by Consent. — Jurisdiction of an appeal cannot be given by consent of parties. Rodman v. Davis, 53 N.C. 134 (1860); J.R. Cary Co. v. Allegood, 121 N.C. 54, 28 S.E. 61 (1897).

Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. Caudle v.

Morris, 158 N.C. 594, 74 S.E. 98 (1912); Byrd v. Southerland, 186 N.C. 384, 119 S.E. 2 (1923).

An appellant's right of appeal is dependent upon his observance of the rules regulating appeals. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921); State v. Butner, 185 N.C. 731, 117 S.E. 163 (1923).

Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals and where the appellant has failed to comply with these rules the appeal will be dismissed. Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922).

The proper method for obtaining relief from legal errors is by appeal under this section and not by application to another superior court. In such cases, a judgment entered by one judge of the superior court may not be modified, reversed or set aside by another superior court judge. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

An immediate appeal is the proper method to obtain relief from legal errors and it may not be obtained by application to another superior court judge. A judgment entered by one superior court may not be modified, reversed, or set aside by another. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

And appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

But Petitioner Alleging Denial Must Show Appeal Would Have Been Fruitful. —The weight of authority clearly stands for the proposition that the petitioner who claims he was denied his right to appeal through the neglect of counsel must show that his appeal would have been fruitful. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

This section regulates the practice of appeal in respect to when an order or judgment is subject to immediate review. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

It Must Be Complied with.—Since there is no right to appeal outside the provisions of the statute, the requirements of the statute must be complied with for the appeal to be made. Pitts v. North Carolina, 267 F. Supp. 870 (M.D.N.C. 1967).

Causes coming before a judge are in the bosom of the court during term time. So long as his orders, judgments and rulings do not fall within the classifications set out in this section, no appeal therefrom will lie. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

Discretionary Power to Consider Premature and Fragmentary Appeal.—Even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Failure to Transmit Record.—An appellant who merely prays an appeal in open court, and files a bond with the clerk, without settling and transmitting the record, does not "take" an appeal, within the meaning of this section. Wilson v. Seagle, 84 N.C. 110 (1881).

Both Parties Interested on Same Side of Case.—The appellate court will dismiss an appeal from a judgment in an action brought to obtain a construction of such act where it is apparent that both parties are interested on the same side of the case. Kistler v. Southern Ry., 170 N.C. 666, 79 S.E. 676 (1914).

Party Not Appealing.—A party not appealing or assigning any errors is not in position to complain of a ruling. Hannah v. Hyatt, 170 N.C. 634, 87 S.E. 517 (1916).

Separate Appeals in Related Causes. — Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. Williams v. Carolina & W.R.R., 144 N.C. 498, 57 S.E. 216 (1907).

Applied in Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962); Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963); Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967).

Quoted in Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

Stated in Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951); Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

Cited in Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); State Highway Comm'n v. Raleigh Farmers Market, Inc., 264 N.C. 139, 141 S.E.2d 10 (1965); Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968); State v. Williams, 209 N.C. 57, 182 S.E. 711 (1935);

In re Estate of Suskin, 214 N.C. 218, 198 S.E. 661 (1938).

B. From What Decisions, Orders, etc., Appeal Lies.

Cross Reference.—For particular orders, decisions, etc., see post, this note, "Appeal as to Particular Subjects," III.

Judicial Order or Determination. — The right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. In re Estate of Reynolds, 221 N.C. 449, 20 S.E.2d 348 (1942).

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

Cause Directly Affected.—An appeal lies from an order or determination in an action which affects the right litigated—the cause of action in controversy therein—in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and not affecting directly the cause of action litigated. Bynum v. Board of Comm'rs, 101 N.C. 412, 8 S.E. 136 (1888).

An order directing reference to ascertain certain alleged expenditures by guardian is not appealable, it not affecting any substantial rights. Sutton v. Schonwald, 80 N.C. 20 (1879).

It was formerly held that every order of a court of equity by which the rights of the parties may be affected may be reviewed in the appellate court. Graham v. Skinner, 57 N.C. 94 (1858).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Final Judgment.—Except where statute otherwise expressly provides, appeal to Supreme Court lies only from final judgment or one in its nature final. Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922); Veazey v. Durham, 231 N.C. 357, 57 S.E.2d 377 (1950). See Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

As a general rule, an appeal will not lie until there is a final disposition of the whole case. State v. Keeter, 80 N.C. 472 (1879); Moore v. Hinnant, 87 N.C. 505 (1882); Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885); Hailey v. Gray, 93 N.C. 195 (1885); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949); **State v. Childs,** 265 N.C. 575, 144 S.E.2d 653 (1965).

All issues should be determined, and a final judgment rendered, before an appeal should be permitted. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918).

Any decision, order, or decree of the circuit court, which puts an end to the proceedings between the parties to a cause in that court, is final, and may be reviewed upon appeal. Ex parte Spencer, 95 N.C. 271 (1886); Bain v. Bain, 106 N.C. 239, 11 S.E. 327 (1890).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Same—Premature Appeal. — See post, this note, "What Supreme Court Will Consider," II, C.

Interlocutory Orders.—In order to present the subject of appeals in a logical manner as a whole, interlocutory orders are discussed here. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by § 1-278.—Ed. note.

An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891); Warren v. Stancill, 117 N.C. 112, 23 S.E. 216 (1895). See Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965).

Appeals will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

By special act the legislature may provide that no appeal lies from an interlocu-

tory order in a specific proceeding. Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885).

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. Perry v. Tupper, 71 N.C. 380 (1874).

Where a party appeals from an interlocutory order, and proceeds to trial, without waiting for a decision upon the matter appealed from, the appeal will be dismissed with costs. Love v. Johnston, 34 N.C. 367 (1851).

Defendant's appeal from an order continuing its motion to dismiss is premature, since the order disposes of no substantial right. Sanderson v. Aetna Life Ins. Co., 218 N.C. 270, 10 S.E.2d 802 (1940).

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. Cole v. Farmers Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950); Gardner v. Price, 239 N.C. 651, 80 S.E.2d 478 (1954); Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Where the question sought to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the appellate court may determine the appeal on the merits even though the appeal is from an interlocutory order and premature. Moses v. State Highway Comm'n, 261 N.C. 316, 134 S.E.2d 664 (1964).

An appeal does not lie to the appellate court from an interlocutory order of the superior court, unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Shelby v. Lackey, 235 N.C. 343, 69 S.E.2d 607 (1952); Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Tucker v. State Highway & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957).

Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes in substance, that an appeal does not lie from an interlocutory order of the superior court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Judgments of Superior Court Final as to Matters of Fact.—The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. State ex rel. Util. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Appeal from Order Allowing Amendment to Pleadings. — Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. George E. Nissen Co. v. Nissen, 198 N.C. 808, 153 S.E. 450 (1930).

Motions to Strike Allegations from Pleadings and Motions.—While the appellate court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

Judicial Nature of Decision.—An appeal lies in all cases from the judgment applying the law to the facts found. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899); Ladd v. Teague, 126 N.C. 544, 36 S.E. 45 (1900); Stokes v. Cogdell, 153 N.C. 181, 69 S.E. 65 (1910).

Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. Pender v. North State Life Ins.

Co., 163 N.C. 98, 79 S.E. 293 (1913).

Refusal to Dismiss Action.—An appeal does not lie from the refusal to dismiss an action. Winder v. Penniman, 181 N.C. 7, 105 S.E. 884 (1921); Capps v. Atlantic Coast Line R.R., 182 N.C. 758, 108 S.E. 300 (1921); City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939).

Appeal taken from an order denying a motion to dismiss a special proceeding is premature. After denying such motion, the judge should proceed with the hearing, and the appeal should be from the final decision. Mitchell v. Kilburn, 74 N.C. 483 (1876); Mitchell v. Hubbs, 74 N.C. 484 (1876); Mitchell v. West, 74 N.C. 485 (1876).

A refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud does not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void, is premature and must be dismissed. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Denial of Motion for Judgment on the Pleadings.—An appeal does not lie from a denial of a motion for judgment on the pleadings. Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Verdict Set Aside.—When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

Where the verdict is set aside in the court's discretion, there is no judgment from which an appeal may be taken, and on appeal from the action of the court setting the judgment aside, appellant cannot present his contentions of error in denying his motion for judgment as of nonsuit. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

Dismissal of Appeal.—A party who loses on appeal cannot review its decision by second appeal, but the only way is by petition to rehear. Carter v. White, 134 N.C. 466, 46 S.E. 983 (1904); Holland v. Railroad, 143 N.C. 435, 55 S.E. 835 (1906).

Refusal of Motion for Judgment upon Special Verdict. — An order by the trial court, denying defendants' motions for judgment on the special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as may be necessary to determine the rights of the parties, with leave to file amended pleadings, is not a final judgment. Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

Application for Citizenship.—Under this section an alien may appeal from decree of superior court denying application for citizenship. United States v. Ovens, 13 F.2d 376 (4th Cir. 1926).

Judgment Confessed. — One who confesses judgment has no right of appeal from such judgment; but where an appeal was allowed, and the plaintiff failed to move to dismiss, the appellate court may pass by the irregularities and consider the errors. Rush v. Halcyon Steamboat Co., 67 N.C. 47 (1872).

Decisions of Intermediate Courts. — An appeal lies from the dismissal of an action, or of an appeal from justice court; but it does not lie from a refusal to dismiss, for an exception should be noted, and an appeal lies from the final judgment. Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Decisions and Orders Favorable to Appellant.—See post, this note, "Estoppel to Allege Error," II, D.

Matters in Discretion of the Trial Court. —The discretion of the trial court will not be reviewed, unless it appears that such discretion was abused or that the ruling was based upon a matter of law. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917); Gordon v. Pintsch Gas Co., 178 N.C. 435, 100 S.E. 878 (1919). See 5 N.C.L. Rev. 14.

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subject to review in any event, unless there has been an abuse of discretion on his part. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. Jenkins v. North Carolina Ore Dressing Co., 65 N.C. 563 (1871).

If, in the trial court, the verdict of the jury is, in the opinion of the presiding judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. Watts v. Bell, 71 N.C. 405 (1874).

When a motion on which an order is based is made as a matter of right and is not addressed to the court's discretion,

upon its denial the movant may appeal immediately and have his motion decided there on its merits. Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942).

Appeals from Subsidiary Proceedings.—Where, after the issuing of an injunction from which an appeal is taken, it appears that the case has been tried, and the issues found, and judgment rendered against appellant, the appeal will be dismissed. Pritchard v. Baxter, 108 N.C. 129, 12 S.E. 906 (1891).

Detached Rulings.—The appellate court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. Arrington v. Arrington, 91 N.C. 301 (1884).

Removal of Public Officer.—An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920).

C. What Supreme Court Will Consider.

Cross Reference. — See post, this note, "Presumptions on Appeal — Burden of Proof," II, E.

Record Discloses No Error.—Where the record discloses no error of law or legal inference made upon the trial, the appellate court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Exception Not Considered by Trial Court.—An exception which the trial court, through inadvertence, did not consider, cannot be reviewed on appeal, but the case will be remanded that such exception may be passed on. Scroggs v. Stevenson, 100 N.C. 354, 6 S.E. 11 (1888).

Points Reviewed Must Have Been Passed On.—In case of an appeal, from the probate court to the judge, if there be a further appeal from the judge to the appellate court, the latter tribunal can review no point before the probate court that was not passed upon by the judge. Rowland v. Thompson, 64 N.C. 714 (1870).

Error Not Based on Exceptions. — An assignment of error not based on any exception in the record cannot be considered. Thompson v. Seaboard Air Line Ry., 147 N.C. 412, 61 S.E. 286 (1908); Morse v. Freeman, 157 N.C. 385, 72 S.E. 1056 (1911).

Will Not Go Behind Judge's Finding of Fact. — A finding by the trial judge as a fact that plaintiff moved to set aside a judgment only upon ground of excusable neglect prevents the appellate court from considering any other ground. Shepherd v. Shepherd, 180 N.C. 494, 105 S.E. 4 (1920).

Questions Decisive of Appeal.—The appellate court will pass only on the questions decisive of the appeal. Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909).

Where there is not enough evidence to take case to the jury, it will not be decided whether defendant would be liable to plaintiff if allegations of complaint had been established. Pegram v. Canton, 179 N.C. 700, 103 S.E. 371 (1920).

Questions Which May Not Arise on New Trial.—Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. Supervisor & Comm'rs v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921); Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 111 S.E. 776 (1922).

Appellant Not Entitled to Favorable Decision in Any Event.—Plaintiff cannot complain of technical error of the court in the exclusion of evidence offered, where the whole case shows that he could not recover in any event. Wilcox v. McLeod, 182 N.C. 637, 109 S.E. 875 (1921); Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

Defendant's Appeal.—Where, on plaintiff's appeal, it was decided that plaintiff could not maintain his action, defendant's appeal need not be considered. Beard v. Sovereign Lodge of Woodmen of the World, 184 N.C. 154, 113 S.E. 661 (1922).

Verdict Bars Right of Action.—Where jury's answer to one issue is a complete bar to plaintiff's right of action, and no error is alleged in determination of that issue, it is unnecessary to consider exceptions relating to other issues. Lamm v. Holloman, 176 N.C. 686, 97 S.E. 161 (1918).

Error Must Be Prejudicial. — Error to warrant reversal must be prejudicial. McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913); Brogden v. Gibson, 165 N.C. 16, 80 S.E. 966 (1914); Steeley v. Dare Lumber Co., 165 N.C. 27, 80 S.E. 963 (1914).

Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails. Carter v. Seaboard Air Line R.R., 165 N.C. 244, 81 S.E. 321 (1914).

Errors Not Affecting Result.—The finding for defendant upon one issue renders harmless any error in regard to that issue, and judgment for plaintiff is not reversible therefor. Vickers v. Leigh, 104 N.C. 248, 10 S.E. 308 (1889); Perry v. Insurance Co., 137 N.C. 402, 49 S.E. 889 (1905).

Error Must Be Material.—Mere error in the trial of a cause is not sufficient grounds for reversal but it should be made to appear that the ruling was material and prejudicial to appellant's rights. Schas v. Equitable Life Assurance Soc'y of the United States, 170 N.C. 420, 87 S.E. 222 (1915); Shaw Cotton Mills v. Acme Hosiery Mills, 181 N.C. 33, 106 S.E. 24 (1921).

Trivial Errors. — Courts do not lightly grant reversals or set aside verdicts, and a motion for such to be meritorious should not be based on any merely trivial errors committed manifestly without prejudice. Rierson v. Carolina Steel & Iron Co., 184 N.C. 363, 114 S.E. 467 (1922).

Technical Errors. — Verdicts and judgments will not be set aside and new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right, and this rule applies especially where the trial was a long drawn out and vigorous contest. In re Will of Ross, 182 N.C. 477, 109 S.E. 365 (1921).

Error Cured by Verdict or Judgment.—Exceptions to a portion of a charge on an issue which was immaterial under the special verdict, cannot be sustained. Fourth Nat'l Bank v. Wilson, 168 N.C. 557, 84 S.E. 866 (1915); Gambier v. Kimball, 168 N.C. 642, 85 S.E. 3 (1915).

Error Cured by Withdrawal.—An exception has no point on appeal, where the testimony objected to was stricken on the appellant's motion. In re Will of Staub, 172 N.C. 138, 90 S.E. 119 (1916); Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918).

Error Not Involved on Appeal. — Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In re Will of Rawlings, 170 N.C. 58, 86 S.E. 794 (1915).

Opinion in Case Not Properly before Court.—The appellate court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916); Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

On dismissal of a fragmentary appeal, the appellate court may in its discretion express its opinion upon the merits so far as it may be a guide in further proceedings in the court below. Penn-Allen Cement Co. v. Phillips, 182 N.C. 437, 109 S.E. 257 (1921).

Where appellate court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion is authoritative on subsequent appeal. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918); North Carolina Pub. Serv. Co. v. Southern Power Co., 181 N.C. 356, 107 S.E. 226 (1921).

When Court Gave Wrong Reason for Judgment.—A correct judgment will not be disturbed on writ of error because the trial court gave a wrong reason therefor. Burns v. McFarland, 146 N.C. 382, 59 S.E. 1011 (1907); Brown v. Elm City Lumber Co., 167 N.C. 9, 82 S.E. 961 (1914); King v. McRacken, 171 N.C. 752, 88 S.E. 226 (1916).

Errors in Case of Decisions Correct on Merits. — A judgment will be affirmed, though irregularly rendered, where the correct result was accomplished. Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

Moot Question.—Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. Kistler v. Southern Ry., 170 N.C. 666, 79 S.E. 676 (1914); Waters v. Boyd, 179 N.C. 180, 102 S.E. 196 (1920); Greenleaf Johnson Lumber Co. v. Valentine, 179 N.C. 423, 102 S.E. 774 (1920).

Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only in the event of a favorable decision. In re Custody of Morris, 225 N.C. 48, 33 S.E.2d 243 (1945).

Proceedings Frivolous or for Delay. — Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. Blount v. Jones, 175 N.C. 708, 95 S.E. 541 (1918); Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 108 (1919).

An appeal by defendant from an order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground will be dismissed as made for delay. Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916).

Premature Appeal.—The appellate court will not entertain premature or fragmentary appeals. Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920). See Joyner v. Reflector Co., 176 N.C. 274, 97 S.E. 44 (1918);

Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921).

A premature or fragmentary appeal will not be considered. Cape Fear & Y.V. Ry. v. King, 125 N.C. 454, 34 S.E. 541 (1899); Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921).

Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

Where no final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the appellants, if the appeal should be delayed until the final judgment, an appeal will not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N.C. 193 (1886); Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

When Appeal Is Premature. — Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 126 N.C. 62, 35 S.E. 185 (1900).

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N.C. 586, 71 S.E. 1087 (1911); Ingle v. McCurry, 243 N.C. 65, 89 S.E.2d 745 (1955).

Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955).

Same—Effect of Dismissal.—Though an appeal is dismissed as premature, its entry is equivalent to "noting an exception." Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Bernard v. Shemwell, 139 N.C. 446, 52 S.E. 64 (1905); Gray v. James, 147 N.C. 139, 60 S.E. 906 (1908); Kerr v. Hicks, 154 N.C. 265, 70 S.E. 468 (1911).

Fictitious Action.—The appellate court will not hear an appeal in a fictitious action. Blake v. Askew, 76 N.C. 325 (1877).

Abstract Propositions. — The appellate court will not entertain a cause to settle abstract propositions no longer at issue. Reid v. Norfolk S.R.R., 162 N.C. 355, 78 S.E. 306 (1913); Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

Admission Rendering Question Academic.—That in a referendum election, to amend city charter pursuant to a legislative enactment, no booth was provided, etc., becomes academic upon express admission that no person was interfered with or prevented from casting free ballot. Taylor v. City of Greensboro, 175 N.C. 423, 95 S.E. 771 (1918).

Where Appeal Becomes Irrelevant. — Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. Page v. Page, 167 N.C. 350, 83 S.E. 627 (1914); Cannon v. Commissioners of Pender County, 170 N.C. 677, 87 S.E. 31 (1915).

Case Not before Appellate Court. — An agreement that other pending causes shall abide the determination in the one in question is a matter between the parties, and does not authorize the appellate court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. Belden v. Snead, 84 N.C. 243 (1881).

D. Estoppel to Allege Error.

In General. — A defendant cannot ask that a party be brought in, and when it is so ordered object because he is an improper party. Armfield Co. v. Saleeby, 178 N.C. 298, 100 S.E. 611 (1919).

A party to an action cannot except to an instruction which was given by the trial court at his request. Bell v. Harrison, 179 N.C. 190, 102 S.E. 200 (1920); Washington Horse Exch. Co. v. Bonner, 180 N.C. 20, 103 S.E. 907 (1920).

The defendant cannot object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness. Jenkins v. Long, 170 N.C. 269, 87 S.E. 47 (1915).

Prevailing Parties. — A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. Doe v. South, 32 N.C. 237 (1849); Hoke v. Carter, 34 N.C. 327 (1851).

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial his appeal must be dismissed. McCullock v. North Carolina R.R., 146 N.C. 316, 59 S.E. 882 (1907).

Errors Favorable to Party Complaining. —A party cannot complain of error in his favor. Shaw v. North Carolina Pub. Serv. Corp., 168 N.C. 611, 84 S.E. 1010 (1915); Gaston Farmers Warehouse Co. v. American Agricultural Chem. Co., 176 N.C. 509, 97 S.E. 472 (1918); Nance v. King, 178 N.C. 574, 101 S.E. 212 (1919).

A ruling in appellant's favor is not re-

viewable, where appellee does not complain of it. Hendon v. North Carolina R.R., 127 N.C. 110, 37 S.E. 155 (1900); Miller v. Curl, 162 N.C. 1, 77 S.E. 952 (1913).

Favorable Instructions. — A party cannot complain of charges favorable to himself. Lupton v. Southern Express Co., 169 N.C. 671, 86 S.E. 614 (1915); Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917); Belk v. Belk, 175 N.C. 69, 94 S.E. 726 (1917).

Acceptance of Benefits.—Where plaintiff recovered judgment on two of the causes of action alleged in the complaint, and no exception was taken to the ruling of the court, the plaintiff by the payment of the judgment was not estopped from complaining on appeal of exclusion of evidence as to other causes of action pleaded in the complaint. Garland v. Linville Improvement Co., 184 N.C. 551, 115 S.E. 164 (1922).

Party Who Acquiesces in Judgment.— Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial court, he acquiesced in the judgment, and cannot assign it as error. Rice v. McAdams, 149 N.C. 29, 62 S.E. 774 (1908).

Consent Judgment. — No appeal lies from a consent judgment. Union Bank v. Commissioners of Oxford, 119 N.C. 214, 25 S.E. 966 (1896); Overman v. Lanier, 156 N.C. 537, 72 S.E. 575 (1911); Hartsoe v. Southern Ry., 161 N.C. 215, 76 S.E. 684 (1912).

Order in Furtherance of Parties' Own Demand.—A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. Leak v. Covington, 87 N.C. 501 (1882); Hocutt v. Wilmington & W.R.R., 124 N.C. 214, 32 S.E. 681 (1899).

E. Presumptions on Appeal—Burden of Proof.

Presumption against Error.—On appeal there is a presumption against error. In re Will of Ross, 182 N.C. 477, 109 S.E. 365 (1921); Fellows v. Dowd, 182 N.C. 776, 109 S.E. 69 (1921); Carstarphen v. Carstarphen, 193 N.C. 541, 137 S.E. 658 (1927); Mason v. Andrews, 193 N.C. 854, 138 S.E. 341 (1927).

The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Prejudicial error will not be presumed. Blevins v. Norfolk & W. Ry., 184 N.C. 324, 114 S.E. 298 (1922).

Burden on Appellant to Show Error.— The burden is on the party alleging error to show it affirmatively by the record. Quelch v. Futch, 175 N.C. 694, 94 S.E. 713 (1917); Baggett v. Lanier, 178 N.C. 129, 100 S.E. 254 (1919); Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Facts Not Shown by Record.—Where the testimony on which the trial court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. Bowers v. Bryan Lumber Co., 152 N.C. 604, 68 S.E. 19 (1910).

Where the charge is not in the record, it will be presumed that it correctly stated the law. Ellison v. Western Union Tel. Co., 163 N.C. 5, 79 S.E. 277 (1913); Harrison v. Western Union Tel. Co., 163 N.C. 18, 79 S.E. 281 (1913).

Burden to Show Prejudice from Error.— The burden is on the appellant to show clearly that error was prejudicial. Mercer v. Frank Hitch Lumber Co., 173 N.C. 49, 91 S.E. 588 (1917); Universal Oil & Fertilizer Co. v. Burney, 174 N.C. 382, 93 S.E. 912 (1917); Quelch v. Futch, 175 N.C. 694, 94 S.E. 713 (1917).

But the immateriality of an error must clearly appear to warrant the court to treat it as surplusage. McLenan v. Chisholm, 64 N.C. 323 (1870).

Admission of Evidence. — Evidence improperly admitted will be presumed to be prejudicial. Patton v. Porter, 48 N.C. 539 (1856); Johnson v. Railroad Co., 140 N.C. 574, 53 S.E. 362 (1906).

F. Effect of Appeal on Proceedings in Lower Court.

Cross References.—See § 1-294 and note thereto. For undertaking to stay execution on appeal, see § 1-289.

III. APPEAL AS TO PARTICULAR SUBJECTS.

A. Costs.

Cross Reference.—As to costs on appeal, see § 6-23 et seq., and notes thereto.

Costs Alone Involved.—An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. Martin v. Sloan, 69 N.C. 128 (1873); State v. Richmond & D.R.R., 74 N.C. 287 (1876); Hasty v. Funderburk,

89 N.C. 93 (1883); Russell v. Campbell, 112 N.C. 404, 17 S.E. 149 (1893).

Where, pending an appeal, the subject matter of an action, or the cause of action, is destroyed, in any matter whatever, the appellate court will not go into a consideration of the abstract question which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

When Appeal Lies for Costs.—The exceptions to the general rule that the appellate court will not decide upon a mere question of costs are: (1) Where the very question at issue is the legality of a particular item of costs (Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897)); or (2) the liability of a prosecutor for costs in a criminal action (State v. Byrd, 93 N.C. 624 (1885)); or (3) taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party (State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896)). Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

If some important substantial right be involved an exception will be made and an opinion given. Martin v. Sloan, 69 N.C. 128 (1873).

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, is appealable. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Fiduciaries.—Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." May v. Darden, 83 N.C. 237 (1880).

Denial of Motion to Retax Costs.—Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from party taxed, or whether one or more items have been erroneously inserted in bills of costs. Van Dyke v. Aetna Life Ins. Co., 174 N.C. 78, 93 S.E. 444 (1917).

Rulings Founded upon Lack of Power.—A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. Martin v. Bank of Fayetteville, 131 N.C. 121, 42 S.E. 558 (1902); Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

B. Demurrer.

Demurrer to Whole Cause.—An appeal lies from an order sustaining or overruling a demurrer to a whole cause of action or defense. Pender v. Maliett, 122 N.C. 163, 30 S.E. 324 (1898); Abbott v. Hancock, 123 N.C. 89, 31 S.E. 271 (1898); Shelby v. Charlotte Elec. Ry., Light & Power Co., 147 N.C. 537, 61 S.E. 377 (1908).

Demurrer Sustained but No Verdict Rendered.—The appellate court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered. Bazemore v. Bridges, 105 N.C. 191, 10 S.E. 888 (1890); Teal v. Liles, 183 N.C. 678, 111 S.E. 617 (1922).

Overruling Demurrer. — On an overruling of its demurrer a party made a defendant is entitled to appeal, unless the demurrer has been held frivolous. Joyner v. Champion Fibre Co., 178 N.C. 634, 101 S.E. 373 (1919).

An appeal lies to the appellate court from an order of the court below overruling a demurrer. State ex rel. Commissioners of Wake County v. Magnin, 78 N.C. 181 (1878).

An order overruling demurrer to part of answer with leave to reply is not a final order and an appeal therefrom will be dismissed. Chambers v. Seaboard Air Line Ry., 172 N.C. 555, 90 S.E. 590 (1916).

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it. Headman v. Board of Comm'rs, 177 N.C. 261, 98 S.E. 776 (1919).

Refusal to Hold Demurrer or Answer Frivolous.—The refusal to hold a demurrer or answer frivolous, and to render judgment thereon is not appealable. Walters v. Starness, 118 N.C. 842, 24 S.E. 713 (1896); Morgan v. Harris, 141 N.C. 358, 54 S.E. 381 (1906).

Withdrawal of Matter Demurred to. — An appeal cannot be taken from a refusal of the court to proceed to try the action on the demurrer, after the withdrawal of the subject matter to which it relates and the consequent order of continuance. Gay v. Brookshire, 82 N.C. 409 (1880).

An order or judgment which sustains a demurrer affects a substantial right and a defendant may appeal therefrom. Rule 4(a), Rules of Practice in the Supreme Court, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is overruled. Quick v.

High Point Mem. Hosp., 269 N.C. 450, 152 S.E.2d 527 (1967).

Order Sustaining Demurrer to Plea in Bar. — An order or judgment which sustains a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom. Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965).

An appeal from a judgment sustaining a plea in bar is not regarded as premature. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Order Striking Portion of Pleading. — When an order striking a portion of a pleading is in effect an order sustaining a demurrer and denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action, it is within the provisions of this section and appealable. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

Rule 4 (a), Rules of Practice in the Court of Appeals, has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of this section and the party adversely affected may appeal. McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

A motion to strike allegations in the complaint was equivalent to a demurrer to the purported cause of action, and the effect of an order allowing the motion was to sustain the demurrer. Rule 4(a), Rules of Practice in the Supreme Court, has no application to such orders, for they come within the provisions of this section. Davis v. North Carolina State Highway Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967).

Where plaintiff alleged a cause of action for wrongful death and a cause of action to recover damages for pain and suffering endured by his intestate from the time of injury to the date of death, the allowance of a motion to strike all the allegations stating the cause of action for pain and suffering amounted to a demurrer dismissing that cause of action, and the order was immediately appealable. Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967).

Order Allowing Motion to Strike Allegations in Answer.—In a proceeding by a housing authority to condemn land, a motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously and arbitrarily in selecting the land for the site of the housing project, was in effect a demurrer to the plea in bar, and an order allowing the motion is appealable. Housing Authority of City of Wilson v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962).

Order Allowing Plaintiff to Withdraw Appeal from Final Judgment and File Amended Complaint. — Where, upon demurrer, a cause of action is dismissed, and at a subsequent term plaintiff is allowed to withdraw her appeal from the final judgment and file an amended complaint, such order affects a substantial right of the defendant and he is entitled to appeal therefrom. Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954).

C. Granting or Denying New Trial.

In General.—An appeal from an order granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right, and as a matter of law. Braid v. Lukins, 95 N.C. 123 (1886).

An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. Thomas v. Myers, 87 N.C. 31 (1882); Carson v. Dellinger, 90 N.C. 226 (1884).

The appellate court has jurisdiction to review, upon appeal, the decision of the court below, granting, or refusing to grant, a new trial, where a matter of law or legal inference is involved. Johnson v. Bell, 74 N.C. 355 (1876).

Setting Aside Verdict and Granting New Trial.—The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. Coats v. Norris, 180 N.C. 77, 104 S.E. 71 (1920); Harrill v. Seaboard Air Line Ry., 181 N.C. 315, 107 S.E. 136 (1921).

An appeal from an order setting aside the award of damages as excessive is premature. Rogerson v. Lumber Co., 136 N.C. 266, 48 S.E. 647 (1904); Billings v. The Charlotte Observer, 150 N.C. 540, 64 S.E. 435 (1909).

Order setting aside verdict, as matter of law is appealable. Tuthill v. Norfolk S.R.R., 174 N.C. 77, 93 S.E. 446 (1917).

Grant of Partial New Trial.—An appeal from refusal of motion for judgment upon verdict and a grant of partial new trial,

which has been granted as matter of law and not of discretion is not fragmentary and premature. Grove v. Baker, 174 N.C. 745, 94 S.E. 528 (1917).

Contents of Record When New Trial Granted or Refused.—To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not. Carson v. Dellinger, 90 N.C. 226 (1884).

D. Injunction.

Order Refusing Injunction.—A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First Nat'l Bank v. Jenkins, 64 N.C. 719 (1870).

Interlocutory Injunction. — An appeal from an injunction pendente lite against counting and certifying the result of a special election granted on the ground that women, infants, and nonresidents, though freeholders, were not counted in determining the necessary number of the signers, is not subject to dismissal as fragmentary and premature. Gill v. Board of Comm'rs, 160 N.C. 176, 76 S.E. 203 (1912).

Appeal from an interlocutory injunction is not considered premature and will be entertained by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, the Court of Appeals is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Order Continuing Injunction. — Overruling a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected; but, when an injunction has been issued, an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. H.P. Reynolds & Co., 151 N.C. 606, 66 S.E. 657 (1910).

Finding of Fact Reviewable in Injunction Cases. — While the appellate court may review findings of fact in an action for injunction, it will not, where no special findings are set out in the case, reverse what were apparently the judge's findings necessary to sustain his judgment unless such findings are clearly wrong. Davenport v. Board of Educ., 183 N.C. 570, 112 S.E. 246 (1922).

Overruling Demurrer to Complaint for Injunction. — An appeal taken from a judgment overruling demurrers to the complaint and allowing defendants to answer for the purposes of a motion to restrain one of defendants from suing plaintiff in the federal court, remains in the court below, and he must obtain relief there and not by appeal. Worth v. Knickerbocker Trust Co., 152 N.C. 242, 67 S.E. 590 (1910).

Seeking to Restrain Act Already Committed. — The correctness of a ruling dissolving a restraining order will not be considered on appeal, when it is made to appear that the act sought to be restrained has been committed. Wallace v. Town of N. Wilkesboro, 151 N.C. 614, 66 S.E. 657 (1910); Moore v. Cooper Monument Co., 166 N.C. 211, 81 S.E. 170 (1914); Kilpatrick v. Harvey, 170 N.C. 668, 86 S.E. 596 (1915); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

Injunction against Cutting Timber. — Where plaintiffs were stopped to assert title to land in controversy, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 178, 132 S.E.2d 340 (1963).

E. Nonsuit.

In General. — If, as a matter of law, plaintiff was not entitled to a verdict, he could not take a voluntary nonsuit, and have the decision reviewed, as the setting aside of a verdict for such reason is not reviewable; being controlled by the sound discretion of the court. McKinney v. Patterson, 174 N.C. 483, 93 S.E. 967 (1917).

No appeal lies to set aside a voluntary nonsuit. White v. Harris, 166 N.C. 227, 81 S.E. 687 (1914); Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914).

An order sustaining a motion for nonsuit as to one cause of action and overruling it as to other causes of action is not appealable by defendant. Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921).

An appeal will lie from the judgment of the superior court reversing the clerk's order permitting the plaintiff to take a vol-

untary nonsuit. City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

An appeal cannot be taken from a nonsuit to test an adverse ruling of the judge, leaving issuable matter presented and undetermined. Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914).

Where the clerk permits voluntary nonsuit in an action in which defendant has asserted his right to affirmative relief, order of the superior court reversing the clerk's judgment of nonsuit has the same effect as if plaintiff's motion for dismissal as of voluntary nonsuit had been made in the first instance before the judge, and attempted appeal from the order reversing the nonsuit is a nullity notwithstanding that the judge signs the appeal entries. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Where Court Intimates Opinion.—Where the court on the trial intimates an opinion that plaintiff cannot maintain his action, he may take a judgment of nonsuit and appeal; and the appeal will not be dismissed on the ground that plaintiff voluntarily took a nonsuit. Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880); Hedrick v. Pratt, 94 N.C. 101 (1886); Midgett v. Manufacturing Co., 140 N.C. 361, 53 S.E. 178 (1906); Morton v. Blades Lumber Co., 144 N.C. 31, 56 S.E. 551 (1907).

A plaintiff may, in deference to an intimation from the court that he cannot maintain his action, submit to a nonsuit and have the questions of law reviewed upon appeal. Hedrick v. Pratt, 94 N.C. 101 (1886); Warner v. Western N.C.R.R., 94 N.C. 250 (1886).

Where court intimated that he would charge jury that certain deed did not convey land described in complaint, which was vital to plaintiff's recovery, plaintiff had the right to submit to a nonsuit and appeal. Quelch v. Futch, 172 N.C. 316, 90 S.E. 259 (1916).

But where the court intimated that the complaint stated a cause of action for rescission of a contract, but not for reformation; whereupon plaintiff suffered nonsuit, and appealed. Held that, as the intimation by the court was open to reconsideration, an appeal was error. Davis v. Ely, 100 N.C. 283, 5 S.E. 239 (1888). See Tiddy v. Harris, 101 N.C. 589, 8 S.E. 227 (1888); Hayes v. Railroad, 140 N.C. 131, 52 S.E. 416 (1905).

Construction of Evidence in Nonsuit Cases.—Where the appellate court passes on a motion to nonsuit, the plaintiff is entitled to have the evidence considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921); Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921).

The court is not limited to a consideration of the evidence of defendant, but must examine all the evidence. Ridge v. Norfolk S.R.R., 167 N.C. 510, 83 S.E. 762 (1914).

Setting Aside Nonsuit. — Where the superior court granted nonsuit on defendant's counterclaim, but after the jury's failure to reach a verdict on plaintiff's action, withdrew a juror, ordered a mistrial, and set aside the nonsuit on the counterclaim, although the striking out of the nonsuit involved a question of law, the court had the right to change his ruling on the motion any time before verdict, and therefore the exercise of such right could not affect a substantial right of plaintiff, and the action of the court is not appealable. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

F. Order of Reference and Referee's Report.

Motion to Refer.—Where the answer in a proceeding to compel an accounting did not constitute a valid plea in bar, the denial of a motion to refer on the ground that such answer did not set up a valid plea in bar affected a substantial right, and was appealable. Jones v. Sugg, 136 N.C. 143, 48 S.E. 575 (1904).

Appointing Referee.—An appeal from a judgment adjudging that plaintiff recover nothing on account of certain items, and referring all matters in controversy as to other items to a referee to take and state an account, is premature. International Waste Co. v. Bloomfield Mfg. Co., 168 N.C. 92, 83 S.E. 609 (1914).

An appeal will not lie from an interlocutory judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909).

Relating to Reference of Cause.—Where the court ordered a reference to take an account of partnership receipts and expenses, an appeal from such order before judgment on the report thereon is premature. Leroy v. Saliba, 182 N.C. 757, 108 S.E. 303 (1921).

Ordinarily an appeal will not lie from an order of compulsory reference made pursuant to statute, and where there is no complete plea in bar to the entire case.

Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Plea in Bar. — When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal. Pritchett v. Greensboro Supply Co., 153 N.C. 344, 69 S.E. 249 (1910).

An appeal lies from a judgment sustaining or overruling a plea in bar, and no reference should be ordered until the plea is finally determined. Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895); Royster v. Wright, 118 N.C. 152, 24 S.E. 746 (1896). Where a matter pleaded in bar is an estoppel was discussed in Rogers v. Ratcliff, 48 N.C. 225 (1855).

Order of Reference Made before Disposition of Plea in Bar. — An order of reference made before disposition of a plea in bar of an action is one from which an appeal can be immediately taken. Austin v. Stewart, 126 N.C. 525, 36 S.E. 37 (1900); Jones v. Wooten, 137 N.C. 421, 49 S.E. 915 (1905); Duckworth v. Duckworth, 144 N.C. 620, 57 S.E. 396 (1907).

Submitting Issue on Plea in Bar. — An action on the part of the court submitting to the jury an issue on a plea in bar before ordering a reference decides no substantial right, and is not the subject of an appeal. Sloan v. McMahon, 85 N.C. 296 (1881).

Setting Aside Judgment.—The appellate court can review the ruling of the judge below on a motion to set aside a judgment. Clegg v. New York White Soap Stone Co., 67 N.C. 302 (1872).

Order to Show Cause. — An order of a judge for the defendant to appear at a subsequent time and show cause why a receiver should not be appointed is not such an order as can be appealed from. Gray v. Gaither, 71 N.C. 55 (1874).

Exceptions Must Be Passed On by Judge.—The Supreme Court will not review exceptions of law to a referee's report, unless they are passed upon by the judge. John Church Co. v. Dawson, 157 N.C. 566, 72 S.E. 1009 (1911).

Exceptions Overruled.—Where some of the exceptions to a referee's report were overruled, and the case retained by the court to try the other issues raised by the pleadings, it was held that this was an interlocutory order and not appealable. Leak v. Covington, 95 N.C. 193 (1886).

Exception to Partial Report of Referee. —A judgment passing on exceptions to a referee's report, distributing part of the fund, and sending the case back for further report as to certain claims, is not final so as to support an appeal. Pritchard v. Panacea Spring Co., 151 N.C. 249, 65 S.E. 968 (1909); Smith v. Miller, 155 N.C. 242, 71 S.E. 353 (1911).

Sustaining Exceptions.—An appeal from an order sustaining an exception to a referee's report, and recommitting the case to the referee to take further evidence, is premature. Grant v. Reese, 90 N.C. 3 (1884); Wallace Bros. v. Douglas, 105 N.C. 42, 10 S.E. 1043 (1890).

Where the rulings on exceptions to a referee's report and an order of recommittal do not affect the substantial rights of either party, no appeal will lie. Lutz v. Cline, 89 N.C. 186 (1883); Jones v. Call, 89 N.C. 188 (1883).

Approval of Findings Supported by Evidence. — Where a referee's finding of fact is supported by evidence and approved by the judge on exception to the report, it will not be reviewed by the appellate court. State ex rel. Marler-Dalton-Gilmer Co. v. Golden, 172 N.C. 823, 90 S.E. 909 (1916); Lewis v. May, 173 N.C. 100, 91 S.E. 691 (1917).

Necessity for Further Action.—Where an order based on the report of a receiver as to claims establishes the priority of a claim, but continues the proceeding for further consideration of the report except as to matters "adjudicated herein," an appeal from such order as to the claim mentioned is premature. Corporation Comm'n v. Farmers Bank & Trust Co., 183 N.C. 170, 110 S.E. 839 (1922). See H.L. Beck & Co. v. Bank of Thomasville, 157 N.C. 105, 72 S.E. 632 (1911).

Setting Aside Referee's Report and Ordering a Trial by Jury.—An order setting aside a report of a referee, and ordering a jury trial, is appealable, as affects the substantial rights of the parties. Stevenson v. Felton, 99 N.C. 58, 5 S.E. 399 (1888).

Report Set Aside for Newly Discovered Evidence. — The discretion of a superior court judge to set aside a report of a referee, on the ground of newly discovered testimony, cannot be reviewed in the appellate court. Vest v. Cooper, 68 N.C. 131 (1873); Braid v. Lukins, 95 N.C. 123 (1886).

Vacating Report and Ordering New Survey. — Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955).

G. Appeals as to Miscellaneous Subjects.

An order appointing a next friend for plaintiff is an order affecting a substantial right from which plaintiff may appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968).

Order Permitting Intervention.—Where there is no subsisting controversy as between plaintiff and defendants, an order permitting intervention by parties who may litigate their claim against plaintiff by independent action will be reversed. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956).

An order of the superior court remanding the cause to the Industrial Commission is an interlocutory order, and an appeal therefrom to the appellate court is premature and is subject to dismissal. However, the appellate court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that proceeding, is an order affecting a substantial right of defendant, from which appeal lies under this section. State ex rel. Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).

A judgment in a processioning proceeding adopting the referee's findings and conclusions was a final judgment and as such was only reviewable by appeal to this court. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

Boundary Dispute. — An order requiring petitioners in a proceeding to establish a disputed boundary to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition, affects a substantial right and is appealable. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Condemnation by State Highway Commission.—When the State Highway Commission condemns property under ch. 136, art. 9, appeals by either party are governed by this section, the same as any other civil action. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.—Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (C. C. P., s. 313; Code, s. 562; Rev., s. 589; C. S., s. 640.)

Cross Reference.—As to appeals from interlocutory orders, see § 1-277 and note thereto.

Applied in Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939); Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962).

Stated in Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

Cited in City of Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951).

§ 1-279. When appeal taken.—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641.)

Constitutionality.—Section 15-180, by incorporating the provisions of this section, provides that notice of appeal must be filed within ten days after rendition of judgment. The constitutionality of this requirement was upheld by the Supreme Court of the United States in Brown v. Allen, 344 U.S. 443, 73 Sup. Ct. 397, 97 L. Ed. 469 (1953). Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

The provisions of this section and § 1-280 are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it. Aycock v. Richardson, 247 N.C. 233, 100 S.E.2d 379 (1957); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Teague v. Teague, 266 N.C. 320, 146 S.E.2d 87 (1966); Dunn v. North Carolina State Highway Comm'n, 1 N.C. App. 116, 160 S.E.2d 113 (1968).

When the requirements of this section and § 1-280 are not complied with, the appellate court obtains no jurisdiction of

a purported appeal and must dismiss it. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

What This Section and § 1-280 Require.—This section and § 1-280 require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to be entered by the clerk on the judgment docket within ten days after notice thereof. Summey v. McDowell, 4 N.C. App. 62, 165 S.E.2d 768 (1969).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Intimation of Intent to Appeal.—Under this section it is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893).

Appeal by Serving Notice.—A party to an action may appeal by serving notice thereof within ten days after the adjournment of court. Houston v. Lumber Co., 136 N.C. 328, 48 S.E. 738 (1904).

Computation of Time.—Within ten days notice thereof means ten days after notice of the rendition thereof. Fisher v. Fisher, 164 N.C. 105, 80 S.E. 395 (1913). See Delafield v. Lewis Mercer Constr. Co., 115 N.C. 21, 20 S.E. 167 (1894).

Defendant Held Not to Have Knowingly and Intelligently Waived His Right of Appeal. — See Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

Applied in Van Mitchell v. North Carolina, 247 F. Supp. 139 (E.D.N.C. 1964); Mason v. Moore County Bd. of Comm'rs, 229 N.C. 626, 51 S.E.2d 6 (1948).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968); Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968); Brantley v. Jordan, 90 N.C. 25 (1884); Jones v. City of Asheville, 114 N.C. 620, 19 S.E. 631 (1894); Seaboard Air Line Ry. v. Brunswick County, 198 N.C. 549, 152 S.E. 627 (1930); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

§ 1-280. Entry and notice of appeal.—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient. (C. C. P., s. 301; Code, s. 550; Rev., s. 591; C. S., s. 642.)

The Provisions of This Section and § 1-279 Are Jurisdictional. — See note to § 1-279.

What This Section and § 1-279 Require.—This section and § 1-279 require an appellant who gives notice of appeal from a judgment rendered out of term to cause his appeal to be entered by the clerk on the judgment docket within ten days after notice thereof. Summey v. McDowell, 4 N.C. App. 62, 165 S.E.2d 768 (1969).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Former Rule.—Under the statute in force before the adoption of the Code, a notice of appeal filed in the clerk's office was sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. Brantley v. Jordan, 90 N.C. 25 (1884).

Record Must Show Appeal by Party Seeking Review. — Appeal by the party seeking review is necessary to give the appellate court jurisdiction, and this fact must appear by appeal entry of record, and in the absence of appeal entry of record the purported appeal must be dismissed. The appellate court is without power to correct the record, since it can have no jurisdiction of the cause, nor may counsel correct the record proper by stipulation. Mason v. Moore County Bd. of Comm'rs, 229 N.C. 626, 51 S.E.2d 6 (1948).

Appellee Entitled to Notice. — In all cases the appellee is entitled to notice of an appeal as provided by statute. Marion v. Tilley, 119 N.C. 473, 26 S.E. 26 (1896).

Effect of Failure to Give Notice.—Where the notice of appeal is not given in the prescribed time, the appeal will be dismissed. Campbell v. Allison, 63 N.C. 568 (1869); Bryan v. Hubbs, 69 N.C. 423 (1873); Applewhite v. Fort, 85 N.C. 596 (1881); Brantley v. Jordan, 90 N.C. 25 (1884).

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appeal was taken during a term of the court from which it was taken. Campbell v. Allison, 63 N.C. 568 (1869).

Record Must Show Notice.—The appeal will be dismissed, where the record does

not show service of notice of appeal. Howell v. Jones, 109 N.C. 102, 13 S.E. 889 (1891).

When Record Need Not Show Notice. — The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken. Delozier v. Bird, 123 N.C. 689, 31 S.E. 834 (1898).

Filing of Bond as Notice.—The filing of an appeal bond and its approval in open court afford notice to the appellee of the appeal. Capehart v. Kader Biggs & Co., 90 N.C. 373 (1884).

Codefendant.—Where one appeals from so much of a judgment as is in favor of his codefendant, he must give such codefendant notice of his appeal. Rose v. Baker, 99 N.C. 323, 5 S.E. 919 (1888).

When Party Resides Out of State. — A writ of error may be granted upon notice to the attorney at law who obtained the judgment when the party resides out of the State. Leake v. Murchie, 1 N.C. 258 (1800).

Notice Held to Be in Proper Time. — Where appellant's counsel, five days after the adjournment of court, mails notice of appeal to the sheriff at the county seat, so as to leave ample time for the latter to serve it on appellee's counsel, laches is not imputable to appellant because the sheriff does not take it from the post office till after the ten days allowed for service. Arrington v. Arrington, 114 N.C. 113, 19 S.E. 105 (1894).

Notice to a Coparty. — Notice must be given to the real party in interest, notice to a coparty, not a real party in interest, is insufficient. Barden v. Pugh, 129 N.C. 60, 39 S.E. 724 (1901).

Waiver of Notice.—Agreements of counsel, to waive notice of appeal, to be recognized in the appellate court, must appear upon the record. Wade v. City of Newbern, 72 N.C. 498 (1875).

Disagreement as to Waiver of Notice. — Notice of appeal will not be considered when filed after the statutory time, where one counsel swears that consent to an extension was given, and the other denies such statement. Pipkin v. McArtan, 122 N.C. 194, 29 S.E. 334 (1898).

A statement in the case on appeal, that notice of appeal was waived, cannot be contradicted for the first time on argument in the appellate court. Atkinson v. Asheville St. Ry., 113 N.C. 581, 18 S.E. 254 (1893).

Notice as a Waiver of Objection.—The fact that a notice of appeal served after the expiration of the term at which judgment was rendered, stated only that the appeal was "on account of the erroneous rulings of the judge on motion for a new trial," did not constitute a waiver of an exception to the judgment. Ferrell v. Thompson, 107 N.C. 420, 12 S.E. 109 (1890).

Entry of Appeal Not Absolutely Necessary.—That an appeal was not entered of record as required was not material, where the fact of the appeal having been taken was not denied, and notice had been served. Barden v. Stickney, 130 N.C. 62, 40 S.E. 842 (1902).

The record need not show that an appeal was duly entered, when it affirmatively appears from the case on appeal, which bears date within the time within which an appeal could be taken, that the appeal was taken, and notice thereof waived. Atkinson v. Asheville St. Ry., 113 N.C. 581, 18 S.E. 254 (1893).

Effect of Failure to Enter.—Failure of the clerk to enter the appeal is not ground for dismissal. Allison v. Whittier, 101 N.C. 490, 8 S.E. 338 (1888); Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896). But see Bryan v. Hubbs, 69 N.C. 423 (1873); Moore v. Vanderburg, 90 N.C. 10 (1884).

Cited in State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); Seaboard Air Line Ry. v. Brunswick County, 198 N.C. 549, 152 S.E. 627 (1930); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

§ 1-281. Appeals from judgments not in term time.—When appeals are taken from judgments of the clerk or judge not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C. S., s. 642(a).)

Clerk Not Authorized to Enlarge Time for Service of Case on Appeal.—This section does not authorize a clerk of the superior court to enlarge the time for service of a statement of the case on appeal in those instances in which appeal is taken from judgment rendered by the court out of term and out of the district by agreement. Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

§ 1-282. Case on appeal; statement, service, and return.—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and

the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and of the countercase or exceptions to the case on appeal. The initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal, and any subsequent order of extension must be entered prior to the expiration of the time allowed by the preceding order, and all additional time or times granted in such order or orders of extension must terminate within sufficient time to enable appellant to docket the record on appeal in accordance with the requirements of the rules of the appellate court. (C. C. P., s. 301; Code, s. 550; 1905, c. 448; Rev., s. 591; C. S., s. 643; 1921, c. 97; 1969, c. 1190, s. 35.)

Cross References.

As to settlement of case on appeal, see § 1-283. As to transcript, see § 1-284.

I. EDITOR'S NOTE.

The 1969 amendment, effective July 1, 1969, deleted at the end of the section, a proviso authorizing the judge to enlarge the time in which to serve the statement of case on appeal and exceptions thereto or counter statement of case, and added the present last two sentences of the section.

II. GENERAL CONSIDERATION —COUNTERCASE.

Procedure Generally. — In those instances requiring a case on appeal, the appellant must serve statement of case on appeal on appellee or its attorney under this section; if the parties do not agree, the case must be settled by the court under § 1-283; if the appeal is on the record proper, it must be certified to the appellate court by the clerk of the superior court under § 1-284. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

Strict Observance Required.—The statutory requirements as to making up cases on appeal and docketing them are conditions precedent which must be complied with, or the appeal will be dismissed. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute. Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Preparation of Record on Appeal.—It is not the function of the appellate court to oversee the preparation of the record on appeal; that is the function of counsel. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

It is the duty of appellant to see that the record is properly made up and transmitted to the court. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Necessity for Filing Record on Appeal. —Until a record on appeal is filed, there is nothing before the appellate court. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Evidence Need Not Be Set Forth in Its Entirety.—It is not required that the appellant set forth in his statement of the case on appeal the evidence in its entirety. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

It is common practice to omit portions of the testimony deemed by the parties of no consequence upon the appeal. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, Rules of Practice in the Court of Appeals, and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968).

Record Imports Verity.—The record on appeal imports verity and the appellate court is bound thereby. State v. Brown, 207 N.C. 156, 176 S.E. 260 (1934); Abernethy v. Burns, 210 N.C. 636, 188 S.E. 97 (1936); State v. Stiwinter, 211 N.C. 278, 189 S.E. 868 (1937).

The record on appeal imports verity. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The appellate court is bound by the contents of the record on appeal. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

A record filed in a petition for a writ of certiorari, nothing else appearing, does not become the record on appeal upon allowance of the writ. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Authority of Court from Which Appeal Taken.—After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by statute. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Duties of Attorney General and Solicitor as to Case on Appeal.—See State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

Distinction between Record and Case on Appeal.—The record on appeal consists of the "record proper," i.e., the summons, pleadings and judgment, and the case on appeal, which consists of the exceptions taken and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

The trial judge is without authority to change appellant's case on appeal, though regarded by him as erroneous, when that case has become the case on appeal. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

Certiorari to Correct Record Refused.—Under this section, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record, may alone be considered in determining the rights of the parties interested in the appeal, and the State's motion for certiorari for correction of the record may not be allowed. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

No presumption of Regularity.—An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken during a term of the court from which it comes. Campbell v. Allison, 63 N.C. 568 (1869).

Necessity for Taking Appeal.—An appeal will be dismissed if the record fails to show affirmatively that an appeal was taken. Randleman Mfg. Co. v. Simmons, 97 N.C. 89, 1 S.E. 923 (1887); Howell v. Jones, 109 N.C. 102, 13 S.E. 889 (1891).

When Grouping of Exceptions Unnecessary.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N.C. 337, 51 S.E. 941 (1905).

Duty When Case on Appeal Not Settled.—Where an appeal is taken, the record should be transmitted to the appellate court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. Owens v. Phelps, 91 N.C. 253 (1884).

When Case on Appeal Dispensed with.—A "case on appeal" can be dispensed with only when the errors are presented by the record proper. Errors occurring during the trial can be presented only by case on appeal. Cressler v. Ashevills, 138 N.C. 482, 51 S.E. 53 (1905).

Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. Privette v. Allen, 227 N.C. 164, 41 S.E.2d 364 (1947).

Same—Order Entered at Chambers.—On appeal from an order of court entered

by the judge at chambers no case is necessary. North Carolina Bessemer Co. v. Piedmont Hdwe. Co., 171 N.C. 728, 88 S.E. 867 (1916).

Same—Appeal from Judgment.—An appeal from a judgment alone is maintainable without any case on appeal. American Soda Fountain Co. v. Schell, 160 N.C. 529, 76 S.E. 631 (1912).

Same—Case Tried on Agreed Statement of Facts.—On appeal from the judgment in a case tried on an agreed statement of facts, no separate "case" is necessary. Chamblee v. Baker, 95 N.C. 98 (1886); Davenport v. Leary, 95 N.C. 203 (1886).

Same—Granting or Refusing Injunction.—On appeal from an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Wallace v. Salisbury, 147 N.C. 58, 60 S.E. 713 (1908).

Same—Order of Reference. — It is not necessary to make a statement of the case on appeal from an order of reference, where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order. Cape Fear & N.R.R. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903); Duckworth v. Duckworth, 144 N.C. 620, 57 S.E. 396 (1907).

On appeal from the action of the superior court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. Wilson v. Beasley, 192 N.C. 231, 134 S.E. 485 (1926).

When Case on Appeal Essential. — In Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948), it is said: "Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be presented only through a 'case on appeal' or 'case agreed' . . . This is the sole statutory means of vesting this court with jurisdiction to hear the appeal." Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948).

Appeal from Construction of Will.—On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that "plaintiffs claim that he died without issue," is not sufficient. Arnold v. Hardy, 131 N.C. 113, 42 S.E. 553 (1902).

Appellee May Prepare Countercase.—It is no objection to the objections filed by the appellee to the appellant's case that it is in the form of a countercase, and not of specific objections. State v. Gooch, 94 N.C. 982 (1886).

Where the exceptions to appellant's case on appeal are served within the required time, appellant cannot complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled. Stevens v. Smathers, 123 N.C. 497, 31 S.E. 721 (1898).

Appellee May Make Specific Objections.—Upon the appellant's serving of his case on appeal, the appellee may file specific objections. Holloman v. Holloman, 172 N.C. 835, 90 S.E. 10 (1916).

Request for Substitution. — Where the appellee makes his objections to the appellant's statement of the case on appeal by asking that a statement prepared by him be substituted, it is a sufficient compliance with the section. Horne v. Smith, 105 N.C. 322, 11 S.E. 373 (1890).

Countercase May Become Case on Appeal.—Where appellee returned a countercase as a statement of his exceptions to appellant's case, and such countercase was adopted by the court, it constitutes the "case on appeal." Harris v. Carrington, 115 N.C. 187, 20 S.E. 452 (1894); McDaniel v. Scurlock, 115 N.C. 295, 20 S.E. 451 (1894).

Effect of Failure to Serve Countercase.—Where the appellant's case on appeal is served in time, and no exceptions are taken thereto, nor any countercase served, it stands as the case on appeal. State v. Carlton, 107 N.C. 956, 12 S.E. 44 (1890); Abernethy v. Burns, 210 N.C. 636, 188 S.E. 97 (1936).

The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963); Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Where the solicitor does not serve any countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes the case on appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Appellate court order granting time in which to serve statement of case on appeal and time in which to serve exceptions or countercase, and providing that if the case should not be settled by agreement it should be settled by the trial judge within a given time, does not relieve appellant

of the duty of requesting the judge to settle the case and of otherwise performing the duties imposed by this section and § 1-283. Wiggins v. Tripp, 253 N.C. 171, 116 S.E.2d 355 (1960).

Judicial Notice.—The appellate court can judicially know only that which appears in the record. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Countercase Not Considered. — When countercase of the State has not been served or service acknowledged thereon or filed for more than a month after the State has accepted service of case of defendants, in an appeal by the defendant the countercase will not be considered. State v. Freeman, 127 N.C. 544, 37 S.E. 206 (1900).

Clerk Authorized to Complete Case.—A mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, etc., is not sufficient compliance with this section, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so. Sloan v. Equitable Life Assurance Soc'y, 169 N.C. 257, 85 S.E. 216 (1915).

No Return of Appellant's Case. — If the appellant's case on appeal is not returned by appellee in ten days with objections, it shall be deemed approved. Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905); Coral Gables v. Ayres, 208 N.C. 426, 181 S.E. 263 (1935).

Conflict between Statements of Judge and Counsel.—Where the case on appeal prepared by counsel conflicts with a statement of a fact found by the judge, the latter must control. Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904).

Service of Countercase.—See post, this note, "Service of Case and Countercase," V.

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); Nicholson v. Dean, 267 N.C. 375, 148 S.E.2d 247 (1966). State v. Cannon, 227 N.C. 336, 42 S.E.2d 343 (1947); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E.2d 407 (1947).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968); Carter v. Bryant, 199 N.C. 704, 155 S.E. 602 (1930); McMahan v. Southern Ry., 203 N.C. 805, 167 S.E. 225 (1933); State v. Barnett, 218 N.C. 454, 11 S.E.2d 303 (1940).

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

Cross Reference.—See Supreme Court Rules 19 (1) and (3), 21.

Concise Statement of Case.—One of the essential requisites of an appeal is that a "concise statement of the case" shall be made and filed with the clerk, to be transmitted to this court as part of the record, for the want of which the judgment will be affirmed unless there is error apparent in the record, in which case it would be the duty of the judge to arrest the judgment or award a venire de novo. State v. Thompson, 83 N.C. 595 (1880).

The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal. Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1876).

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigman v. Railroad Co., 135 N.C. 181, 47 S.E. 420 (1904).

And the statement should only contain matter explanatory of exceptions taken. Surratt v. Crawford, 87 N.C. 372 (1882).

Although case on appeal was not a concise statement of case it was held that the appeal would be allowed as a dismissal would have been a denial of justice. Messick v. Hickory, 211 N.C. 531, 191 S.E. 43 (1937).

The record on appeal should consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to Rule 19 of the Rules of Practice in the Court of Appeals of North Carolina. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

Assignments of error may not be filed initially in the appellate court, but must be filed in the trial court and certified with the case on appeal. State v. Dew, 240 N.C. 595, 83 S.E.2d 482 (1954); E.L. Lowie & Co. v. Atkins, 245 N.C. 98, 95 S.E.2d 271 (1956).

Appeal Itself Treated as Exception to Judgment.—Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be

treated as an exception to the judgment. Ellis v. Atlantic Coast Line R.R., 241 N.C. 747, 86 S.E.2d 406 (1955).

Narrowed to Matters of Substance and Moment.—When counsel came to prepare the statement of case on appeal, both record and briefs should be narrowed to matters of substance and moment. State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

Testimony Should Be in Narrative Form.—Testimony reported by the stenographer should be set up on appeal in narrative form, instead of in questions and answers. Overman v. Lanier, 157 N.C. 544, 73 S.E. 192 (1911). The sending up of the stenographer's notes is a failure to prepare "a concise statement of the case." Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

This rule must be observed, though the case on appeal is settled by agreement of counsel. Boggs v. Cullowhee Mining & Reduction Co. (N.C.), 76 S.E. 717 (1912).

When the stenographer's full notes of the evidence taken on the trial of a case on appeal are transcribed in the record, immediately followed by an unsigned entry, repudiated by appellee's counsel, that "the record, stenographer's notes, the judgment, and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court," the case on appeal is not properly constituted. Brewer v. Mineola Mfg. Co., 161 N.C. 211, 76 S.E. 237 (1912).

This requirement cannot be waived by the parties. First Nat'l Bank v. Fries, 162 N.C. 516, 77 S.E. 678 (1913).

Appellant must make concise statement necessary to present assignments of error, and should set out all pertinent evidence in narrative form, with the charge, and the judge must correct the narrative. Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1918).

For penalty for violation of this rule see Fisher v. Montvale Lumber Co., 162 N.C. 531, 78 S.E. 286 (1913).

Evidence to Present Questions of Law.—The appeal should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. Green v. Collins, 28 N.C. 139 (1845); Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Sufficiency of Evidence Brought Up. — Only so much of the evidence as is needed to show the questions raised by the exceptions should be made a part of the case on appeal. Surratt v. Crawford, 87 N.C. 372 (1882); Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Evidence Unnecessary.—Where the findings of the court below are admitted by both parties to be true, it is unnecessary that the case contain the evidence. Tayloe v. Tayloe, 108 N.C. 69 12 S.E. 836 (1891).

Necessity of Setting Forth Evidence Excluded. — A judgment will not be reversed because of the exclusion of evidence, where such evidence is not set out in the record. Elm City Lumber Co. v. Childerhose & Pratt, 167 N.C. 34, 83 S.E. 22 (1914).

The exclusion of evidence cannot be reviewed where the record does not disclose what the witness would have testified to, or what was proposed to be proven. In re Will of Smith, 163 N.C. 464, 79 S.E. 977 (1913).

Omission of Matter Not Pertinent to Issue.—Matter not pertinent to the points raised should be omitted. Sampson v. Atlantic & N.C.R.R., 70 N.C. 404 (1874); Hilton v. McDowell, 87 N.C. 364 (1882); Surratt v. Crawford, 87 N.C. 372 (1882).

Exhibits Should Accompany Case. — Where deeds, records, etc., are referred to, and make a necessary part of the case transmitted to the appellate court, it is the duty of the appellant to see that they accompany the case. Waugh v. Andrews, 24 N.C. 75 (1841).

Surveys.—In an action for the diversion of surface water by the construction of a railway, surveys of the locality, made under order of the court, must accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing. Whichard v. Wilmington & W.R.R., 117 N.C. 614, 23 S.E. 437 (1895).

Exceptions—Case Must Show Exceptions.—If the case on appeal does not show that exceptions were taken to the ruling of the court below, the appellate court will not review the same on appeal. Powers v. City of Wilmington, 177 N.C. 361, 99 S.E. 102 (1919).

Questions cannot be considered on appeal which are not presented by motion or exception in the case on appeal. Trimmer v. Gorman, 129 N.C. 161, 39 S.E. 804 (1901).

The presentation of matters for the first time in the assignments of error on appeal is too late. Bloxham v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916).

Assignments of error must be based upon exceptions duly taken in apt time during the trial and preserved as required by this section and the rules of the Supreme

Court. State v. Moore, 222 N.C. 356, 23 S.E.2d 31 (1942).

Same — Broadside Exceptions. — As a general rule a broadside exception to the judge's charge is inadmissible. In favorem vitae, in a capital case, the Attorney General will readily assent to the assertion of proper exceptions, nunc pro tunc. State v. Kinsauls, 126 N.C. 1095, 36 S.E. 31 (1900).

An "unpointed broadside" exception to the court's instructions to the jury will not be considered. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. Lambert v. Caronna, 206 N.C. 616, 175 S.E. 303 (1934); Arnold v. State Bank & Trust Co., 218 N.C. 433, 11 S.E.2d 307 (1940).

What Need Not Be Set Out.—The court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction or because complaint does not state a cause of action, or to the sufficiency of an indictment. Taylor v. Plummer, 105 N.C. 56, 11 S.E. 266 (1890); Walker v. Scott, 106 N.C. 56, 11 S.E. 364 (1890).

The object of the "case on appeal" is to set forth the alleged errors appealed from, and, if it sufficiently discloses these, the appeal will not be dismissed, though the record does not show formal exceptions. Singer Mfg. Co. v. Barrett, 95 N.C. 36 (1886).

Same—Must Point Out Error.—The appellate court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. Clements v. Rogers, 95 N.C. 247 (1886).

Same—Judge May Pass on Exceptions. — When exceptions are filed the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the judge pass upon their correctness in "settling the case on appeal." Walker v. Scott, 106 N.C. 56, 11 S.E. 364 (1890).

The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934).

What Assignments of Error Considered. — The appellate court will not consider any assignments of error except those appearing in the record proper and in the case settled on appeal. Rodman v. Harvey, 102 N.C. 1, 8 S.E. 888 (1889); State v. Campbell, 184 N.C. 765, 114 S.E. 927 (1922).

The assignment of error must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934).

Requirements Mandatory.—The requirements that assignments of error must be based upon exceptions duly taken during the trial to be considered on appeal are statutory, as well as mandatory under numerous decisions of the court. The appellate court on appeal exercises only appellate jurisdiction, and it is necessary that the errors alleged should be presented as the law directs. State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934).

When Assignment of Error Unnecessary.—No assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto. Wallace v. Salisbury, 147 N.C. 58, 60 S.E. 713 (1908); North Carolina Bessemer Co. v. Piedmont Hdwe. Co., 171 N.C. 728, 88 S.E. 867 (1916).

No Error Assigned.—Where no errors were assigned in the case, and none appeared in the record proper, but it appeared that counsel for both sides had agreed that all the papers in the cause should constitute the case on appeal, the case was remanded, in order that error might be properly assigned. Holly v. Holly, 94 N.C. 639 (1886).

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the appellate court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercase under this and § 1-283, and before the lapse of sufficient time for it to have been deemed approved under this section. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The appellate court considered the "case on

appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the Attorney General's motion to affirm is allowed. State v. Parnell, 214 N.C. 467, 199 S.E. 601 (1938).

IV. APPEALS FROM INSTRUCTIONS.

Exceptions to Instructions.—If there is an error in the instruction given, an exception thereto is valid if entered within ten days after adjournment for the term. Williams v. Harris, 137 N.C. 460, 49 S.E. 954 (1905). And the appellant is entitled to have his exceptions to the charge included in his statement of the case on appeal. Paul v. Burton, 180 N.C. 45, 104 S.E. 37 (1920).

The requests to charge being "separately stated and numbered" an exception for giving them is equally specific and not "broadside" since it gives the judge and the appellee specific information of each instruction excepted to, what evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss on appeal. Coley v. City of Statesville, 121 N.C. 301, 28 S.E. 482 (1897).

Exception Taken after Trial.—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of this section. Cherry v. Atlantic Coast Line R.R., 186 N.C. 263, 119 S.E. 361 (1923).

Error in Instructions Must Be Assigned.—The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to but nonetheless it is the duty of the appellant to assign such as error in making up his statement of case on appeal and if this is not done, the exception is deemed waived. Taylor v. Plummer, 105 N.C. 56, 11 S.E. 266 (1890).

Assignment of Error Must Be Fully Presented.—Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Necessity of Case on Appeal.—The instructions cannot be reviewed in the absence of a case on appeal. Oak Hall Clothing Co. v. Bagley, 147 N.C. 37, 60 S.E. 648 (1908).

Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court on appeal. Hart v. Cannon, 133 N.C. 10, 45 S.E. 351 (1903).

Instructions Not in Record.—Where the instructions are not in the record the appellate court cannot judicially determine whether they were as stated in exceptions thereto. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912); Jenkins v. Carson, 173 N.C. 725, 92 S.E. 328 (1917).

Where the settled "case" does not show the giving of instructions requested by a party, exceptions to the giving of such instructions will not be considered. McCord v. Southern Ry., 130 N.C. 491, 41 S.E. 886 (1902).

A statement in the case on appeal that appellant's request to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in conflict with the general charge, a new trial will be granted. Wilson v. Winston-Salem Ry. & Elec. Co., 120 N.C. 531, 27 S.E. 46 (1897).

Requests for Instructions.—Where the record contains no prayers for instructions, assignments of error in refusing to give defendant's prayers will not be considered. Davis v. Seaboard Air Line Ry., 132 N.C. 291, 43 S.E. 840 (1903). As to requests for instructions generally, see § 1-181 and note thereto.

Setting Out of Instructions.—Appellant is entitled to have the judge set out what he charged in lieu of the prayer, that the appellate court might see that it "fully" covered the prayer asked. Bennett v. Telegraph Co., 128 N.C. 103, 38 S.E. 294 (1901).

Application of Instruction to Evidence.—An objection to a certain instruction on the ground that there was no evidence to sustain it cannot be reviewed unless all of the evidence is contained in the record. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903).

V. SERVICE OF CASE AND COUNTERCASE.

A. Necessity and Mode of Service.

As to countercase in general, see ante, this note, "General Consideration—Countercase," II.

Rules requiring service to be made of case on appeal are mandatory. They are applied alike to all appellants. State v. Daniels, 231 N.C. 17, 341, 56 S.E.2d 2, 646 (1949), 231 N.C. 509, 57 S.E.2d 653 (1950), cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L. Ed. 1366 (1950); Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 437 (1953).

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. Roberts v. Stewart, 3 N.C. App. 120, 164 S.E.2d 58 (1968).

Necessity for Serving.—A case on appeal signed only by appellant's counsel, and not showing that it had been served on appellee or his counsel, cannot be considered. Walker v. Scott, 102 N.C. 487, 9 S.E. 488 (1889); Peebles v. Braswell, 107 N.C. 68, 12 S.E. 44 (1890); Howell v. Jones, 109 N.C. 102, 13 S.E. 889 (1891).

Necessity for Serving Codefendant. — Where one appeals from so much of the judgment as is in favor of his codefendant, he must serve on such codefendant his statement of the case. Rose v. Baker, 99 N.C. 323, 5 S.E. 919 (1888).

Each Appellee Must Be Served.—Where the interests of different appellees are not identical, and they are represented by different counsel, only as to such appellees as have been served with the appellant's "case" in due time, will the appeal be considered. Shober v. Wheeler, 119 N.C. 471, 26 S.E. 26 (1896).

Service of Original Instead of Copy. — This section is complied with by a service of the original instead of a copy. McDaniel v. Scurlock, 115 N.C. 295, 20 S.E. 451 (1894).

Necessity for Service by Officer. — A case on appeal must be served by an officer, unless appellee's attorneys accept service otherwise. Cummings v. Hoffman, 113 N.C. 267, 18 S.E. 170 (1893).

Service by Counsel. — A service of the case on appeal by counsel is a nullity unless accepted by appellee. Roberts v. Partridge, 118 N.C. 355, 24 S.E. 15 (1896).

Service by Improper Officer.—The case on appeal cannot be considered when it was served by an improper officer during, and by a proper officer after, the time limited for service thereof. McNeill v. Raleigh & A. Air Line Ry., 117 N.C. 642, 23 S.E. 268 (1895).

Service by Constable. — A constable is not such an officer as can serve on appellee appellant's case on appeal. Forte v. Boone, 114 N.C. 176, 19 S.E. 632 (1894).

Service by Mail.—Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service. Smith v. Smith, 119 N.C. 311, 25 S.E. 877 (1896).

Service Where Parties Make Common Cause. — When it appears of record that several cases on appeal were consolidated by consent and duly served in that form, and the parties made common cause in its prosecution, a motion to dismiss made by one of the appellees on the ground that appellant had not served the case on him individually will be denied. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Service by Officer May Be Waived.—The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service. Ashville Woodworking Co. v. Southwick, 119 N.C. 611, 26 S.E. 253 (1896). See Willis v. Atlantic & D. Ry., 119 N.C. 718, 25 S.E. 790 (1896).

Leaving Copy in Office of Solicitor.—Service of statement of case on appeal may be made by a proper officer leaving a copy thereof in the office of the solicitor. State v. Daniels, 231 N.C. 17, 56 S.E.2d 2 (1949).

Effect of Failure to Serve Countercase on Exceptions.—Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record, in the absence of service of exceptions or countercase it is deemed approved by the appellee, and will stand in the appellate court as the case on appeal. Texas Co. v. Beaufort Oil & Fuel Co., 199 N.C 492, 154 S.E. 829 (1930); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

Settlement as Curing Failure to Serve Legally.—Failure to serve appellant's case on appeal legally on appellee cannot be cured by the judge's subsequent settlement of the case. Forte v. Boone, 114 N.C. 176, 19 S.E. 632 (1894).

Order Allowing Time for Serving Countercase Does Not Affect Rule Prescribing Time of Appeal.—An order of the superior court enlarging the time for serving statement of case on appeal and exceptions thereto on countercase, does not affect the rules of court prescribing the term to which the appeal must be taken and the time within which the appeal must be docketed. State v. Moore, 210 N.C. 459, 187 S.E. 586 (1936).

B. Time of Service.

1. In General.

Strict Compliance Required.—The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time, in which case the proceeding must be taken within the time so extended. Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. American Floor Mach. Co. v. Dixon, 260 N.C. 732 133 S.E.2d 659 (1963).

Where appellant's statement of case on appeal was not served within the time allowed by agreement of counsel, the judge was without authority to settle the case, and his attempted settlement of the case, without finding that service within the stipulated time had been waived, did not cure the defect. American Floor Mach. Co. v. Dixon, 260 N.C. 732 133 S.E.2d 659 (1963).

Only Judge May Enlarge Time for Service. — The General Assembly having expressly fixed the time for serving a statement of case on appeal, and having specifically authorized the judge to enlarge the time, it would seem, therefore, that this procedure is exclusive. And it will not be assumed that the General Assembly intended by § 1-281 to give to a clerk of the superior court implied authority to do that for which express authority is given to the judge in this section. Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

By the terms of this section, only the judge who tried the case can extend the time for serving the statement of the case on appeal. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Subsequent Extension.—Having granted one extension, the judge may not grant another after the expiration of the term at which the judgment was entered. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), decided prior to 1969 amendment to this section.

Waiver of Time. — A motion to dismiss an appeal, because case was not served within time, was fully met by statements in supplemental transcript that appellees accepted service of notice of appeal, and agreed to extend time for serving case, and accepted service of case within extended time. Sanford v. Junior Order of United Am. Mechanics, 176 N.C. 443, 97 S.E. 384 (1918).

Where the appellant in apt time submitted the case on appeal to the appellee's counsel, who declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare a case, the appellee waived the Code time and cannot take advantage of his own negligence. Mott v. Ramsay, 91 N.C. 249 (1884).

Where there is a controversy as to whether the exceptions were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. State v. Ray, 206 N.C. 736, 175 S.E. 109 (1934).

Same — Promise to Accept Service.— Where appellant's counsel telegraphs, within the time appellee is required to serve his countercase, that he will, on his return home, accept service, he is estopped to claim that the countercase was not served in time. Watkins v. Raleigh & A. Air Line Ry., 116 N.C. 961, 21 S.E. 409 (1895).

Same—Acceptance of Service Conditionally.—In accepting service of a case on appeal, after time limited by statute, it was competent for counsel to add to the indorsement, the date, and he did not waive the objection that the case was not presented in time. Barrus v. Wilmington & W. Ry., 121 N.C. 504, 28 S.E. 187 (1897).

Same—Necessity for Waiver Appearing of Record.—Within certain limits the parties may by consent waive the time of complying with the rules for perfecting an appeal, and the appellate court will respect such agreements between counsel if they appear upon the record. If such agreement does not so appear, the appellate court will adhere to and enforce the rules prescribed in the Code. Wade v. City of Newbern, 72 N.C. 498 (1875).

Failure of Sheriff to Take Copy from Post Office. — Where appellee mailed his countercase, with fees, to the sheriff of the county in which appellant's counsel resided, and the sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post office till too late, there was no laches on appellee's part. Arrington v. Arrington, 114 N.C. 115, 19 S.E. 145 (1894). See Arrington v. Arrington, 114 N.C. 113, 19 S.E. 105 (1894).

Agreement Misunderstood. — When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and countercase de novo. Mitchell v.

Haggard, 105 N.C. 173, 10 S.E. 856 (1890).

Illness of Counsel.—Illness of counsel is no excuse for failing to settle the case on appeal in time, where such counsel is not the only counsel for appellant, and, even if he is, it is the duty of the party to obtain other counsel. Tripp v. Somersett, 182 N.C. 767, 108 S.E. 633 (1921).

Negligence of Counsel. — That appellant's failure to serve his case in time was the result of negligence of his counsel was no excuse for his remedy being an action against the counsel for damages sustained. Cozart v. Assurance Co., 142 N.C. 522, 55 S.E. 411 (1906).

Stenographer Too Busy to Transcribe Note. — When counsel for appellee consented to an extension of time in which to serve case on appeal, the Supreme Court will not relieve appellant, on an excuse that stenographer was busy and could not transcribe her notes within that time, since the stenographer's notes are not the supreme authority as to what occurred at the trial. Rogers v. City of Ashville, 182 N.C. 596, 109, S.E. 865 (1921).

Illness of Reporter. — The preparation and settlement of cases on appeal belong to the parties and to the judge of the superior court under this section and § 1-283, and while a stenographic report of the trial may be of great assistance, the stenographic notes of the reporter are not conclusive, and the inability of the reporter to transcribe his notes due to continued illness does not excuse defendant from making out and serving his statement of case on appeal within the time allowed. State v. Wescott, 220 N.C. 439, 17 S.E.2d 507 (1941).

Transcript of Evidence Not Obtained in Time.—It was negligence on part of defendant appellants, not to have had any arrangement with clerk of court to let them have copy of transcript of testimony when filed, and not to have requested him to notify them when transcript was filed, and to have failed to inquire of him thereafter. Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

No Certiorari until Time Is Up.—Where the parties to an action have agreed to an extension of time for service of case and countercase, that will present its being docketed in the time prescribed by Supreme Court Rule 5, and consequently no case has been yet settled by the trial judge, appellant's motion for a writ of certiorari will be denied. Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

When Appellant Guilty of Laches.— A motion for a certiorari will not be considered when it appears that appellant has been guilty of laches in respect to serving his case. Peoples Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926).

2. Computation of Time.

The term ends when the judge leaves, and the time within which a case on appeal can be served must be computed from the day he leaves. Delafield v. Lewis Mercer Constr. Co., 115 N.C. 21, 20 S.E. 167 (1894).

The time for service of a case on appeal must be computed from the day of the actual adjournment of the court, and not from the last day to which a term of court could be extended. Rosenthal v. Roberson, 114 N.C. 594, 19 S.E. 667 (1894).

An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of court, and defendant thirty days thereafter," entitled defendant to thirty days after service of appellant's case. Mitchell v. Haggard, 105 N.C. 173, 10 S.E. 856 (1890).

When Appeal Taken after Adjournment. —When an appeal is taken at the trial, the case on appeal must be served within ten days from adjournment of the court, but the appellant has the right to reserve taking his appeal and enter it within ten days after adjournment of the court, in which case he has ten days after entry of the appeal to serve the case on appeal. The same applies to appeals from judgment taken out of term. Mecke v. Valleytown Mineral Co., 122 N.C. 790, 29 S.E. 781 (1898).

When Judgment Becomes Final.—Until the term expires there is no final determination of the cause, so that the case on appeal need only be filed within fifteen days after the end of the term at which judgment is rendered. Turrentine v. Richmond & D.R.R., 92 N.C. 642 (1885).

Time Computed from Judgment. — Where, on judgment rendered during the term, it was agreed that entry should be made thereafter, the appellant being allowed 90 days to complete the appeal, he was entitled to 90 days from the judgment, and not from the judgment entry. Caldwell Land & Lumber Co. v. Chester, 170 N.C. 399, 87 S.E. 111 (1915).

Judgment Rendered during Vacation. — Where judgment is rendered during vacation by a consent of parties, the time in which to appeal is counted from the filing of the judgment in the clerk's office. Fisher v. Fisher, 164 N.C. 105, 80 S.E. 395 (1913); Caldwell Land & Lumber Co. v. Chester, 170 N.C. 399, 87 S.E. 111 (1915).

First and Last Day Counted.—Under an

agreement extending the time as to the service of the case or countercase, in computing the time, the first day allowed in the time extended is counted as well as the last, allowing the full number of days agreed upon. Board of Educ. v. Orr, 161 N.C. 218, 76 S.E. 693 (1912).

3. Effect of Failure to Serve in Time.

Record Proper May Be Reviewed for Error Appearing on Its Face.—Where the statement of a case on appeal is not filed within the time allowed, it is a nullity, but failure of the case on appeal does not require dismissal, since the record proper may be reviewed for error appearing on its face and the judgment affirmed on motion of appellant when no error so appears. Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

Normally, the effect of failure to serve the appellant's statement of the case on appeal within the time fixed by the statute, or within the period of such authorized extension by the trial judge, is that upon such appeal the appellate court is limited to a consideration of the record proper and if no errors appear on the face thereof, the judgment will be affirmed. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Appeal Dismissed. — Where the statement was not made or served in time, the appeal will be dismissed. Twitty v. Logan, 85 N.C. 592 (1881).

Service a Nullity.—Service after the expiration of the time granted is a nullity. Rosenthal v. Roberson, 114 N.C. 594, 19 S.E. 667 (1894); Hardee v. Timberlake, 159 N.C. 552, 75 S.E. 799 (1912). See Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905).

Service by the solicitor of exceptions and objections after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver, and defendant's statement becomes the statement of case on appeal. State v. Ray, 206 N.C. 736, 715 S.E. 109 (1934).

Same—Trial Court May Strike Case.—Where a dispute arises in a trial court as to whether there has been service on appellee of appellant's case on appeal within the statutory time, and the court finds that there has not, it may direct appellant's case to be stricken from the files. Hicks v. Westbrook, 121 N.C. 131, 28 S.E. 188 (1897).

Agreement to Waive Time.—Where appellant fails to prepare a statement of the case in time, the judgment should be affirmed, unless the record shows a written agreement of counsel waiving the lapse of time, or it appears that the alleged agreement is oral and disputed, and such waiver shown by the affidavit of the appellee. Twitty v. Logan, 85 N.C. 592 (1881).

The statute has fixed the time for the settlement of cases on appeal, and this should be strictly observed, unless there is a mutual agreement which is either in writing or admitted. Tripp v. Somersett, 182 N.C. 767, 108 S.E. 633 (1921). As to sufficiency of waiver, see Graham v. Edwards, 114 N.C. 228, 19 S.E. 150 (1894).

Oral Agreement to Extend Time. — A parol agreement to waive an oral agreement made between the parties as to the time of serving a countercase to an appeal will not be considered by the appellate court if denied. Board of Educ. v. Orr, 161 N.C. 218, 76 S.E. 693 (1912).

Where the appellant alleges in an affidavit, or duly verified statement, that there was an agreement for an extension of time and this affidavit is not disputed by the oath of the appellee, a certiorari, upon proper application, will issue if the court deems it proper. Justice v. Boone Fork Lumber Co., 181 N.C. 390, 107 S.E. 232 (1921).

When Exceptions Returned Alone.—An appellant cannot complain that his original statement of case on appeal was not returned to him within ten days, when in fact the appellee's exceptions thereto were duly filed with him within the ten days. McDaniel v. Scurlock, 115 N.C. 295, 20 S.E. 451 (1894).

Failure to Serve Objections in Time. — An appellant has a right to disregard an objection to the case on appeal, not served on him within ten days. Cummings v. Hoffman, 113 N.C. 267, 18 S.E. 170 (1893).

VI. RELIEF GRANTED.

When No Case on Appeal. — An appeal will not be dismissed simply because there is no case on appeal before the appellate court, but the judgment will be affirmed, unless error appears on the face of the record proper. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Cummings v. Hoffman, 113 N.C. 267, 18 S.E. 170 (1893).

Where there is no proper statement of case on appeal, the appellate court can determine only whether there is error on the face of the record proper. Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948).

In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof.

American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

When Judgment. Affirmed. — Where there is no case on appeal, and no error on the face of the record proper, the judgment will be affirmed. State v. Foster, 110 N.C. 510, 14 S.E. 966 (1892); Table Rock Lumber Co. v. Branch, 150 N.C. 110, 63 S.E. 171 (1908).

Where there is no "case agreed" on appeal and none "settled" by the judge, and no error upon the face of the record proper, the judgment must be affirmed. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

The absence of a case on appeal does not entitle appellee to a dismissal. Rosenthal v. Roberson, 114 N.C. 594, 19 S.E. 667 (1894); Hicks v. Westbrook, 121 N.C. 131, 28 S.E. 188 (1897).

See Royster v. Burwell, 90 N.C. 24 (1884), where it was held that an appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

Case Affirmed in Absence of Exception. —In the absence of exceptions in the record as a basis for the assignments of error, appellee's motion to affirm must be allowed. Boyer v. Jarrell, 180 N.C. 479, 105 S.E. 9 (1920).

In Absence of Motion to Affirm. — Where a case on appeal is required, but none is filed, respondents' remedy is by motion to affirm, and not to dismiss the appeal, since, if the motion to affirm is not made, it is the duty of the court of its own motion to inspect the record proper for errors appearing on the face thereof. Hicks v. Westbrook, 121 N.C. 131, 28 S.E. 188 (1897); Barrus v. Wilmington & W.R.R., 121 N.C. 504, 28 S.E. 187 (1897); Wallace v. Salisbury, 147 N.C. 58, 60 S.E. 713 (1908).

Appeal Not Dismissed for Absence of Statement of Facts. — An appeal will not be dismissed for failure to furnish a statement of facts signed by the judge or by both counsel, as required by rule, where everything necessary to a consideration of the case appears from the record. Clark v. Peebles, 120 N.C. 31, 26 S.E. 924 (1897).

Oath of Counsel.—A motion to dismiss an appeal because it does not appear that a case had been made and served as prescribed by the Code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the Code were complied with in the court below. Kirk v. Barnhart, 74 N.C. 653 (1876).

Appeal a Nullity.—Where a case on appeal is signed only by appellant's counsel, and it does not appear that it was served on appellee, it must be treated as a nullity; but the appeal will not be dismissed on that ground, since there may be errors on the face of the record proper. Walker v. Scott, 102 N.C. 487, 9 S.E. 488 (1889); Howell v. Jones, 109 N.C. 102, 13 S.E. 889 (1891).

Exceptions Relating to Oral Testimony Treated as Nullity. — Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admitted the court correctly applied the law. Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948).

When New Trial Granted. — Where appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling to trust to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, a new trial will be granted. Ritter v. Grimm, 114 N.C. 373, 19 S.E. 239 (1894); McGowan v. Harris, 120 N.C. 139, 26 S.E. 690 (1897).

A new trial will be granted, when, from no default of the appellant, no assignment of errors accompanies the record, and the omission cannot be supplied by reason of the retirement from office of the presiding judge. Nichols v. Dunnnig, 91 N.C. 4 (1884).

But a new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained. Nichols v. Dunning, 91 N.C. 4 (1884).

Certiorari to Bring Up Case for Review Denied.—See Womble v. Moncure Mill & Gin Co., 194 N.C. 577, 140 S.E. 230 (1927); State v. Angel, 194 N.C. 715, 140 S.E. 727 (1927).

§ 1-283. Settlement of case on appeal.—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him.

If the appellant delays longer than fifteen days after the respondent serves his countercase, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and countercase or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it. (C. C. P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C. S., s. 644.)

Cross Reference. — As to contents of case on appeal, see § 1-282 and note thereunder.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

Intent of Section.—Appellants are too often prone to forget that appellees have rights. The intent of this section is to safeguard them. Board of Water & Light Comm'rs v. Chapman, 151 N.C. 327, 66 S.E. 221 (1909).

The provisions of this section are mandatory. Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

When Settlement Necessary.—It is necessary that the trial judge settle the case on appeal when the parties do not agree. Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912).

Effect of Failure to Serve Countercase or Exceptions. — The authority of the trial judge to settle a case on appeal may be invoked only by the service of a countercase or by filing exceptions to the appellant's statement of case; otherwise the appellant's statement becomes the case on appeal. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963).

Until a record on appeal is filed, there is nothing before the appellate court. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Preparation of Record on Appeal.—It is not the function of the appellate court to oversee the preparation of the record on appeal; that is the function of counsel. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Appellant Must Request Notice. — An appellant cannot complain that he was not notified of the time and place of settlement of the case when he did not request to be so notified. Walker v. Scott, 106 N.C. 56, 11 S.E. 364 (1890); State v. Williams, 109 N.C. 846, 13 S.E. 880 (1891).

When Appellant Fails to Request Settlement.—Upon the service of a countercase on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case, and upon his failure to do so the case of the appellee becomes the case on appeal. Booth v. Ratcliffe, 107 N.C. 6, 12 S.E. 112 (1890); Burlingham v. Canady, 156 N.C. 177, 72 S.E. 324 (1911).

Same — Case May Be Remanded. — Where an appellant, after exceptions filed to his "case on appeal," fails to apply to the judge to settle the case, this court may consider the appellant's "statement" and the appellee's exceptions as the case on appeal, or in case of any complications, the case will be remanded in order that the judge may settle the case. McDaniel v. Scurlock, 115 N.C. 295, 20 S.E. 451 (1894).

Same—Judgment Affirmed. — A judgment will be affirmed, on error being assigned on the record, where the statement

has been returned with objections, and appellant has failed to apply to the court below to settle the case. Kirkman v. Dixon, 66 N.C. 406 (1872).

Where appellant, after a failure to agree on the case on appeal, does not "immediately" request the trial judge to settle the same, but delays for several weeks, and in the meantime the judge dies, and no excuse is shown for the appellant's laches, the judgment below will be affirmed. Heath v. Lancaster, 116 N.C. 69, 20 S.E. 962 (1895).

Same—Excuse Shown.—Where appellant's failure to send appellee's countercase to the judge to settle was caused by his bona fide contention that it was served too late, the case will be remanded for settlement. Arrington v. Arrington, 114 N.C. 115, 19 S.E. 145 (1894).

Time Limitation. — The effect of the time limitation in this section is to substitute "fifteen days" in lieu of "immediately" as the time in which appellant, after receipt of repondent's exceptions or countercase, can make his request of the judge. Chozen Confections, Inc. v. Johnson, 220 N.C. 432, 17 S.E.2d 505 (1941), citing Chauncey v. Chauncey, 153 N.C. 12, 68 S.E. 906 (1910).

When Statements Not Submitted to Judge.—When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the appellate court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. Owens v. Phelps, 92 N.C. 231 (1885).

Appellant's Duty When Case Settled.— It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or countercase of the appellee, etc., and have the judge sign the case so redrafted and incorporate it in the record. Waller v. Dudley, 193 N.C. 749, 138 S.E. 128 (1927); Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948).

Same—When Appellant Fails in This Regard. — Where, after the court had adopted "appellant's case as amended by appellee's exceptions," appellant submitted the record in that shape without redrafting and incorporating the amendments and having the same signed by the trial judge there was no "case settled." State v. King, 119 N.C. 910, 26 S.E. 261 (1896); Gaither v. Carpenter, 143 N.C. 240, 55 S.E. 625 (1906). See Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948).

Duty of Judge.—If counsel agree, the judge has nothing to do with making up the "case on appeal"; but when they differ, he sets a time and place for settling the case, after notice that counsel of both parties may appear before him. He then "settles" the case. In so doing he does not merely adjust the differences between the two cases, but may disregard both cases, and should do so, if he finds that the facts of the trial were different. State v. Gooch, 94 N.C. 982 (1886); Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906).

Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required. Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1918).

The trial judge alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and countercase, or motion to strike out purported case on appeal. Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E.2d 407 (1947).

Where appellant serves his statement of case on appeal and appellee returns same with objections and appellant requests the judge to fix a time and place for settling the case, all within the time allowed by the court or by statute, it is the duty of the judge to settle the case on appeal and the judge may not strike appellant's statement of case on appeal from the record upon appellee's motion on the ground that appellant's statement of case was insufficient to meet the requirements of this section and the rules of practice of the court. Chozen Confections, Inc. v. Johnson, 220 N.C. 432, 17 S.E.2d 505 (1941).

If the solicitor and counsel for the defendant do not agree on the record on appeal, the judge who tried the case is required to settle the record on appeal as provided by law. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

He Cannot Settle Case by Anticipatory Order.—When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948); Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948); Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952).

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such

anticipatory order cannot settle or determine what evidence was adduced at the hearing. Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948).

Judge May Act Only Where Counsel Disagree.—The trial court is without authority to settle a case on appeal until and unless there is a disagreement of counsel. Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948); Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952).

Judge's Action Conclusive.—The action of the judge in settling the case on appeal, when the parties cannot agree, is final, and cannot be reviewed. State v. Gooch, 94 N.C. 982 (1886).

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that he has settled the case on appeal, it is binding upon the appellate court and it will not be dismissed on the ground that no case on appeal had been stated and settled. Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1918).

Appellate court order granting time in which to serve statement of case on appeal.—See same catchline in note to § 1-282, analysis line II.

Where there is no proper statement of case on appeal, the Supreme Court can determine only whether there is error on the face of the record. Wiggins v. Tripp, 253 N.C. 171, 116 S.E.2d 355 (1960); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963).

A record filed in a petition for a writ of certiorari, nothing else appearing, does not become the record on appeal upon allowance of the writ. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Judicial Notice. — The appellate court can judicially know only that which appears in the record. State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Statement in Record Considered True.— Any statement in the record is taken as true, and the appellate court will act on it, until it shall be modified in some proper way by the judge who made it. McCoy v. Lassiter, 94 N.C. 131 (1886).

Conflict between Record and Case. — Where the "case" on appeal prepared by counsel conflicts with a record statement of a fact found by the judge, the latter must control. Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904).

Making and Filing Agreed Case. — The case stated by the judge, having been filed with the transcript of the record, and treated by the parties and the court as a part of it, though not so certified, cannot be displaced by another paper, purporting to be a case agreed on, signed by the counsel. Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888).

Supplemental Statement.—The appellate court will not consider assignments of error filed as a "supplemental statement," which the court below declined to make a part of the case settled for appeal. Rodman v. Harvey, 102 N.C. 1, 8 S.E. 888 (1889).

Insertion of Testimony Presented at Hearing.—Where, upon the disagreement of the parties, the trial judge settles the case on appeal from order revoking suspension of judgment, defendant may not complain of the insertion therein of testimony presented at the hearing. State v. Johnson, 230 N.C. 743, 55 S.E.2d 690 (1949).

Case Not Signed by Judge.—Where the case as settled by the trial judge is not signed by him, and there is no agreed statement of the case, the record contains no proper statement of the case on appeal. Ingram v. Yadkin River Power Co., 181 N.C. 359, 107 S.E. 209 (1921).

Right of Judge to Make Stenographer's Notes Part of Record.—While a stenographer's notes are material for the consultation of the trial judge in making up the case, he may not send them up as a part of the record of his own motion. Green v. Dunn, 162 N.C. 340, 78 S.E. 211 (1913).

Failure of Judge to Settle Case.—Where appellant's timely request, for settlement of his case on appeal is denied, he is entitled to certiorari to procure settlement. Chauncey v. Chauncey, 153 N.C. 12, 68 S.E. 906 (1910).

The remedy for a refusal to settle a case on appeal, when judgement has been entered by consent, is a motion to set aside the judgment. King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924).

Under this section, the judge is given power to settle the case on appeal, and ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. Lindsay v. Brawley, 226 N.C. 468, 38 S.E. 2d 528 (1946).

Where the trial court at the time and place fixed for settlement of case on appeal fails to settle the case and erroneously grants appellee's motion that appellant's case should be struck from the record, the appellate court will grant appellant's motion for certiorari to the end that the judge, after notice, may settle the case as provided in this section, since appellant's failure to perfect the appeal is due to error of the court and not to any fault or neglect of appellant or his agent. Chozen

Confections, Inc. v. Johnson, 220 N.C. 432, 17 S.E. 2d 505 (1941).

Failure to Send Up Correct Statement.—The failure of a judge to send up a correct statement is not sufficient ground for mandamus, but the mistake may be correct by certiorari. McDaniel v. King, 89 N.C. 29 (1883).

Prerequisites for Application for Certiorari.—If for any reason the judge fails to settle the case on appeal, in time for the appeal to be docketed in the appellate court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before the appellate court. Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N.C. 60, 84 S.E. 54 (1915).

Laches of Appellant.—An application for a certiorari to a judge to settle a case on appeal, made seven months after the appeal was taken, will be denied in the absence of an affidavit to negative laches. Peebles v. Braswell, 107 N.C. 68, 12 S.E. 44 (1890). A delay of two months, without excuse, is too long. Straod v. Western Union Tel. Co., 133 N.C. 253, 45 S.E. 592 (1903).

Delay of Appellee's Counsel.—Where appellant in apt time submitted the case on appeal to appellee, who declined to sign it, but suggested that he would prepare another, and get the judge to settle the case, and promised that no advantage should be taken, it was held, that he was bound by his promise. Mott v. Ramsay, 91 N.C. 249 (1884).

Authority of Judge after Settling Case.—Having "settled" the case, at the time and place of which counsel had notice, the judge is functus officio unless, by agreement of parties, or by certiorari from Supreme Court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension and the like. Slocumb v. Construction Co. 142 N.C. 349, 55 S.E. 196 (1906).

Authority of Appellate Court over Settled Case.—The appellate court has no power to amend a settled case. Walker v. Scott, 102 N.C. 487, 9 S.E. 488 (1889).

Authority of Clerk. — The clerk has no authority to find the fact of such delay as provided by this section, nor to settle the case on appeal upon the admission of such fact, it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge. Weaver c. Hampton, 206 N.C. 741, 175 S.E. 110 (1934).

Modification of Settled Case.—Where it is made to appear to the appellate court by proper evidence, that the judge has made an omission or mistake in the settlement of the case on appeal, the appellate court will give him an opportunity to correct it, or to modify an inaccurate statement. State v. Gooch, 94 N.C. 982 (1886).

It is only when the trial judge has settled the case on appeal, in the exercise of his proper jurisdiction, that the appellate court, upon affidavit of error therein, and a letter from the judge that he wishes to make the correction, will give him such opportunity. Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905).

A judge cannot resettle a case on appeal; he can only correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. Boyer v. Teague, 106 N.C. 571, 11 S.E. 330 (1890).

Judge's Duty in Modifying Case. — Where a certiorari is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with reference to the corrections, and counsel should be present at the settlement thereof. Cameron v. Power Co., 137 N.C. 99, 49 S.E. 76 (1904).

Place of Settlement.—The requirement that the place appointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory. Cameron v. Power Co., 137 N.C. 99, 49 S.E. 76 (1904).

An appeal will not be dismissed because the statement of the judge below was made out of the district in which the suit was tried, unless the record shows that the appellee demanded to be present and that by reason of his absence he was prejudiced, especially when the error consists in the rejection of material and competent evidence. Whitesides v. Williams, 66 N.C. 141 (1872).

The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, except by agreement of the parties, or when the countercase or exception had been served, respectively, within the time prescribed by the statute. State v. Humphrey, 186 N.C. 533, 120 S.E. 85 (1923).

Effect of Absence of Judge from District.—The absence of the judge from the district does not dispense with the requirements that he should settle the case on appeal upon disagreement of counsel. Owens v. Phelps, 92 N.C. 231 (1885); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E. 2d 407 (1947). When he has so

left he may settle case upon notice without returning to the district. Cameron v. Power Co., 137 N.C. 99, 49 S.E. 76 (1904).

While it is provided by this section that when the judge from whose ruling appeal is taken, has left the district before notice of disagreement as to case on appeal, he may settle the case on appeal without returning to the district, he has no authority to do more, except by consent. White Way Laundry, Inc. v. Underwood, 220 N.C. 152, 16 S.E.2d 703 (1941).

Case May Be Settled after Expiration of Sixty Days.—Although the failure of the judge to settle a case on appeal within sixty days after the courts of the district closed, might subject him to a civil action for the penalty prescribed in the statute, he may, after that time, make up the case. State v. Williams, 109 N.C. 846, 13 S.E. 880 (1891).

Retirement of Judge. — The mere fact that a judge who tried a cause has gone out of office will not prevent his settling the case on appeal. Ritter v. Grimm, 114 N.C. 373, 19 S.E. 239 (1894); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E. 2d 407 (1947).

Where the judge who presided at a trial goes out of the office without making up a case of appeal, and the appellant is in no default, a new trial will be awarded. Simonton v. Simonton, 80 N.C. 7 (1879).

Illness of Judge.—Where the judge is unable to settle the case on appeal on account of sickness and appellee, to expedite matters, agrees to a new trial, and it appears that the judge will not be able to settle the case within a reasonable time, a new trial will be granted even though appellant opposes one. Turner v. Southern Gas Improvement Co., 171 N.C. 750, 87 S.E. 970 (1916).

Errors and omissions in the case on appeal are corrected upon certiorari and cannot be brought upon exception taken at the time the case is settled. Lindsay v. Brawley, 226 N.C. 468, 38 S.E. 2d 528 (1946).

Impossible to Settle Case on Appeal.—Where it appeared by affidavits that the statement of a case upon appeal had been lost by no fault of the attorneys for appellant, and that, by reason of lapse of time, the judge had forgotten the exceptions, and a new case could not be prepared, a new trial will be granted. Isler v. Haddock, 72 N.C. 119 (1875); Adams v. Reeves, 74 N.C. 106 (1876); Board of Comm'rs v. Dominion S.S. Co., 98 N.C. 163, 3 S.E. 505 (1887).

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the appellate court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercase, under this and § 1-282, and before the lapse of sufficient time for it to have been deemed approved under § 1-282. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The appellate court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the Attorney General's motion to affirm is allowed. State v. Parnell, 214 N.C. 467, 199 S.E. 601 (1938).

Applied in State v. Stubbs, 265 N.C. 420, 144 S.E. 2d 262 (1965); Messick v. Hickory, 211 N.C. 531, 191 S.E. 43 (1937); State v. Cannon, 227 N.C. 336, 42 S.E.2d 343 (1947).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); State v. Angel, 194 N.C. 715, 140 S.E. 727 (1927); Metropolitan Life Ins. Co. v. Boddie, 196 N.C. 666, 146 S.E. 598 (1929); Penland v. French Broad Hosp., 199 N.C. 314, 154 S.E. 406 (1930); McMahan v. Southern Ry., 203 N.C. 805, 167 S.E. 225 (1933).

§ 1-284. Clerk to prepare transcript.—The clerk or appropriate official of the trial tribunal, on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the appropriate clerk of the appellate division. The clerk, or appropriate official of the trial tribunal, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the appellate division until the appellant has given the undertaking on appeal or made

the deposit required. (C. C. P., s. 302; Code, s. 551; 1889, c. 135; Rev., s. 592; C. S., s. 645; 1969, c. 44, s. 4.)

Cross References.

As to the distinction between the record and the case on appeal and the requisites of the latter, see § 1-282 and note thereunder. As to the settlement of case on appeal, see § 1-283.

I. EDITOR'S NOTE.

The 1969 amendment inserted "or appropriate official of the trial tribunal" in the first and second sentences, substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" in the first sentence and substituted "appellate division" for "Supreme Court" in the second sentence.

II. GENERAL CONSIDERATION.

Procedure Generally.—See same catchline in note to § 1-282, analysis line II.

Section is directory.—This section is directory merely, and where a party has duly perfected his appeal, and tendered the necessary fees, the clerk must forthwith transmit a transcript of the record, notwithstanding the attorneys have not settled a case. Russell v. Davis, 99 N.C. 115, 5 S.E. 895 (1888).

Transcript Essential—Before the appellate court will entertain an appeal, the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment sought to be reviewed was rendered. State v. Preston, 104 N.C. 733, 10 S.E. 84 (1889).

Matter Not Contained in Transcript.—The appellate court will not consider matters not contained in the transcript of the record on appeal. Presnell v. Garrison, 122 N.C. 595, 29 S.E. 839 (1898).

How Transcript Drawn.—The transcript of record on appeal should be drawn in accordance with Eaton's Forms. State v. Butts, 91 N.C. 524 (1884).

Original Papers.—The requirement that appellant file a transcript on appeal is not complied with by filing the original papers from the court below. Emmons v. McKesson, 58 N.C. 92 (1859); Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

Duty to Transmit.—On the taking of an appeal, the record should be transmitted to the appellate court, and the appeal docketed, whether the statement of the case on appeal is settled or not. Owens v. Phelps, 91 N.C. 253 (1884).

When Appeal Not Properly Constituted.—Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. Cross v. Williams, 91 N.C. 496 (1884).

Costs of Irrelevant Matter.—The costs of unnecessary and irrelevant matter, accompanying a transcript, in regard to which no exception is taken below, will be taxed against the appellant, whether he succeeds or not. Clayton v. Johnson, 82 N.C. 423 (1880).

Omission of Evidence and Charge. — The evidence and the charge of the court are properly omitted from the appeal record where there is no exception involving the same. Parker v. Southern Express Co., 132 N.C. 128, 43 S.E. 603 (1903).

Contradictory Records. — Where two transcripts are sent, contradictory to each other, and the parties do not agree which is correct, the court will direct the proper officer to attend with the original record. State v. Reid, 18 N.C. 377 (1835).

Failure to Tender Required Fees. — Failure of the clerk of the court below to send up a transcript after the case on appeal had been filed by appellant in his office does not excuse appellant's failure to file the transcript or the case on appeal where he does not show that he has tendered the required fees and is otherwise free from laches. Critz v. Sparger, 121 N.C. 283, 28 S.E. 365 (1897).

Stenographer's Notes.—A statute authorizing the employment of an official stenographer and providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the records, does not make those notes a part of the record proper on appeal, or of the case on appeal. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

Bill of Exceptions Unnecessary.—Errors apparent on the record may be reviewed though there is no bill of exceptions. Cape Fear & N.R.R. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903).

Demurrer.—A demurrer and the action of the court thereon are part of the record, and no bill of exceptions or case is neces-

sary. Chamblee v. Baker, 95 N.C. 98 (1886).

Refusal to Sign Judgment. — The fact that a form of judgment offered by plaintiff, and which the court declined to sign, recited that plaintiff was refused leave to take a nonsuit as to certain defendants, did not make such recital a part of the record; it not being stated in the case by the judge, and nowhere appearing in the record proper. Tennessee River Land & Timber Co. v. Butler, 134 N.C. 50, 45 S.E. 956 (1903).

Binding Effect of Record.—The appellate court is bound by the record, even though it seems improbable that it can be true. McDaniel v. King, 89 N.C. 29 (1883); Davidson v. Southern Ry., 156 N.C. 578, 72 S.E. 622 (1911).

Amendment of Record.—The appellate court has no authority to allow an amendment of the record. Neal v. Cowles, 71 N.C. 266 (1874).

Showing Additional Facts.—Where the findings of fact made the basis of a judgment denying a motion for vacation of a judgment are not in the record, the record cannot be amended so as to show the facts on the request of a single party. Smith v. Whitten, 117 N.C. 389, 23 S.E. 320 (1895).

How Errors in Record Corrected.—Errors in the record should be corrected by means of certiorari, and not by having the amendment made by the clerk below while the transcript is on file in the appellate court. State v. Jackson, 112 N.C. 849, 16 S.E. 906 (1893).

Response to Issue.—An appeal will not be dismissed because the response to the issue was omitted in printing the record, where the omission was palpably a printer's error; the response being recited and printed in the judgment. Baker v. Hobgood, 126 N.C. 149, 35 S.E. 253 (1900).

Failure of Judge to Return Papers.—Where the trial judge takes the papers and does not return them in time for the seasonable preparation of appellant's transcript, a dismissal for failure to file will be vacated, and a certiorari issued to bring up the appeal. Roulhac v. Miller, 89 N.C. 190 (1883); Seay v. Yarborough, 94 N.C. 291 (1886).

Proper Transcript Obtainable.—An appeal will not be dismissed because the clerk of the lower court fails to transmit a proper transcript, especially when a proper transcript is obtainable before the case will stand for argument. Bryan v. Moring, 99 N.C. 16, 5 S.E. 739 (1888).

Cited in Carter v. Bryant, 199 N.C. 704, 155 S.E. 602 (1930); Lindsay v. Brawley, 226 N.C. 468, 38 S.E.2d 528 (1946).

III. CONTENTS OF TRANSCRIPT.

In General.—It must appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much, not more, of the record in every case, ought to be sent up as will properly present the exceptions taken, that is, as will show that they were taken, the rulings of the court to which they apply, and how they bear upon the action. The appellate court must be able to see that a court was held and that the action was properly constituted before it. This requirement is not a mere matter of form that may be dispensed with. It is an essential part of procedure in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented. State v. Butts, 91 N.C. 524 (1884).

In order for the appellate court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment. Spence v. Tapscott, 92 N.C. 576 (1885).

And that the action was properly constituted in the court below. Markham v. W.H. Hicks & Co., 90 N.C. 1 (1884).

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict, and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. Sigman v. Railroad Co., 135 N.C. 181, 47 S.E. 420 (1904).

Jurisdiction of Action.—It is the appeal that puts the appellate court in relation with the case in the court below, and that court in respect to the judgment appealed from; and the appellate court must be able to see, from the record, the relation thus established. Moore v. Vanderburg, 90 N.C. 10 (1884).

Essential Part of Record.—The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, and such of the evidence, charge, prayers and

other matters occurring at the trial as are necessary to present the matters excepted to for review. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

Taking of Appeal. — Where the record on appeal does not show that any appeal was taken, the appellate court has no jurisdiction. Randleman Mfg. Co. v. Simmons, 97 N.C. 89, 1 S.E. 923 (1887); Howell v. Jones, 109 N.C. 102, 13 S.E. 889 (1891).

Authority of Court or Judge.—Every transcript or record, to be authoritative must set forth before what person or persons the proceedings were had, or by whose authority the record was made, so that it may appear that such proceedings were not coram non judice. Howell v. Ray, 83 N.C. 558 (1880).

A transcript on appeal, which contains a copy of a commission to a judge other than the one regularly designated by statute, to hold a term in the county whence it comes, and of a judgment certified to have been signed by him, does not show, "with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the time and place prescribed by law," and hence it is insufficient. Jones v. Hoggard, 107 N.C. 349, 12 S.E. 286 (1890).

Opening of Court.—The record on appeal from the superior court of a county is fatally defective if it does not show that a superior court was opened and held for such county at all. High v. Carolina Cent. R.R., 112 N.C. 385, 17 S.E. 79 (1893).

When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the appellate court has no jurisdiction to act upon it. Broadfoot v. McKeithan, 92 N.C. 561 (1885).

Jurisdiction of Parties. — The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held, and that it had obtained jurisdiction of the parties by service or waiver of process. Daniel v. Rogers, 95 N.C. 134 (1886); Jones v. Hoggard, 107 N.C. 349, 12 S.E. 286 (1890).

Agreed Case.—Where a matter is before the appellate court on a case agreed, the whole of that paper is an essential part of the record. Upper Appomattox Co. v. Buffaloe, 121 N.C. 37, 27 S.E. 999 (1897).

Incidental Matters. — Entries of continuances, and other docket entries, interlocutory judgments, and incidental matters, such as judgments nisi against witnesses, as well as the evidence, prayers for instructions, and charge of the court, are not part of the record on appeal unless there is some exception presenting them for review. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

Second Appeal.—On second appeal, the formal recitals and the proceedings subsequent to the filing of the opinion on reversal and the exceptions only need appear in the record. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896); Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Special Orders as to Contents. — The clerk of the superior court, in sending up the transcript to the appellate court, should be guided solely by the order of the superior judge, and should send no other papers than those directed. Clark v. Saco-Pettee Mach. Works, 150 N.C. 88, 63 S.E. 153 (1908).

Appeals from Interlocutory Judgments. —Upon appeals from interlocutory judgments nothing should be certified except so much of the case below as is necessary to present the point to be reviewed. Smith v. Collier, 20 N.C. 60 (1838).

IV. EFFECT ON APPEAL OF IMPROPER TRANSCRIPT.

A. When Appeal Remanded.

Imperfect Transcript.—Where the transcript of the record sent to the appellate court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. Spence v. Tapscott, 92 N.C. 576 (1885).

Fragmentary Record.—Where the transcript did not contain the record, and it was ordered sent up on certiorari, to which the clerk returned fragmentary parts of the record, certifying that these were all he could by diligent search find, it was held, that the case must be remanded to the court below to supply the necessary record, and to make all necessary amendments thereto to perfect the appeal. Cox v. Jones, 110 N.C. 909, 14 S.E. 782 (1892).

Remand for Proper Transcript.—A transcript which fails to show any process, or waiver thereof, or any pleading, by which defendant was brought into court, or any agreement for the submission of the controversy without action, is insufficient, and the cause will be remanded for a proper transcript. Jones v. Hoggard, 107 N.C. 349, 12 S.E. 286 (1890).

Proper Proceedings Below.—An appeal will be remanded where the transcript does not show that the action was properly constituted in the court below. Markham v. W.H. Hicks & Co., 90 N.C. 1 (1884).

Failure to Show Process and Pleading. —Where the transcript on appeal contains only the judgment of the court below, and

shows no process or pleading, the cause will be remanded. Rowland Bros. v. R.J. Mitchell & Son, 90 N.C. 649 (1884); Bethea v. Byrd, 93 N.C. 141 (1885).

Failure to Show Contention of Parties. —Where the transcript on appeal merely shows process, a reference to arbitration, an award, exception thereto, the action of the court below thereon, and an appeal, but there are no pleadings, nor an agreed statement of facts, so that the appellate court can see the contention of the parties, and that the court below had jurisdiction, and where both parties are not able to file the pleadings nunc pro tunc in the appellate court, the cause will be remanded. Wyatt v. Lynchburg & D.R.R., 109 N.C. 306, 13 S.E. 779 (1891).

Failure to Show Entry of Judgment. — Where the record on appeal contains no judgment entry, the appeal or writ of error cannot be considered. Logan v. Harris, 90 N.C. 7 (1884); Harvey v. Rich, (N.C.), 1 S.E. 647 (1887). See Vann v. Winders, 184 N.C. 629, 113 S.E. 927 (1922).

B. When Appeal Dismissed.

Absence of All Essential Matters.—An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned or statement of the case for appeal, and no appeal bond or order dispensing with one. State v. Gaylord, 85 N.C. 551 (1881).

Where there is no case on appeal settled by the judge or by counsel, the evidence is in the record by question and answer, there is no leave to appeal as a pauper, although the action was brought as a pauper, and no appeal bond, printed record, or printed brief for plaintiff, the appeal will be dismissed. Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912).

Failure to Make Transcript. — Where appellant failed to file a transcript, but filed a certificate by the clerk that such a case had been tried, the appellee could docket and dismiss without filing additional certificate of his own. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

Incomplete Transcript. — Where the transcript is incomplete, and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed. Mitchell v. Moore, 62 N.C. 281 (1867).

On appeal to the appellate court from order dismissing motion to have respondent subjected to contempt order for refusal to pay amounts due under prior judgment, where pleadings in action in which judgment was entered were not brought up as a part of the record and such pleadings were a necessary part of the record as determining the character of the action and jurisdiction and power of the court, motion to dismiss appeal was allowed. Campbell v. Campbell, 226 N.C. 653, 39 S.E.2d 812 (1946).

Omission of Affidavits.—Where, in settling the case on appeal, the judge directed the clerk to include certain affidavits in the transcript, after which the appellant directed the clerk to omit them, the appeal will be dismissed. Finch v. Strickland, 130 N.C. 44, 40 S.E. 841 (1902).

Omission of Complaint.—Appeal will be dismissed when the consideration of the complaint is essential to determination of the question involved, it not being in the record, and appellant having made no motion for certiorari to perfect the record. Allen v. Hammond, 122 N.C. 754, 30 S.E. 16 (1898).

Record Consists Only of Case on Appeal.—Where the record consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a certiorari, nor that the case be remanded, the appeal will be dismissed. Rice v. Guthrie, 114 N.C. 589, 19 S.E. 636 (1894).

Failure to Pay Fees.—Where a certiorari has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the superior court returns that defendant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed. Broadwell v. Ray, 112 N.C. 191, 16 S.E. 1009 (1893).

§ 1-285. Undertaking on appeal; filing; waiver.—To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written con-

sent on the part of the respondent. No appeal shall be dismissed in the appellate division on the ground that the undertaking on appeal was not filed, or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the appellate division. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the appellate division, the apellate division shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit. (C. C. P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C. S., s. 646; 1969, c. 44, s. 5.)

I. General Consideration.
II. Time of Filing.
III. Waiver.
IV. Parties.

Cross References.

As to undertaking to stay execution, see § 1-289 et seq. See also note under § 1-277. As to costs on appeal, see § 6-33 and note thereunder.

I. GENERAL CONSIDERATION.

Editor's Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" twice in the third sentence and twice in the fourth sentence.

This section has no application to appeals from a justice of the peace to the superior court. Massenburg v. Fogg, 256 N.C. 703, 124 S.E.2d 868 (1962).

Compliance with This Section or § 1-288.—As to the necessity, for those desiring an appeal, of complying with either the provisions of this section or those of § 1-288, see note to the latter section.

Necessity of Security to Perfect Appeal. —An appeal bond or undertaking is necessary to the perfection of an appeal. Hinton v. Pritchard, 107 N.C. 128, 12 S.E. 242 (1890); Ex parte Berry, 107 N.C. 326, 12 S.E. 125 (1890).

The appellate court has no power to order a certiorari without requiring bond and security thereon. Weber v. Taylor, 66 N.C. 412 (1872). See Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910).

Duty to Provide Bond.—Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. Lunsford v. Alexander, 162 N.C. 528, 78 S.E. 275 (1913).

After Perfecting of Appeal.—When an appeal is perfected, the trial court has no longer any jurisdiction of the cause, and cannot require an additional bond. McRae v. Board of Comm'rs, 74 N.C. 415 (1876).

New Security on Second Appeal.—After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. Spence v. Tapscott, 93 N.C. 250 (1885).

Deposit as Security. — Under this section the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890); State v. Parish, 151 N.C. 659, 65 S.E. 762 (1909).

No Substitute for Undertaking or Deposit.—The clerk has no authority to accept any substitute for the undertaking on appeal, or deposit of money in lieu thereof, provided by the statute. Eshon v. Board of Comm'rs, 95 N.C. 75 (1886).

Surety Misinformed Concerning Legal Effect of Bond.—One who has signed a bond given to stay execution pending an appeal cannot defend on the ground that he was misinformed concerning the legal effect of the bond. McMinn v. Patton, 92 N.C. 371 (1885). See Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

Extent of Liability. — An appeal bond given under this section to secure "all costs" means the appellee's costs. Morris v. Morris, 92 N.C. 142 (1885).

When there is judgment in the appellate court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee, or their principal. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872). See Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Attempt to Cure Defects in Bond.—An uncompleted undertaking on appeal, filed on the last day on which by statute it could be filed, and then immediately withdrawn to be completed by obtaining the signatures of other parties, is ineffectual. Smith v. Reeves, 85 N.C. 594 (1881).

Misrecital of Judgment. — A misrecital in the appeal bond of the date of the judgment or order appealed from is not fatal error, if the judgment or order is otherwise correctly and sufficiently described. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888).

Effect of Failure to Give Undertaking.— In the absence of an affidavit for leave to appeal without bond, an appeal must be

dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. Lunsford v. Alexander, 162 N.C. 528, 78 S.E. 275 (1913).

Giving bond on appeal or the granting leave to appeal without bond are jurisdictional, and, unless the statute is complied with, the appeal will be dismissed. Smith v. Reeves, 85 N.C. 594 (1881); Honeycutt v. Watkins, 151 N.C. 652, 65 S.E. 762 (1909). See Brown v. S.H. Kress & Co., 207 N.C. 722, 178 S.E. 248 (1935).

Effect of Failure to File Bond within Statutory Time. — Appeals will be dismissed if the bond on appeal is not given within the time required by law. Applewhite v. Fort, 85 N.C. 596 (1881); McCanless v. Reynolds, 90 N.C. 648 (1884).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

II. TIME OF FILING.

Presumption of Timely Filing.—Where an appeal bond has no date, it will be presumed to have been filed on the day it is justified. Boyden v. Williams, 92 N.C. 546 (1885).

Computation of Time. — The ten days within which the undertaking on appeal must be filed are not counted from the day on which the judgment is rendered, but from that on which the court adjourned. Chamblee v. Baker, 95 N.C. 98 (1886).

Ten Days after Rendition of Judgment. —The undertaking on appeal must be filed within ten days after the rendition of the judgment. Wade v. City of Newbern, 72 N.C. 498 (1875); Sever v. McLaughlin, 82 N.C. 332 (1880); Boyden v. Williams, 92 N.C. 546 (1885).

Ten Days after Trial.—Where an undertaking on appeal recited that the judgment appealed from was rendered on the first day of the term (following the fiction that all the business of a term is done on its first day), but it appeared that the trial took place during the second week, and the justification was dated within ten days after the trial, it was held that the bond was filed in time. Worthy v. Brady, 91 N.C. 265 (1884).

Day Facts Were Found. — Where the record does not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an appeal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, is given in time. Gwathney v. Savage, 101 N.C. 103, 7 S.E. 661 (1888).

Delay in Filing Caused by Clerk.—An undertaking filed within a few days after the time agreed on will be treated as valid where it appears that the appeal was in good faith, that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk, and that the delay was without prejudice to appellee. Harrison v. Hoff, 102 N.C. 25, 8 S.E. 887 (1889); Jones v. Wilson, 103 N.C. 13, 9 S.E. 580 (1889).

Before Transmission of Record to Appellate Court.—An appeal bond, filed and sent up with the record, is in time, provided it should be given before the record of the case is transmitted to the appellate court. Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889); In re Snow's Will, 128 N.C. 100, 38 S.E. 295 (1901).

Reasonable Excuse Must Be Shown.— While the appellate court may allow an undertaking on appeal to be filed in that court, the power thus conferred will not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking within the time prescribed by this section. Harrison v. Hoff, 102 N.C. 25, 8 S.E. 887 (1889); Jones v. City of Asheville, 114 N.C. 620, 19 S.E. 631 (1894).

The same cause that excused failure to perfect the appeal excuses the failure to file appeal bond. Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

Before or after Motion to Dismiss.—The appellate court may allow an appellant to substitute a sufficient for an insufficient appeal bond, after a motion by the appellant to dismiss the appeal for such defect. Robeson v. Lewis, 64 N.C. 734 (1870).

III. WAIVER.

Waiver as to Costs.—Parties to a suit have no right to waive an appeal bond so far as costs are concerned. Cape Fear & Deep River Nav. Co. v. Costen, 63 N.C. 264 (1869).

Waiver of Timely Filing.—The necessity of filing the appeal bond within the prescribed time may be waived by agreement. Wade v. City of Newbern, 72 N.C. 498 (1875).

Same—Must Appear of Record. — No agreement of parties waiving the necessity of timely filing of appeal bond will be respected by the appellate court unless it appears on the record. Wade v. City of Newbern, 72 N.C. 498 (1875).

Same—Verbal Agreements Disregarded. —Verbal agreements to waive the statutory requirements will not be regarded. McCanless v. Reynolds, 91 N.C. 244 (1884). See Skinner v. Bland, 91 N.C. 1 (1884).

Same—Delay in Making Objection. — Where the absence of a bond on appeal is

not objected to for two years, and in the meantime the cause has been continued, and witnesses summoned, respondent will be deemed to have waived objection to the defect. Arrington v. Smith, 26 N.C. 59 (1843).

Same—By Failure to Object.—Where the appellant is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient waiver in writing under the statute. Howerton v. Henderson, 86 N.C. 718 (1882); Harshaw v. McDowell, 89 N.C. 181 (1883).

Same—By Proceeding with Trial. — If the appellee let the cause go to the jury in the appellate court, he thereby waives objections to defects in the appeal bond, but the court, in its discretion, may require further security. Ferguson v. M'Carter, 4 N.C. 544 (1817).

IV. PARTIES.

Obligee. — An undertaking on appeal, though not so expressed, is, by implication, taken to be made with the appellee. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872).

Omission of Obligor's Name.—The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. Chamblee v. Baker, 95 N.C. 98 (1886).

Operates Favorably to Respondent. — The undertaking for costs and damages on appeal, operates in favor of the respondent, although he is not required to be named in it as a party. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872).

Made Payable to State. — An appeal bond made payable to the State is void. The State will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law—as guardian bonds, etc. Dorsey v. Raleigh & G.R.R., 91 N.C. 201 (1884).

Necessity for Obligor's Signature.—The signature of the appellant is not essential to a bond or undertaking on appeal or error. Cohoon v. Morton, 49 N.C. 256 (1857); Walker v. Williams, 88 N.C. 7 (1883).

Party Acting as Surety.—An undertaking on appeal may be good although signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. Syme v. Badger, 91 N.C. 272 (1884).

Opposite Party.—A plaintiff cannot be principal obligor on a bond where an appeal is taken by defendant. Speed v. Harris, 4 N.C. 317 (1816).

Signature by Mark. — An appeal bond may be executed by the surety making his mark. State v. Byrd, 93 N.C. 624 (1885).

Name Signed by Magistrate.—A magistrate, who has rendered a judgment on a warrant, is not a fit person to sign the name of another as obligor on the appeal bond. Weaver v. Parish, 8 N.C. 319 (1821).

§ 1-286. Justification of sureties.—The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days. (C. C. P., s. 310; Code, s. 560; 1887, c. 121; Rev., s. 594; C. S., s. 647.)

Purpose.—The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing, unless a sum of money be deposited with the clerk by order of the court in lieu of the undertaking. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects. State v. Wagner, 91 N.C. 521 (1884).

Necessity of Justification. — An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. Greenlee v. McCelvey, 92 N.C. 530 (1885); Singer Mfg. Co. v. Barrett, 94 N.C. 219 (1886).

Dismissal of Appeal.—An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof. McCanless v. Reynolds, 91 N.C. 244 (1884); State v. Roper, 94 N.C. 859 (1886).

Justification Must Be by Surety.—The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. Morphew v. Tatem, 89 N.C. 183 (1883).

Failure to Show Proper Amount. — A justification of two sureties that each is

worth the amount of the bond, is not a sufficient compliance with this section. Anthony v. Carter, 91 N.C. 229 (1884).

Need Not Mention Liabilities. — The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is above his liabilities and homestead and exemption allowed by law. Witt v. Long, 93 N.C. 388 (1885).

Justification Held Insufficient. — Where the approval of an unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. Gruber v. Washington & J.R.R., 92 N.C. 1 (1885).

Indorsement of Clerk Not a Substitute for Justification.—An indorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance within the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. Bryson v. Lucas, 85 N.C. 397 (1881).

Justification May Be Waived. — While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily avoid the bond. It is a defect which may be cured by waiver. McMillan v. Baker, 92 N.C. 111 (1885); Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905).

Necessity of Written Waiver. — Where the record fails to show that appellee in writing waived an appeal bond, the appeal will be dismissed if such bond is not justified. Lytle v. Lytle, 90 N.C. 647 (1884).

When Waiver Sufficient. — Where the record stated, "Plaintiff appealed. Notice waived. Bond filed," which was signed by the judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount. Singer Mfg. Co. v. Barrett, 94 N.C. 219 (1886).

An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. Greenlee v. McCelvey, 92 N.C. 530 (1885).

Same — Appellee Present When Bond Taken.—When it appears by the case settled that the appellees were present when the appeal bond was taken, and made no objection to the sufficiency of the sureties, such objection will be deemed waived. Gruber v. Washington & J.R.R., 92 N.C. 1 (1885); Moring v. Little, 95 N.C. 87 (1886).

Same—Acceptance in Open Court.—The acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified cannot be sustained. Jones v. Potter, 89 N.C. 220 (1883).

Same—Signing Case on Appeal.—An objection to an appeal bond on the ground that the sureties failed to justify is not waived when the counsel for the adverse party agrees to and signs the statement of the case on appeal. McMillan v. Nye, 90 N.C. 11 (1884), distinguishing Howerton v. Henderson, 86 N.C. 718 (1882), distinguished in Gruber v. Washington & J.R.R., 92 N.C. 1 (1885).

Same—Entry on Record.—An entry on the record, "bond fixed at $25; filed and approved," was held a sufficient waiver in writing. Hancock v. Bramlett, 85 N.C. 393 (1881). See State v. Wagner, 91 N.C. 521 (1884).

§ 1-287. Notice of motion to dismiss; new bond or deposit.—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the appropriate clerk of the appellate division a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (1887, c. 121; Rev., s. 596; C. S., s. 648; 1969, c. 44, s. 6.)

Cross Reference.—As to the time of the motion to dismiss, see Supreme Court Rule 16.

Editor's Note.—The 1969 amendment substituted "appropriate clerk of the appellate division" for "clerk of the Supreme Court" in the second sentence.

Section Is Mandatory — A motion to

dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of this section are complied with. Jones v. Slaughter, 96 N.C. 541, 2 S.E. 681 (1887).

Section Does Not Apply When No Bond Filed.—No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days required for a motion to dismiss by the section applies only when there is an irregularity in the bond or in the justification of sureties. Jones v. City of Asheville, 114 N.C. 620, 19 S.E. 631 (1894).

Nor When Not Filed in Time.—A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days' notice, as provided by this section. Bowen v. Fox, 98 N.C. 396, 4 S.E. 200 (1887).

Necessity of Written Notice.—A motion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by this section. McGee v. Fox, 107 N.C. 766, 12 S.E. 369 (1890).

At Hearing of Motion.—Though a void bond has been given on appeal from the county to the superior court, the appeal should not be dismissed where the appellant offers to file a good bond at the hearing of the motion to dismiss. March v. Griffith, 53 N.C. 264 (1860).

Failure to File New Bond.—Where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. Goodman v. Call, 185 N.C. 607, 116 S.E. 724 (1923).

Effect of Appearance.—The failure to state, from inadvertence, that counsel appeared specially in the court above to move to dismiss the appeal for failure to docket it in time, should not be deemed a waiver of the grounds of the motion. Suiter v. Brittle, 90 N.C. 19 (1884).

§ 1-287.1. Dismissal of appeals to appellate division when statement of case not served within time allowed. — When it appears to the superior court that statement of case on appeal to the appellate division has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the superior court judge, upon motion by the appellee, to enter an order dismissing such appeal; provided the appellant has been given at least five (5) days' notice of such motion. The motion herein provided for may be heard by either the resident judge, the presiding judge, a special judge residing within the district, or the judge assigned to hold the courts of the district, in term or out of term, in any county of the district. The provisions of this section shall not apply in any case in which a sentence of death has been pronounced. The provisions of this section shall not apply in any case with respect to which there is no requirement to serve a case on appeal. The provisions of this section are not exclusive but are in addition to any other procedures for obtaining the dismissal of a case on appeal to the appellate division. (1959, c. 743; 1965, c. 136; 1969, c. 44, s. 7.)

Editor's Note.—The 1965 amendment substituted "superior court judge" for "presiding judge" in the first sentence and added the present second sentence.

The 1969 amendment substituted "appellate division" for "Supreme Court" in the first and last sentences.

Statutory requirements with reference to notice are strictly construed where the giving of notice must be relied upon to divest the recipient of a right. Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968).

Appeal from County Civil Court.—This section relates to the dismissal of an appeal from the superior court to the appellate division. If applicable under any circumstances to an appeal from a county civil court to the superior court, it could apply only to a motion to dismiss addressed to the county civil court. Pendergraft v. Harris, 267 N.C. 396, 148 S.E.2d 272 (1966).

Appeal Is Subject to Dismissal in Superior Court.—Where the case on appeal is not served within the time allowed, it is subject to dismissal in the superior court pursuant to this section, without moving to docket and dismiss in the appellate division. Williams v. Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962).

But Section Does Not Apply When Case Has Been Docketed.—This section does not apply when the case on appeal has been docketed in the appellate division. Leggett v. Smith-Douglass Co., 257 N.C. 646, 127 S.E.2d 222 (1962).

When the case on appeal has been docketed in the appellate division the appeal may not be withdrawn without the ap-

proval of the appellate division. Leggett v. Smith-Douglass Co., 257 N.C. 646, 127 S.E.2d 222 (1962).

Effect of Abandoning Appeal.—When an appeal is abandoned or not perfected within the time allowed, the order of the lower court sustaining a demurrer and dismissing the action becomes the law of the case and the plaintiff is thereby precluded from amending his complaint which ordinarily may be done when a demurrer is sustained without dismissing the action. Williams v. Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962).

Applied in Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966); Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

Cited in Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

§ 1-288. Appeals in forma pauperis; clerk's fees. — When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the appellate division, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the appellate division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the term at which the judgment was rendered or within ten days from the expiration by law of the term, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The request for appeal shall be passed upon and granted or denied by the clerk within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the appellate division of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the appellate division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C. S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8.)

Cross Reference.—As to appeal in forma pauperis in criminal actions, see § 15-181.

Editor' Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" throughout the section.

Appeals in forma pauperis in civil cases were first provided for in ch. 60, Laws 1873-74, under which they could only be allowed by the judge during the term. But in 1889, Laws 1889, ch. 161, this section was amended and appeals in forma pauperis were allowed by the judge either at term or on affidavit filed within five days after court, or the clerk might pass upon and allow such application during term, or within ten days after its expiration.

Formerly the clerk of the superior court was not bound to render his services gratuitously but in 1907, Acts 1907, ch. 878, this section was again amended and the clerk of the superior court is not now allowed to demand his fees for making the transcript in appeals in forma pauperis.

Supreme Court Rule 22 offers appellants in forma pauperis the option of filing nine typewritten copies of the record, rather than having the same printed.

Purpose of Section.—The statutory provision for appeals in forma pauperis is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on ap-

peal. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. Perry v. Perry, 230 N.C. 515, 53 S.E.2d 457 (1949).

Section Mandatory.—Where a party to a civil action which has been tried in the superior court, desires to appeal from a judgment rendered at such trial to this court, without giving security as required by this section, he must comply strictly with the provisions of this section, which are mandatory. McIntire v. McIntire, 203 N.C. 631, 166 S.E. 732 (1932).

Requirements of this section, relating to appeals to appellate court from the superior court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless this section is complied with, the appellate court will take no cognizance of the case, except to dismiss it. Clark v. Clark, 225 N.C. 687, 36 S.E.2d 261 (1945); Dobson v. Johnson, 237 N.C. 275, 74 S.E.2d 652 (1953); Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

The requirements of this section, allowing appeals in forma pauperis, are mandatory, not directory, and a failure to comply with the requirements deprives the appellate court of any appellate jurisdiction. Williams v. Tillman, 229 N.C. 434, 50 S.E.2d 33 (1948); Dobson v. Johnson, 27 N.C. 275, 74 S.E.2d 652 (1953); Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Failure to Obtain Order Allowing Appeal.—Where the judge writes on the judgment that plaintiff shall be allowed to appeal in forma pauperis upon compliance with this section, but plaintiff obtains no order allowing appeal in forma pauperis after the filing of an affidavit of poverty subsequent to the term, the appeal must be dismissed for failure to comply with the mandatory provision of this section. Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Necessity of Affidavit.—In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the appellate court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the printed or mimeographed copies of the brief required by Rule 22 of the Supreme Court. Brown v. S.H. Kress & Co., 207 N.C. 722, 178 S.E. 248 (1935).

Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and the appellate court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. Williams v. Tillman, 229 N.C. 434, 50 S.E.2d 33 (1948). See Gilmore v. Imperial Life Ins. Co., 214 N.C. 674, 200 S.E. 407 (1939).

Statement of Attorney.—On an appeal in forma pauperis, an affidavit not containing the averment that appellant "is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court," is fatally defective. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893); Honeycutt v. Watkins, 151 N.C. 652, 65 S.E. 762 (1909). See Hanna v. Timberlake, 203 N.C. 556, 166 S.E. 733 (1932); Lupton v. Hawkins, 210 N.C. 658, 188 S.E. 110 (1936). It should be noted that these cases were decided prior to the 1951 amendment which substituted the words "a practicing attorney" in lieu of the words "counsel learned in the law" in the above quoted portion of this section. — Ed. note.

The amendment permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal applies only to this section pertaining to appeals in civil actions. State v. Mitchell, 221 N.C. 460, 20 S.E.2d 292 (1942).

The proviso at the end of this section does not permit the filing of an affidavit of the party appealing or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. Clark v. Clark, 225 N.C. 687, 36 S.E.2d 261 (1945).

An affidavit which is defective in that it fails to aver that appellant is advised that there is error of law in the judgment may not be cured by an additional affidavit filed after the expiration of time prescribed by the statute, or one filed after the date for docketing the appeal. Berwer v. Union Cent. Life Ins. Co., 210 N.C. 814, 188 S.E. 618 (1936).

Order Allowing Appeal.—To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912).

Order Must Be Obtained within Statutory Time.—An order allowing an appeal in forma pauperis entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the appellate court is without jurisdiction to entertain the appeal and it will be dismissed,

the provisions of this section being mandatory and not directory. Powell v. Moore, 204 N.C. 654, 169 S.E. 281 (1933); Franklin v. Gentry, 222 N.C. 41, 21 S.E.2d 828 (1942).

Where application to the clerk of the superior court, supported by affidavit and certificate, for leave to appeal in forma pauperis, was not made until more than ten days after expiration of the term of court at which the judgment was rendered, the appeal must be dismissed, the requirements of this section being mandatory and jurisdictional. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Application May Be Made to either Trial Judge or Clerk.—Under this section, the party aggrieved by the judgment of the superior court may apply to either the trial judge or the clerk of the superior court for leave to appeal to the appellate division in forma pauperis. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Applies to Administrators, etc.—Administrators and all other parties to the record, prosecuting or defending, are permitted to appeal to the appellate court without giving security therefor. Mason v. Osgood, 71 N.C. 212 (1874).

Intention to Appeal Need Not Be Intimated at Trial.—The appellant in such case need not intimate his desire to appeal at the time of trial, his timely compliance with the statute being sufficient indication of his desire at the time of trial. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893).

Other Proceedings Not Stayed.—An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. Leach v. Jones, 86 N.C. 404 (1882).

Stenographer's Note.—In view of § 1-282, requiring appellant to prepare a concise statement of the case on appeal, it is improper to submit as a prepared case the stenographer's notes in the form of question and answer, though plaintiff sued in forma pauperis. Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

Appellant Must Pay for Transcript.—An order granted under this section permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript in advance. Martin v. Chasteen, 75 N.C. 96 (1876); Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Right of Party to Appeal in Forma Pauperis.—On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant was earning $300.00 per month, and permitted defendant to appeal from the order in forma pauperis. The cause was remanded to the end that the court may determine whether defendant was in fact entitled to appeal in forma pauperis. Perry v. Perry, 230 N.C. 515, 53 S.E.2d 457 (1949).

Cited in Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-289. Undertaking to stay execution on money judgment.—If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with

the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (C. C. P., ss. 304, 311; Code, s. 554; Rev., s. 598; C. S., s. 650.)

Undertaking Not Necessary to Appeal.—But security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. Bledsoe v. Nixon, 69 N.C. 82 (1873).

No Particular Form Required.—No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such undertaking repugnant to its intent, they will be rejected as surplusage. Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

Bond Given to Mortgagee.—This section does not apply to a bond by a mortgagor to the mortgagee stipulating that the mortgagor will not commit waste on the premises, and, if the judgment shall be affirmed, that he will pay for the use and occupation. Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887).

Security Operates as Stay.—Upon compliance with this section there will be a stay of execution as to parties appealing from a final judgment. Bryan v. Hubbs, 69 N.C. 423 (1873); Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Where First Bond Insufficient. — The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient is not error, as such matter rests within the sound discretion of the court. Love v. Queen City Lines, 206 N.C. 575, 174 S.E. 514 (1934).

When Surety Bound.—Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the appellate court, it is not required that the appeal should have been docketed and dismissed in the appellate court in order to bind the surety on his bond given to stay excution in accordance with the terms of this section. Murray v. Bass, 184 N.C. 318, 114 S.E. 303 (1922).

Judgment against Surety.—Where an undertaking to stay execution on appeal has been given by the defendant against whom judgment has been rendered, and pending appeal he has been adjudicated a bankrupt in the federal court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt poceedings, the judgment against the surety becomes fixed and absolute. Laffoon v. Kerner, 138 N.C. 281, 50 S.E. 654 (1905), cited and distinguished, Murray v. Bass, 184 N.C. 318, 114 S.E. 303 (1922).

Effect of Appeal.—Where from an order of the superior court requiring plaintiff to pay alimony pendente lite and counsel fees, plaintiff appeals to the appellate court and the cause is thereto removed, the superior court is thereafter without jurisdiction to order the sale of plaintiff's land to satisfy the judgment or the execution of a stay bond. Vaughan v. Vaughan, 211 N.C. 354, 190 S.E. 492 (1937).

Applied in Hamilton v. Southern Ry., 203 N.C. 136, 164 S.E. 834 (1932); Hamilton v. Southern Ry., 203 N.C. 468, 166 S.E. 392 (1932); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

Cited in Hinson v. Adrian, 91 N.C. 372 (1884); Adams v. Guy, 106 N.C. 275, 278, 11 S.E. 535 (1890); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Current v. Church, 207 N.C. 658, 178 S.E. 82 (1935).

§ 1-290. How Judgment for personal property stayed.—If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (C. C. P., s. 305; Code, s. 555; Rev., s. 599; C. S., s. 651.)

Cited in Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-291. **How judgment directing conveyance stayed.** — If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (C. C. P., s. 306; Code, s. 556; Rev., s. 600; C. S., s. 652.)

Duty of Clerk.—After the undertaking has been given it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. Bryan v. Hubbs, 69 N.C. 423 (1873).

Cited in Hancock v. Bramlett, 85 N.C. 393 (1881); Hannon v. Commissioners of Halifax, 89 N.C. 123 (1883); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-292. **How judgment for real property stayed.**—If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (C. C. P., s. 307; Code, s. 557; Rev., s. 601; C. S., s. 653.)

Effect on Purchaser at Sale.—Where an appeal is taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust and an appeal bond is filed to stay execution, under this section and §§ 1-293, 1-294, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. Dixon v. Smith, 204 N.C. 480, 168 S.E. 683 (1933).

Cited in Cox v. Hamilton, 69 N.C. 30 (1873); Hancock v. Bramlett, 85 N.C. 393 (1881); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-293. **Docket entry of stay.**—When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the pendency of the appeal. (C. C. P., s. 254; Code, s. 435; 1887, c. 192; Rev., s. 621; C. S., s. 654.)

Cited in Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Queen v. DeHart, 209 N.C. 414, 184 S.E. 7 (1936).

§ 1-294. **Scope of stay; security limited for fiduciaries.** — When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum. (C. C. P., s. 308; Code, s. 558; Rev., s. 602; C. S., s. 655.)

Cross Reference.—As to effect of stay on judgment, see § 1-296.

Entire Cause Transferred to Appellate Court.—Under the North Carolina practice, an appeal carries the whole cause up to the appellate court, equally whether

security is given to stay proceedings, or for costs only. Bledsoe v. Nixon, 69 N.C. 82 (1873); Isler v. Brown, 69 N.C. 125 (1873).

Appeal Must Be Perfected.—An appeal does not take the case beyond the control of the superior court, until it is perfected. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Authority of Lower Court Terminated.—The perfection of an appeal terminates the authority of the inferior court. Governor ex rel. State Bank v. Twitty, 13 N.C. 386 (1830).

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the appellate court. Pruett v. Charlotte Power Co., 167 N.C. 598, 83 S.E. 830 (1914); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

An appeal from a judgment rendered in the superior court suspends all further proceedings in the cause in that court, pending the appeal. Harris v. Fairly, 232 N.C. 555, 61 S.E.2d 619 (1950).

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly discovered evidence cannot be entertained. Combes v. Adams, 150 N.C. 64, 63 S.E. 186 (1908).

An appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the appellate court. Combes v. Adams, 150 N.C. 64, 63 S.E. 186 (1908); Sykes v. Everett, 167 N.C. 600, 83 S.E. 585 (1914).

Where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee, the appellate court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. Griffin v. Bank of Coleridge, 205 N.C. 253, 171 S.E. 71 (1933).

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

When Proceedings Not Stayed by Interlocutory Appeal.—When an appeal is taken from an interlocutory order from which no appeal is allowed by the Code, not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and procrastinate a final judgment. Carleton v. Byers, 71 N.C. 331 (1874).

When an appeal is taken to the appellate court from an interlocutory order of the superior court which is not subject to appeal, the superior court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the appellate court. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

A litigant cannot deprive the superior court of jurisdiction to try and determine a case on its merits by taking an appeal to the appellate court from a nonappealable interlocutory order of the superior court. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

An attempted appeal from a nonappealable interlocutory order is a nullity and does not divest the superior court of jurisdiction to proceed in the action. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Subsequent Proceedings in Lower Court.—Where a cause has been ordered to the appellate court, no subsequent action of the court below can affect it. Murry v. Smith, 8 N.C. 41 (1820).

Allowing Proceedings by Lower Court.—Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the appellate court may direct that certain matters should not be suspended. Pender v. Mallett, 123 N.C. 57, 31 S.E. 351 (1898).

Orders Not Affected by Judgment.—During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders, not affected by

the judgment appealed from. Herring v. Pugh, 126 N.C. 852, 36 S.E. 287 (1900).

Disposition of Collateral Matter.—Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. Penniman v. Daniel, 91 N.C. 431 (1884).

Motion for New Trial.—The fact that an appeal is pending does not prevent a motion in the trial court for a new trial on the ground of newly discovered evidence. Bledsoe v. Nixon, 69 N.C. 82 (1873). But see Skinner v. Bland, 87 N.C. 168 (1882), where it was held that a judge of the superior court has no power to entertain a motion in a cause, which by appeal is in the Supreme Court. See also Isler v. Brown, 69 N.C. 125 (1873).

On appeal to the appellate court the case remains alive in the superior court until the case is certified back and final judgment entered in accordance with the certificate, and the superior court may entertain motion for a new trial for newly discovered evidence at the next term prior to such final judgment. Allen v. Gooding, 174 N.C. 271, 93 S.E. 740 (1917).

Second Trial Pending Appeal Unlawful.—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellant's exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to this section and a new trial will be ordered on appeal. Likas v. Lackey, 186 N.C. 398, 119 S.E. 763 (1923).

Motion to Set Aside Verdict.—An appeal, perfected pending a motion to set aside a verdict, the time for the hearing of which has been extended by consent, does not divest the trial court of jurisdiction to determine the motion. Myers v. Stafford, 114 N.C. 231, 19 S.E. 232 (1894).

Order Refusing to Discharge Attachment.—An appeal from an order refusing to discharge an attachment takes the case out of the jurisdiction of the court whose order is appealed from, and an order cannot subsequently be made by that court discharging the attachment. Pasour v. Lineberger, 90 N.C. 159 (1884).

Appeal Does Not Carry Up Fund.—An appeal from a decree of distribution does not bring up the fund, the court below retaining charge of its safekeeping and investment pending the appeal. Hinson v. Adrian, 91 N.C. 372 (1884).

Question of Sufficiency of Defense Bond.—Where a complaint states a cause of action for the recovery of real property the question of the sufficiency of the defense bond required by § 1-111 is "a matter included in the action," which is not affected in a legal sense by a motion of the defendant to strike the reply. Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 557 (1952).

Order Allowing Plaintiff to File Amended Complaint. — The pendency of an appeal from an order allowing plaintiff to file an amended complaint does not deprive the superior court of jurisdiction to appoint a receiver based on allegations in the amended complaint. York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

Cited in Bohannon v. Virginia Trust Co., 198 N.C. 702, 153 S.E. 263 (1930).

§ 1-295. Undertaking in one or more instruments; served on appellee.—The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (C. C. P., s. 309; Code, s. 559; Rev., s. 603; C. S., s. 656.)

Cross References.—As to undertaking for costs, see § 1-285. As to undertaking to stay executions, see § 1-289 et seq.

Surety Insolvent.—Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887).

Cited in State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-296. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed

from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the appellate division. (1887, c. 192; Rev., s. 604; C. S., s. 657; 1969, c. 44, s. 9.)

Cross Reference.—As to effect of appeal on proceedings in lower court generally, see § 1-294 and note thereto.

Editor's Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

Does Not Annul Judgment.—A judgment is not annulled by an appeal therefrom. State ex rel. Williams v. Mizell, 32 N.C. 279 (1849).

An appeal from an order to vacate a judgment, leaves such judgment, and any execution issued under it, in full force. Murphy v. Merritt, 63 N.C. 502 (1869).

Cited in Dixon v. Smith, 204 N.C. 480, 168 S.E. 683 (1933); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-297. Judgment on appeal and on undertakings; restitution. — Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the appellate division on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (1785, c. 233, s. 2, P. R.; 1810, c. 793, P. R.; 1831, c. 46, s. 2; R. C., c. 4, s. 10; C. C. P., s. 314; Code, s. 563; Rev., s. 605; C. S., s. 658; 1969, c. 44, s. 10.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the third sentence.

Whole Case Taken Up.—Under the provisions of this section, an appeal on the trial and determination of the cause in the inferior court carries the whole case to the appellate court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. Hudson v. Charleston, C. & C.R.R., 55 F. 252 (W.D.N.C. 1893).

Power to Direct Judgment in Lower Court.—A party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the appellate court will direct that judgment be entered on the verdict as rendered. Wilson v. Rankin, 129 N.C. 447, 40 S.E. 310 (1901); Ferrall v. Ferrall, 153 N.C. 174, 69 S.E. 60 (1910).

Judgment on Compromise.—As the appellate court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. Chavis v. Brown, 174 N.C. 122, 93 S.E. 471 (1917).

Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause will be remanded to the trial court, with directions to carry out the agreement. Stokes-Grimes Grocery Co. v. Hill, 176 N.C. 697, 97 S.E. 468 (1918).

Any Relief Consistent with Pleadings.—On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief they will not be restricted to that demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved. Voorhees v. Porter, 134 N.C. 591, 47 S.E. 31 (1904).

Separate Judgments for Separate Parties.—Where two parties have been joined as parties defendant in an action, and issues have been submitted as to each, and adverse verdict rendered as to each, under this section the action may be dismissed as to one party and affirmed as to the other. Kimbrough v. Hines, 182 N.C. 234, 109 S.E. 11 (1921).

Setting Aside of Erroneous Part Only.—Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part.

Newberry v. Seaboard Air Line R.R., 160 N.C. 156, 76 S.E. 238 (1912).

Parties Not Appealing.—Where but one of a number of judgment defendants appeal from the judgment of the superior court, the appellate court, in affirming the judgment, will remand the case, that the judgment of affirmance may be enforced against all such defendants. Baxter v. Wilson, 95 N.C. 137 (1886).

But the appellate court will not determine the rights of persons represented in the trial but who do not appeal. Van Dyke v. Aetna Life Ins. Co., 173 N.C. 700, 91 S.E. 600 (1917).

Same—Determining Interest in Land.—In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and, as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. Johnson v. Whilden, 166 N.C. 104, 81 S.E. 1057 (1914).

When Judgment Reversed.—When, upon the inspection of the whole record, it appears that the judgment was unwarraned upon the facts, the appellate court will, ex mero motu, reverse it. Everett v. Raby, 104 N.C. 479, 10 S.E. 526 (1889).

Reversal as to Certain Issues.—Ordinarily, for error in the charge, or the reception or rejection of evidence, the verdict is set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. Burton v. Wilmington & W.R.R., 84 N.C. 192 (1881).

Judgment Reversed for Substantial Cause Only.—Courts will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. Ball-Thrash Co. v. McCormack, 172 N.C. 677, 90 S.E. 916 (1916).

Where appellant has had a fair submission of the real issues, the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. Smith v. Hancock, 172 N.C. 150, 90 S.E. 127 (1916).

Modifying Provisions of Judgment.—Where defendants were joint tort-feasors, error in submitting to the jury the issue as to which was primarily liable, and rendering a judgment based on a finding of primary liability by one, does not require a reversal, but the judgment can be modified to impose a joint and several liability. Hodgin v. North Carolina Pub. Serv. Corp., 179 N.C. 449, 102 S.E. 748 (1920).

Same—Omission of Parties.—In suit to foreclose deed of trust, executed by husband and wife, securing note executed by husband, against trustee and wife, where there was doubt whether personal representative of deceased husband was necessary party, the appellate court will modify judgment dismissing action for failure to join him, and direct that plaintiff executors may bring him in. Geitner v. Jones, 173 N.C. 591, 92 S.E. 493 (1917).

Modification as to Amount of Recovery.—Although on appeal an issue involving several items cannot be amended where one item is erroneous, and appeal is on that item, the court can allow appellee to deduct that much, or stand a new trial. Ragland v. Lassiter-Ragland, Inc., 174 N.C. 579, 94 S.E. 100 (1917).

Where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly. Planters Stores Co. v. Bullock, 180 N.C. 656, 104 S.E. 65 (1920).

Judgment Affirmed.—The appellate court may affirm the judgment of the trial court. Wilson v. Jones, 176 N.C. 205, 97 S.E. 18 (1918); Selwyn Hotel Co. v. Griffin, 182 N.C. 539, 109 S.E. 371 (1921).

New Trial May Be Granted.—The appellate court has power to grant a new trial. Hall v. Hall, 131 N.C. 185, 42 S.E. 562 (1902); Hawk v. Pine Lumber Co., 149 N.C. 10, 62 S.E. 752 (1908).

The appellate court may order a new trial and direct further proceedings in lower court. Williams v. Kearney, 177 N.C. 531, 98 S.E. 705 (1919).

Same—For Newly Discovered Evidence.—The appellate court may, in its discretion order a new trial for newly discovered evidence, on motion in that court. Clark v. Riddle, 118 N.C. 692, 24 S.E. 492 (1896).

The appellate court, in its discretion, may refuse to grant a new trial for newly discovered evidence. Brown v. Mitchell, 102 N.C. 347, 9 S.E. 702 (1889); Sledge v. Elliott, 116 N.C. 712, 21 S.E. 797 (1895).

Same—To Introduce New Evidence.—After appeal, the cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. Springs v. Wilson, 17 N.C. 385 (1833).

Same—When Necessary Party Absent.—Where it appears that a necessary party is missing from the case, or that the issues

are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. Vaughan v. Davenport, 159 N.C. 369, 74 S.E. 967 (1912), modifying opinion, 157 N.C. 156, 72 S.E. 842 (1911).

When New Trial Granted.—When the judgment is not supported by the record (as where the record shows that there was no verdict), or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. McCanless v. Flinchum, 98 N.C. 358, 4 S.E. 359 (1887).

Ordering New Trial of Certain Issues Only.—The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necesary to a proper determination of the cause. Davis v. Southern Ry., 176 N.C. 186, 96 S.E. 945 (1918), denying motion to recall mandate, 175 N.C. 648, 96 S.E. 41 (1918).

On appeal, it is in the discretion of the court whether to restrict a new trial to the issues affected by the error; wherever the error is confined to one or more issues separable from others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. Huffman v. Ingold, 181 N.C. 426, 107 S.E. 453 (1921).

All Issues.—When the appellate court grants a new trial generally without further disposition, the new trial is upon all of the issues, though it has power to grant either a general or partial new trial. Table Rock Lumber Co. v. Branch, 158 N.C. 251, 73 S.E. 164 (1911).

Technical, Formal, or Trivial Defects.—The appellate court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant. Cauble v. Southern Express Co., 182 N.C. 448, 109 S.E. 267 (1921).

A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby. Burleson v. Helton, 258 N.C. 782, 129 S.E.2d 491 (1963).

To Amend Verdict, Findings or Judgment.—The appellate court has power to remand a cause, so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. Gulf Ref. Co. v. McKernan, 178 N.C. 82, 100 S.E. 121 (1919).

Findings as to Costs.—On appeal, a cause may be remanded for a special finding as to the right to costs. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891).

To Find Additional Facts.—Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. Kitchen v. Troy, 72 N.C. 50 (1875).

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of commissioners and from there to the superior court, and the superior court exceeded its jurisdiction and amended the petition to one for the laying out of a public road, the appellate court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceedings thereunder and to proceed according to law. Holmes v. Bullock, 178 N.C. 376, 100 S.E. 530 (1919).

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, in that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the superior court, it is remanded so that the omission may be supplied. Sedbury v. Southern Express Co., 164 N.C. 363, 79 S.E. 286 (1913).

Plaintiff Entitled to Judgment against Sureties on Undertaking.—Upon the affirmance by the appellate court of a judgment of the superior court, in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmance is conclusive of the liability of the sureties. Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

§ 1-298. Procedure after determination of appeal. — In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the

certificate from the appellate division. (1887, c. 192, s. 2; Rev., s. 1526; C. S., s. 659; 1969, c. 44, s. 11.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

Section applies only to judgments of superior court which have been affirmed or modified on appeal. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

It has no application to decision of appellate court reversing judgment of lower court. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

Jurisdiction of Appellate Court after Remand.—The appellate court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918); Davis v. Southern Ry., 176 N.C. 186, 96 SE. 945 (1918).

Jurisdiction of Lower Court after Affirmation.—After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the appellate court, it becomes final, and the court below has no power to remit or modify it. In re Griffin, 98 N.C. 225, 3 S.E. 515 (1887).

Final Assessment Invalid before Opinion Certified.—In Atlantic Coast Line R.R. v. Sanford, 188 N.C. 218, 124 S.E. 308 (1924), the court said: "The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the superior court and while the questions presented on the appeal were yet in fieri."

Proceedings in Trial Court, after Affirmation, Simply Formal.—When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not vacated by the appeal, the affirmation by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. Bond v. Wool, 113 N.C. 20, 18 S.E. 77 (1893).

Effect in Lower Court of Decision of Appellate Court.—Where a judgment has been affirmed or reversed, but no final judgment entered by the appellate court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the appellate court. Lancaster v. Bland, 168 N.C. 377, 84 S.E. 529 (1915).

Procedure When Lower Court Contravenes Judgment of Appellate Court.—A judgment in appellant's favor taxing the costs of action at variance with the decision of the appellate court rendered on appeal, signed upon appellant's motion in the superior court, after examinaion had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. Phillips v. Ray, 190 N.C. 152, 129 S.E. 177 (1925).

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. North Carolina R.R. v. Story, 193 N.C. 362, 137 S.E. 166 (1927).

Applied in Hamilton v. Southern Ry., 203 N.C. 136, 164 S.E. 834 (1932).

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal

and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. Whenever such appeal is docketed and is regularly set for trial, and the appellant; whether plaintiff or defendant, fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the justice of the peace shall be affirmed. (1777, c. 115, s. 63, P. R.; 1794, c. 414, P. R.; R. C., c. 31, s. 105; C. C. P., s. 540; Code, ss. 565, 881; 1889, c. 443; Rev., ss. 607, 609; C. S., s. 660; 1955, c. 256.)

Local Modification.—Transylvania: 1935, c. 32.

I. General Consideration.
II. When Appeal Lies.
III. Power of Superior Court on Appeal.
IV. Dismissal for Failure to Docket—Recordari.

I. GENERAL CONSIDERATION.

Editor's Note. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form of writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

Jurisdiction Dependent on Jurisdiction of Lower Court.—The jurisdiction of the superior court on appeal from justice court is entirely derivative, and, if the justice had no jurisdiction of the action, the superior court acquires none by the appeal. Lower Creek Drainage Comm'rs v. Sparks, 179 N.C. 581, 103 S.E. 142 (1920).

The appellate jurisdiction of the superior court being entirely derivative, if the justice had no jurisdiction in an action the superior court can derive none by amendment. Stacey Cheese Co. v. Pipkin, 155 N.C. 394, 71 S.E. 442 (1911); McLaurin v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

Where the justice did not have jurisdiction of a party, the superior court cannot obtain it on appeal from the justice court, by ordering a summons to issue to bring the party before it. Durham Fertilizer Co. v. Marshburn, 122 N.C. 411, 29 S.E. 411, 65 Am. St. R. 408 (1898).

Jurisdiction Cannot Be Conferred by Consent. — Where the superior court acquired no jurisdiction of a case on appeal from justice's court without jurisdiction, the parties cannot by consent waive the want of jurisdiction. Love v. Huffines, 151 N.C. 378, 66 S.E. 304 (1909).

Plaintiff Must Prove Case. — As on appeal from a justice the whole case must be tried de novo in the superior court, the mere absence of the defendant, who has answered, and raised a material issue, does not relieve plaintiff from the necessity of establishing his cause of action, and it is error, because of such absence, to dismiss the appeal. Barnes v. Southern Ry., 133 N.C. 130, 45 S.E. 531 (1903).

Appeal Waives Objections to Proceedings before Justice. — Where a party appealed from the judgment of a magistrate to the county court, and a trial was had by jury, the matter being gone through with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal. Kearney v. Jeffreys, 30 N.C. 96 (1847).

Where it did not appear in the summons, and there was no complaint that the amount sued for was over the jurisdictional amount limited to justice courts, the objection as to the court's jurisdiction cannot be raised for the first time on appeal to the superior court. Cromer Bros. v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898).

Trial De Novo. — On appeal from a judgment of a justice of the peace to the superior court, the judgment appealed from is vacated, and a trial de novo had in the superior court. Carolina Bagging Co. v. United States R.R. Administration, 184 N.C. 73, 113 S.E. 595 (1922); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Pridgen v. Lynch, 215 N.C. 672, 2 S.E.2d 849 (1939); Brake v. Brake, 228 N.C. 609, 46 S.E.2d 643 (1948).

All litigated matters in the action are to be tried de novo. Falkner v. Pilcher, 137 N.C. 449, 49 S.E. 945 (1905).

On appeal from a justice of the peace, defendants are entitled to a trial de novo, even when they are called and fail to appear. Globe Poster Corp. v. Davidson, 223 N.C. 212, 25 S.E.2d 557 (1943).

Trial upon Original Papers.—The appeal takes the whole action into the superior court, where it is to be tried de novo, not upon a transcript of the record in the justice's court, but upon the original papers, which must be sent up with the appeal. Phelps v. Worthington, 92 N.C. 270 (1885).

Cannot Change Nature of Action.—Defendant, on appeal from a justice of the peace in an action for rent, cannot amend so as to change the nature of the action, and make it one of which a justice's court has no jurisdiction. Shell v. West, 130 N.C. 171, 41 S.E. 65 (1902).

Right to Remit Claim.—Where plaintiff brought suit in the court of a justice of the peace claiming a debt, and also possession of a horse and wagon, under mortgage, on appeal from the justice's judgment to the superior court, he had a right to remit his claim for the personal property and declare only for the debt. Jones v. Palmer, 83 N.C. 303 (1880).

Party Cannot Answer and Demur.—In an action in justice's court where defendant pleaded to the merits and went to trial, and was cast and appealed, his answer, not withdrawn, waived his demurrer subsequently filed in the superior court. Rosenbacher & Bro. v. Martin, 170 N.C. 236, 86 S.E. 785 (1915).

Cited in Sneed v. State Highway Comm'n, 194 N.C. 46, 138 S.E. 350 (1927); Drafts v. Summey, 198 N.C. 69, 150 S.E. 631 (1929); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950); Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964).

II. WHEN APPEAL LIES.

Judgment Must Put an End to Action.—This section implies a final judgment — that is, one that in some way puts an end to the action. Phelps v. Worthington, 92 N.C. 270 (1885).

No Appeal from Interlocutory Judgment.—Appeals cannot be taken from justices of the peace to the superior courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, the judgment of the superior court on appeal dismissing the plaintiff's action on the ground that no service of process had ever been made was erroneous, as no appeal lay from the order of the justice and the superior court should only have dismissed the appeal. Phelps v. Worthington, 92 N.C. 270 (1885).

Appeal from County Commissioner. — An appeal from the board of county commissioners in establishing a public road should be taken in accordance with this section. Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904).

Taxing Prosecutor with Costs of Criminal Prosecution.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. State v. Morgan, 120 N.C. 563, 26 S.E. 634 (1897); State v. Cole, 180 N.C. 682, 104 S.E. 136 (1920).

Motion to Set Aside Judgment. — If a motion to set aside a judgment in the court of a justice of the peace should be allowed or denied improperly, the complaining party may appeal to the superior court. Whitehurst v. Merchants & Farmers Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

Waiver of Right of Appeal.—A defendant by voluntarily paying a judgment taken against him before a justice of the peace waives his right of appeal. Cowell v. Gregory, 130 N.C. 80, 40 S.E. 849 (1902).

Appeal and Not Motion to Set Aside Judgment Proper Remedy.—Where a defendant relied on the assurance of a justice of the peace, that his cause would not be tried, after which the justice rendered a judgment against him in his absence, the remedy is by an appeal or a recordari as a substitute therefor, and not by a motion to set aside the judgment. Navassa Guano Co. v. Bridgers, 93 N.C. 439 (1885).

III. POWER OF SUPERIOR COURT ON APPEAL.

Limiting Trial to Particular Issues. — The superior court may limit the trial on appeal to particular issues, where there is no evidence to support those excluded. Smith v. Newberry, 140 N.C. 385, 53 S.E. 234 (1906).

Incidental Questions. — An appeal from a court of a justice of the peace comprehends in its scope a new trial of the whole subject matter of the action, and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the appellate court. White v. American Peanut Co., 165 N.C. 132, 81 S.E. 134 (1914).

Amount Claimed Limited to Jurisdictional Amount of Justice's Court.—Where the superior court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceeds de novo, the appellate court cannot allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited. Meneely & Co. v. Craven, 86 N.C. 364 (1882). See, as to applicability of section, Cowles v. Hayes, 67 N.C. 128 (1872).

May Disregard Finding of Facts. — On appeal to the superior court from an order of a justice denying a motion to open a default judgment the court may disregard the justice's finding of fact, and proceed to hear the matter anew. Finlayson v. American Accident Co., 109 N.C. 196, 13 S.E. 739 (1891); Turner v. Threshing Mach. Co., 133 N.C. 381, 45 S.E. 781 (1903).

Same—But Not in Summary Proceedings.—Where on a trial in summary proceedings before a justice, there is evidence to establish equitable title in defendant,

and the court finds from such evidence in favor of defendant, and dismisses the action, his judgment cannot be reviewed; but, where there is no evidence, his decision becomes a question of law, and reviewable. McDonald v. Ingram, 124 N.C. 272, 32 S.E. 677 (1899).

Power to Allow New or Amended Pleadings.—Upon an appeal in a civil action from the court of a justice of the peace to the superior court, the latter has power to amend the pleadings and allow new pleas or matters of defense to be set up. Moore v. Garner, 109 N.C. 157, 13 S.E. 768 (1891).

Same—Discretion of Court. — The trial on appeal in the superior court from a justice's judgment is de novo, and the judge may, in his discretion, allow pleadings to be filed. Teal v. Templeton, 149 N.C. 32, 62 S.E. 737 (1908).

Same—Plea of Statute of Limitations. — The plea of the statute of limitations, not relied on before a justice, cannot be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion. Poston v. Rose, 87 N.C. 279 (1882).

Same—Error in Amount of Summons.— Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive. McPhail Bros. v. Johnson, 115 N.C. 298, 20 S.E. 373 (1894).

Same—Error in Initials of Party.—Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal. Clawson v. Wolfe, 77 N.C. 100 (1877).

May Allow Counterclaim. — The superior court may on appeal from justice court allow the defendant to set up a counterclaim not urged in justice court. Norfolk & S.R.R. v. Dill, 171 N.C. 176, 88 S.E. 144 (1916). See Thomas v. Simpson, 80 N.C. 4 (1879).

Same — Refusal to Allow Counterclaim. — Where it appeared that a defendant made no defense to the action, but suffered judgment to be entered against him in a justice's court and appealed to the superior court, but failed to answer or ask for leave to do so until the trial three years later, the court properly refused to allow a plea of counterclaim then to be set up. Johnson v. Rowland, 80 N.C. 1 (1879).

Court Cannot Set Aside Judgment and Docket Case.—Where a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. Ledbetter v. Osborne, 66 N.C. 379 (1872).

May Make Additional Parties. — Under this section the superior court, on appeal from justice's judgment is authorized to bring in an additional defendant, though less than $200 might be recoverable against such defendant. Sellars Hosiery Mills v. Southern Ry., 174 N.C. 449, 93 S.E. 952 (1917). But not where the presence of the codefendant is unnecessary. Morgan v. Royal Benefit Soc'y, 167 N.C. 262, 83 S.E. 479 (1914).

IV. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

Effect of Failure to Docket in Time.— An appeal from justice court not docketed at the first term to which it was returnable is properly dismissed. Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911); Tedder v. Deaton, 167 N.C. 479, 83 S.E. 616 (1914).

If appellant fails to docket his appeal by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed. Simonds v. Carson, 182 N.C. 82, 108 S.E. 353 (1921).

Under this section the judgment of affirmance is, in substance, equivalent to a judgment dismissing the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904).

Failure to Pay Clerk's Fees.—When the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the superior court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss the appeal will be granted. Ballard v. Gay, 108 N.C. 544, 13 S.E. 207 (1891); Lentz v. Hinson, 146 N.C. 31, 59 S.E. 144 (1907).

Dismissal for Failure to Docket Not Reviewable.—The action of the lower court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the justice of the peace, to docket and dismiss an appeal when the appellant had neither paid the clerk's fees nor requested him to docket the appeal. McClintock v. Life Ins. Co., 149 N.C. 35, 62 S.E. 775 (1908).

When Appeal Not Dismissed.—Where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dis-

missed for the failure of the clerk of the superior court to docket the same. Johnson v. Andrews, 132 N.C. 376, 43 S.E. 926 (1903).

Where, on appeal from a justice of the peace, the case was not docketed, because the fees for this service were not tendered or paid to the clerk, but the clerk did not demand his fees or notify the appellant that the appeal would not be docketed unless they were paid, it was no error for the judge to allow the appeal to be docketed two terms after the regular time, and as soon as the appellant was notified that this had not been done. West v. Reynolds, 94 N.C. 333 (1886).

The statute relating to the Greensboro Municipal-County Court prescribed that appeals therefrom should be governed by the rules governing appeals from justices of the peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the superior court. If it had been filed within the ten-day period, it would not have been on the superior court docket for ten days prior to the beginning of the term. It was held that appellee is not entitled to dismissal of the appeal at such term of the superior court notwithstanding appellant's failure to apply for recordari. Starr Elec. Co. v. Lipe Motor Lines, 229 N.C. 86, 47 S.E.2d 848 (1948).

Waiver of Right to Object to Failure to Docket in Time.—Where defendant failed to see that his appeal from judgment of a justice of the peace was docketed at next term of superior court, but appeal was on docket 1½ years without notice from plaintiff that he intended to take advantage of irregularity, it was held that plaintiff waived his right to object. Rawls & Tingle v. Norfolk S.R.R., 172 N.C. 211, 90 S.E. 116 (1916).

Same — Agreement of Attorneys as Waiving Requirement.—Where the opposing attorneys agree that plaintiff's attorney shall make up the transcript of appeal with the justice of the peace, and submit it to defendant's attorney, and plaintiff's attorney failed to conform to the agreement, the appeal will not be dismissed at his instance on the ground that the case was not docketed at the term next ensuing after the appeal was taken. Jerman v. Gulledge, 129 N.C. 242, 39 S.E. 835 (1901).

Same — Agreement That Defendant Should Hold the Property. — An agreement made after judgment by a justice for plaintiff that defendant should hold the property until the cases should be determined by the higher court did not waive plaintiff's right to have the appeal dismissed because not docketed in time. Jones v. Fowler, 161 N.C. 354, 77 S.E. 415 (1913).

Effect of Not Moving to Dismiss for Failure to Docket in Time.—Upon appellant's failure to docket appeal from justice of the peace to superior court at the next term, appellee can move to dismiss at such term, but his failure to do so does not estop him from asserting appellant's failure to docket appeal at the next term as a bar to the trial of the case in the superior court. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919). See Love v. Huffines, 151 N.C. 378, 66 S.E. 304 (1909).

Privilege of Appellee Only.—The power given by this section to the appellee to docket a case at the first term of the superior court, if the appellant does not, and to have the judgment affirmed, is a privilege granted to the appellee only, and the appellant can draw no argument against appellee from his failure to use it. Davenport v. Grissom, 113 N.C. 38, 18 S.E. 78 (1893).

Laches in Applying for Recordari. — When an appeal from a justice's court has not been docketed within the time prescribed by § 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a recordari and to make proper inquiry of the clerk of the superior court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appelle to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911); Clements v. Booth, 244 N.C. 474, 94 S.E.2d 365 (1956).

Appeal Lost through Default of Appellant.—The provisions of this section, as to the writ of recordari, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a recordari. Pickens v. Whitton, 182 N.C. 779, 109 S.E. 836 (1921). See Helsabeck v. Grubbs, 171 N.C. 337, 88 S.E. 473 (1916).

No Recordari after Removal.—A plaintiff who appealed from the judgment of a justice for less than $25, in his favor, he claiming more, and the judge having affirmed the judgment on the papers sent up to him, under this section, is not en-

titled to a recordari to the justice, as the case has already been removed from his court. Cowles v. Hayes, 67 N.C. 128 (1872).

Liability of Justice for Negligent Failure to Docket Appeal.—A justice who is paid the appeal fee and the fee for docketing the appeal, and yet who negligently fails to docket the appeal, so that the right of appeal is thereby lost, is not liable therefor in a civil suit. Simonds v. Carson, 182 N.C. 82, 108 S.E. 353 (1921). See 1 N.C.L. Rev. 55.

§ 1-300. Appeal from justice docketed for trial de novo.—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (C. C. P., s. 539; 1876-7, c. 251, s. 8; Code, s. 880; Rev., s. 608; C. S., s. 661.)

Docketed at Next Ensuing Term.—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the superior court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Southern Pants Co. v. Smith, 125 N.C. 588, 34 S.E. 552 (1899); Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911).

Same—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be docketed at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. Helsabeck v. Grubbs, 171 N.C. 337, 88 S.E. 473 (1916); Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919). Formerly the rule was different. See West v. Reynolds, 94 N.C. 333 (1886).

Term to Which Appeal Is Taken.—An appeal must be taken to the next term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee, that he may show cause against it. Hahn v. Guilford, 87 N.C. 172 (1882). See State v. Edwards, 110 N.C. 511, 14 S.E. 741 (1892).

The "next term" of the court means that term which shall begin next after the expiration of the ten days allowed for service of notice of appeal. Sondley v. City of Asheville, 110 N.C. 84, 14 S.E. 514 (1892).

Same—Whether Civil or Criminal.—The phrase "next term," within rule requiring appeals from justice's judgments to be docketed at the next term, means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. Jerman v. Gulledge, 129 N.C. 242, 39 S.E. 835 (1901); Johnson v. Andrews, 132 N.C. 376, 43 S.E. 926 (1903); Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

An appeal from the action of the county commissioners in altering a public road should be taken to the next term of the superior court, though it was a criminal term. Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904).

Requirement for Time of Trial. — Under this section an appeal from justice court must be tried at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. Helsabeck v. Grubbs, 171 N.C. 337, 88 S.E. 473 (1916); Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919). Formerly the rule was different. See West v. Reynolds, 94 N.C. 333 (1886).

Subsequent Term.—When the term of the appellate court begins within ten days allowed by § 7-179 to perfect an appeal, the appeal is taken to the next term. Gregory v. Hobbs, 92 N.C. 39 (1885); Sondley v. City of Asheville, 110 N.C. 84, 14 S.E. 514 (1892).

When Judge Does Not Attend Next Term.—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over in the same plight and condition, to the subsequent term. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

Duty of Appellant to See Case Properly Docketed.—One appealing to the superior court from a judgment of a justice of the peace must see that the case is properly docketed, or he loses his appeal. Abell v. Thornton Light & Power Co., 159 N.C. 348, 74 S.E. 881 (1912); Clements v. Booth, 244 N.C. 474, 94 S.E.2d 365 (1956).

Failure of Appellant to Docket Appeal in Apt Time.—Under this section it is appellant's duty to docket his appeal in the superior court in time, and his failure to have done so by the next succeeding term of the superior court, wherein the motion of appellee to dismiss has been properly

allowed, or to apply for a recordari, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. Simonds v. Carson, 182 N.C. 82, 108 S.E. 353 (1921).

Docketing at Subsequent Term as Entitling Appellant to Nonsuit.—Under this section a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit. Davenport v. Grissom, 113 N.C. 38, 18 S.E. 78 (1893).

Finality of Judgment.—Where a justice of the peace has taken a case under advisement and later renders judgment against the defendant without notice to him, and the defendant does all that the law requires of him, after he had notice of the judgment, to perfect his appeal to the superior court within the time required by statute, and later has recordari issued from the latter court, the judgment appealed from will not be held as final. Blacker v. Bullard, 196 N.C. 696, 146 S.E. 807 (1929).

Plea of Limitations.—An appeal from a court of a justice of the peace is tried de novo in the superior court, under this section, and when the account sued on is admitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. Fochtman v. Greer, 194 N.C. 674, 140 S.E. 442 (1927).

Effect of Dismissal.—The dismissal of an appeal from a court of a justice of the peace, when not docketed by the appellant at the term of the superior court prescribed by this section, has the same effect as an affirmation of a judgment thereof under § 1-299. McClintock v. Life Ins. Co., 149 N.C. 35, 62 S.E. 775 (1908).

Cited in Starr Elec. Co. v. Lipe Motor Lines, 229 N.C. 86, 47 S.E.2d 848 (1948).

§ 1-301. **Plaintiff's cost bond on appeal from justice.**—When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of the appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. (1831, c. 29; R. C., c. 31, s. 104; Code, s. 564; Rev., s. 606; C. S., s. 662.)

Cross Reference.—As to costs on appeal, see § 6-33 and note thereto.

Necessity for Surety. — The Code requires no surety on an appeal from a justice's judgment. Steadman v. Jones, 65 N.C. 388 (1871).

Discretion of Judge as to Requiring of Security.—In an appeal by a defendant to the superior court from a judgment of a justice of the peace, it lies within the discretion of the presiding judge to require the plaintiff to give security for the further prosecution of the suit, or not. Smith v. Richmond & D.R.R., 72 N.C. 62 (1875).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-302. **Judgment enforced by execution.**—Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (C. C. P., s. 257; Code, s. 441; Rev., s. 615; C. S., s. 663.)

Cross Reference. — As to provisions for punishment for contempt generally, see §§ 5-1 through 5-9.

In General. — An execution is a writ, issuing from a court, and is an authority to the sheriff or other officer to do what it commands. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 6 L. Ed. 253 (1825).

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. Sheppard v. Bland, 87 N.C. 163 (1882). The general

rule is that the power to issue an execution is a necessary consequence to the power to render judgment. Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 6 L. Ed. 264 (1825).

A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. Vegelahn v. Smith, 95 N.C. 254 (1886).

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Purpose of Execution.—An execution is the end and life of the law, and is indispensably necessary to the beneficial exercise of the jurisdiction of a court. Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 6 L. Ed. 264 (1825). The purpose of an execution is to give effect to the judgment on which issued. Harshman v. Knox County, 122 U.S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152 (1887).

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

Property Subject to Execution. — The property need not be the subject of sale. It is the title of the defendant, and not the property itself, which is subject to execution. Turner v. Fendall, 5 U.S. (1 Cranch) 117, 2 L. Ed. 53 (1801); The Moses Taylor, 71 U.S. (4 Wall.) 411, 18 L. Ed. 397 (1866).

What Law Governs.—Liability of property to be subjected to execution is in the case of real estate, to be determined by the law of the jurisdiction of the situs. Spindle v. Shreve, 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884).

Liability in the case of personal property is determined by the law of the state where the property actually is, regardless of the domicile of the owner. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 23 L. Ed. 1003 (1876).

And in the case of choses in action and trusts, liability is determined by the place where created or found. Spindle v. Shreve, 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884).

Debtor's Funds in Hands of Third Person. — Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the funds. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

An order taxing the cost of action against a party, is in effect a judgment, upon which an execution may be issued under the provisions of this section. Sheppard v. Bland, 87 N.C. 163 (1882).

After Death of Defendant.—But an execution issued on a judgment after the death of the defendant is void. Sawyers v. Sawyers, 93 N.C. 321 (1885); Williams v. Weaver, 94 N.C. 34 (1886). For new execution against the property after defendant dies in execution, see § 1-312.

Execution against Counties Not Authorized.—A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. Gooch v. Gregory, 65 N.C. 142 (1871).

Remedy for Refusal of Clerk to Issue Execution.—Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) He may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) he may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. Gooch v. Gregory, 65 N.C. 142 (1871); Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co., 128 N.C. 199, 38 S.E. 831 (1901).

Justice's Judgments Enforceable by Execution.—For the purposes of its enforcement by execution the judgment of a justice's court is given the same effect and force as the judgments of the superior courts. Broyles v. Young, 81 N.C. 315 (1879).

Cited in Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941); Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

§ 1-303. Kinds of; signed by clerk; when sealed.—There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or

personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (C. C. P., s. 258; Code, s. 442; Rev., s. 616; C. S., s. 664.)

Cross References.—As to forms of executions, see § 1-313. For execution against the person, see §§ 1-311 and 1-313.

Sealing Execution Issued to Another County.—Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. Governor ex rel. Shackelford v. M'Rea, 10 N.C. 226 (1824); Seawell v. Bank of Cape Fear, 14 N.C. 279 (1831); Finley v. Smith, 15 N.C. 95 (1833); Freeman v. Lewis, 27 N.C. 91 (1844); Taylor v. Taylor, 83 N.C. 116 (1880).

Without a seal it confers no power on the sheriff, and his acting under it cannot give it validity. Governor ex rel. Shackelford v. M'Rea, 10 N.C. 226 (1824); Shepherd v. Lane, 13 N.C. 148 (1828).

Execution on Certificate of Commissioner of Revenue.—See note to § 1-307.

§ 1-304. **Against married woman.**—An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (C. C. P., s. 259; Code, s. 443; Rev., s. 617; C. S., s. 665.)

Effect of the Restriction.—The provision of this section that the execution shall be levied only upon her separate property can give no effect other than to exempt what she holds ex jure mariti, i.e., her contingent right of dower. There is nothing else to which the restriction could possibly apply. Harvey v. Johnson, 133 N.C. 352, 45 S.E. 644 (1903). See McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898).

Execution on All Separate Property Except Exemptions. — Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to men or a feme sole. Harvey v. Johnson, 133 N.C. 352, 45 S.E. 644 (1903).

Claiming Exemptions.—In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. Harvey v. Johnson, 133 N.C. 352, 45 S.E. 644 (1903).

Application of Restriction as to Property Charged with Debt. — This section does not restrict the issue of execution against "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly, out of the husband, though he is still a necessary party defendant with her. McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Thrash v. Ould, 172 N.C. 730, 90 S.E. 915 (1916).

Requisites Should Appear on Record.—The mandate of this section that whenever an execution may issue against a married woman it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise, presupposes that all these requisites appear of record, and that the existence of such separate property is fixed by the judgment. Dougherty v. Sprinkle, 88 N.C. 300 (1883).

§ 1-305. **Clerk to issue, in six weeks; penalty.** — The clerk of the superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (1850, c. 17, ss. 1, 2, 3; R. C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C. S., s. 666; 1953, c. 470; 1959, c. 1295.)

Clerk to Issue. — The clerk of the superior court, not the judge, is the proper officer to issue execution. McKethan v. McNeill, 74 N.C. 663 (1876).

It is the duty of a clerk, as a ministerial officer of the court, to issue execution. Gooch v. Gregory, 65 N.C. 142 (1871). See Spencer v. Hawkins, 39 N.C. 288 (1846).

A deputy clerk has power to issue execution in the name of the clerk. Miller v. Miller, 89 N.C. 402 (1883).

Suspension of Statute by Ordinance of 1866.—See Badham v. Jones, 64 N.C. 655 (1870); McIntyre v. Merritt, 65 N.C. 558 (1871); Richardson v. Wicken, 80 N.C. 172 (1879); Williamson v. Kerr, 88 N.C. 11 (1883).

What constitutes "Issuing" of Execution.—A writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk, is not sufficient. State v. McLeod, 50 N.C. 318 (1858).

It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. McKeithen v. Blue, 149 N.C. 95, 62 S.E. 769 (1908).

The signature of the clerk is an absolute necessity to the validity of the writ and this is all the more so since the legislature dispensed with the other indicium of the writ's authenticity, that is, a seal when the writ was to be executed within the county in which it issued. Shepherd v. Lane, 13 N.C. 148 (1828).

The signature of a justice is absolutely necessary to an alias, as well as to an original execution on a justice's judgment. Hence an entry of "execution renewed" without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it. Huggins v. Ketchum, 20 N.C. 550 (1839).

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it. Shepherd v. Lane, 13 N.C. 148 (1828).

Endorsement on Execution Docket. — The requirement to "endorse on the record the date of the issuing" means that the entry should be made on an "execution docket," and is not compiled with by an entry on the execution. Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

Option to Issue to One of Two Counties —Amercement. — An allegation that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties will not justify an amercement under this section. Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

Liability in Damages of Clerk for Failure to Issue.—Under this section a clerk and master, who failed to issue an execution based upon a decree obtained when the defendant had become insolvent, were held liable in damages for whatever sum the plaintiff can show he has sustained by such nonfeasance. McIntyre v. Merritt, 65 N.C. 558 (1871).

Payment of Fees Condition to Clerk's Liability.—This section and § 138-2, providing that the clerk shall not be compelled to perform any services unless his fees be paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for failure to issue execution within six weeks, unless the plaintiff pays or tenders him his fees for that service. Bank of Oxford v. Bobbitt, 111 N.C. 194, 16 S.E. 169 (1892). See Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947).

Penalty to Whose Benefit.—This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. Simpson v. Simpson, 63 N.C. 534 (1869).

Remedy for Refusal of Clerk to Issue.—See Gooch v. Gregory, 65 N.C. 142 (1871), in note to § 1-302.

Applied in Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

§ **1-306. Enforcement as of course.**—The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this article; provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition

of judgment, or any judgment directing the payment of alimony. (C. C. P., s. 255; Code, s. 437; Rev., s. 619; C. S., s. 667; 1927, c. 24; 1935, c. 98.)

Procedure for Obtaining New Judgment.—Under the proviso in this section no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof, and the only procedure whereby the owner of the judgment may obtain a new judgment for the amount is by independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt, which action must, under § 1-47, be commenced within 10 years from the date of the rendition of the judgment. Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

The concept of a dormant judgment and scire facias for leave to issue execution thereon is now obsolete. Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

Preserving Vitality of Judgment by Successive Executions.—Where under this section the vitality of the judgment has been preserved by the issuance of executions within each successive period of three years (that being the limitation prior to 1927 amendment) after its rendition, the statutory bar of ten years which is the time prescribed for bringing actions on judgments, does not prevent an execution from being issued, and the seizure and sale of personal property thereunder, after the expiration of the limited period. Williams v. Mullis, 87 N.C. 159 (1882).

Homestead. — The allotment of homestead suspends the running of the statute of limitations. Cleve v. Adams, 222 N.C. 211, 22 S.E.2d 567 (1942).

Sale Must Be Completed within Ten Years.—This section and § 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

Expiration of Lien of Judgment.—Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Execution Sale Held Less than Ten Days before Expiration of Ten Years.—See note to § 1-234.

Effect of Enjoining Execution.—A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment. Holden v. Totten, 228 N.C. 204, 44 S.E.2d 874 (1947).

Cited in Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

§ 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, one thousand nine hundred and forty-five, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (1871-2, c. 74; 1881, c. 75; Code, s. 444; Rev., s. 623; C. S., s. 669; 1945, c. 773.)

Cross Reference. — As to penalty for false return by sheriff, see § 162-14.

Return to Another County Not Authorized.—Since the passage of the act of 1870-'71, ch. 42, the clerk of the superior court of one county cannot issue a summons re-

turnable in the superior court of another. Howerton v. Tate, 66 N.C. 431 (1872).

May Issue Only from Court Rendering Judgment. — Under the original Code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-'72, ch. 74, § 1, executions shall issue only from the court in which the judgment was rendered. Hasty v. Simpon, 77 N.C. 69 (1877); Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

This section and § 1-352 must be construed in pari materia with other statutes relating to the same matter. Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936). See §§ 1-493, 1-501 and 7-286.

Execution on Certificate of Commissioner of Revenue.—Where the Commissioner of Revenue has the clerk of a superior court docket his certificate setting forth the tax due by a resident of the county pursuant to § 105-242 (c), execution on such judgment directed to the sheriff of the county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

§ 1-308. To what counties issued.—When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution is to be issued. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Execution may be issued at the same time to different counties. (C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905, c. 412; Rev., s. 622; C. S., s. 670; 1953, c. 884.)

Several Defendants.—A writ was issued against three defendants, two of whom were in one county and the other in another county, in which the judgment was rendered. Held, that in the absence of special instructions, the clerk might issue an execution to either county. Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

§ 1-309. Sale of land under execution.—Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (C. C. P., s. 259; Code, s. 443; Rev., s. 622; C. S., s. 671.)

Foreclosure Sales Not Affected. — The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. Kidder v. McIlhenny, 81 N.C. 123 (1879).

Sale by Successor in Office.—Where a fi. fa. was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing, and must be completed by the hand which commenced it. Sanderson v. Rogers, 14 N.C. 38 (1831).

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. Tarkinton v. Alexander, 19 N.C. 87 (1936).

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. Tarkinton v. Alexander, 19 N.C. 87 (1836), explaining and reconciling the cases of Holliday v. Eastwood, 12 N.C. 157 (1827), and Sanderson v. Rogers, 14 N.C. 38 (1831), with those of Barden v. M'Kinne, 11 N.C. 279 (1826), and Seawell v. Bank of Cape Fear, 14 N.C. 279 (1831), and approving them all.

Upset Bid—Setting Aside Sale.—An execution sale, when closed, was not subject to an upset bid prior to Public Laws 1933, c. 482, and, when regularly made, such sale was not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which was required to be alleged and proved, with each case to be judged by its own facts. Weir v. Weir, 196 N.C. 268, 145 S.E. 281 (1928).

§ 1-310. When dated and returnable. — Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624, C. S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697.)

By this statute the legislature has fixed the life of an execution. It begins on the day of the issuance of the execution, and by limitation terminates ninety days from the date of it. It may not be returned in less than forty days but must be returned in ninety days. Hence, under this statute an execution should be made returnable "not less than forty nor more than ninety days" from its date. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. Gardner v. McDonald, 223 N.C. 555, 27 S.E.2d 522 (1943).

The term "return" implies that the process is taken back, with such endorsements as the law requires, to the place from which it originated. Brogden Prod. Co. v. Stanley, 267 N.C. 608, 148 S.E.2d 689 (1966).

Computation of First and Last Day.—In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. Taylor v. Harris, 82 N.C. 25 (1880).

Attestation and Dating Directory.—This section which formerly required the attestation of the execution is merely directory, and the omission of such attestation does not vitiate the process. Bryan v. Hubbs, 69 N.C. 423 (1873); Williams v. Weaver, 94 N.C. 134 (1886). This rule would now be equally applicable to the provision requiring the dating of the execution.—Ed. note.

The Return Day Formerly.—Formerly, when the section required that the execution be returned to the next term of the court, it was held that the sheriff was not compelled to make his return of an execution on the first day of the term, though it was more regular, and for many reasons desirable that he should do so, and that it was sufficient if he make the return during the term, unless ruled to make it on an earlier day of the term. Boyd v. Teague, 111 N.C. 246, 16 S.E. 338 (1892).

Applied in Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947); North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

§ 1-311. Against the person.—If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. (C. C. P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C. S., s. 673; 1947, c. 781.)

Cross Reference.—As to provisional remedies by arrest and bail, see § 1-409 et seq.

General Doctrine.—Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906); Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

If a judgment is rendered against a defendant for a cause of action specified in § 1-410 (1), this section authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Three Classes of Cases Contemplated.—This section providing for execution against the person of the defendant, taken in connection with § 1-411, contemplates

three classes of cases: (1) where the cause of arrest is not set forth in the complaint; (2) where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause set forth in the complaint is essential to the plaintiff's claim. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

This section contemplates three classes whereby execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit; (2) where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action; and (3) where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Same—The First Class.—In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

Same—The Second Class.—In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

Same — The Third Class. — In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

Upon Docketed Judgment of Justice. — An execution against the person can only issue upon a docketed judgment of a justice of the peace when it is authorized by this section, or when it appears to the clerk that the defendant had been arrested before judgment. McAden v. Banister, 63 N.C. 479 (1869).

Necessity for Sufficient Allegations.—An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under § 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Necessity of Recovery of Judgment.—No execution can issue against the person of the defendant, even though the complaint alleges facts to justify an arrest, unless the plaintiff has recovered a judgment against the defendant. Thus in Stewart v. Bryan, 121 N.C. 46, 28 S.E. 18 (1897), the court expounding this doctrine, said: "It will not do to carry the doctrine of State ex rel. Peebles v. Foote, under this section, to the extent contended for in the argument for plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution."

An execution against the person cannot issue simply because of allegations in the complaint. The facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Effect of execution.—The effect of an execution against the person is to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above fifty dollars. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of § 1-410 (1) and to issue an execution against their persons by virtue of the provisions of this section, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Two Alternative Conditions Prerequisite.—There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) a lawful arrest before judgment, or (b) a complaint averring such facts as would have justified

an order for an arrest. Houston v. Walsh, 79 N.C. 36 (1878).

Facts Must Enter into Judgment.—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

Facts Pleaded and Proved and Issue Determined.—In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

In the Absence of Order for Arrest, or Complaint.—Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. Houston v. Walsh, 79 N.C. 36 (1878).

It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887).

Motion before the Clerk—Appeal to Superior Court.—Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

Execution for Conversion.—Under this section and § 1-410, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse, converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

Under this section an affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, is sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial, and a specific finding of fraud being unnecessary. East Coast Fertilizer Co. v. Hardee, 211 N.C. 653, 191 S.E. 725 (1937).

For Injury Committed to Plaintiff's Person — Stay of Execution. — Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff who appealed without giving bond to stay execution, it was held, (1) upon the return of execution against defendant's property unsatisfied an execution upon the person may issue; (2) filing an inventory of his property, etc., will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judgment. Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911).

Injury Wilfully Inflicted.—Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper under this section and § 1-410. Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: Held, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody under this section, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury

or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. Overton v. Combs, 182 N.C. 4, 108 S.E. 357 (1921).

Allegation of Malice. — In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. Olinger v. Camp, 215 N.C. 340, 1 S.E.2d 870 (1939).

Discharge of Person under Execution. —The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of $50. Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894). The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above $50.

When a person is taken by authority of an execution against his person by virtue of the provisions of this section, he can be discharged from imprisonment only by payment or giving notice and surrender of all his property in excess of fifty dollars as provided in § 23-23 and §§ 23-30 through 23-38. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of § 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of this section. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Allegation and Proof. — Where plaintiff suggests fraud in defendant's affidavit of insolvency he must sufficiently allege and prove fraud or proceeding will be dismissed. Hayes v. Lancaster, 202 N.C. 515, 163 S.E. 602 (1932).

Cited in Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

§ 1-312. Rights against property of defendant dying in execution. —Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have the same rights against the property of the person deceased, as they might have had if that person had never been in execution. (21 James I, s. 24; R. C., c. 45, s. 28; Code, s. 469; Rev., s. 626; C. S., s. 674.)

Cross Reference. — As to payment of judgments in settlement of a decedent's estate, see § 28-105.

§ 1-313. Form of execution.—The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Cross Reference. — As to subscribing and sealing the execution by the clerk, see § 1-303 and note thereto.

Liens on Real Estate and Personalty Distinguished.—A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

To make a valid levy the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Duty to Report Levy on Automobile.— When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate by the Department. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

(1) Against Property—No Lien on Personal Property until Levy. — If it is against the property of the judgment debtor, it shall require the officer

to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Refusal to Produce Personalty Warrants Sale of Realty.—The provision requiring that the officer satisfy the judgment first out of the personalty, is solely for the debtor's benefit, and if he refuses to produce his personalty his lands may be sold. McCoy v. Beard, 9 N.C. 377 (1823).

The judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the sheriff is about to make a levy. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

And No One Else Can Object if Sheriff Sells Land First. — The provisions that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor and nobody else can object if the sheriff levies on and sells land without first exhausting the judgment debtor's personalty. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Presumption That Sheriff Levied on Realty.—Where it is not made to appear that the judgment debtors possessed personalty, attack on the sale on the ground that the sheriff failed to satisfy the judgment out of the personalty is untenable, since it will be presumed that the sheriff levied on realty because he could not find any personalty. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Lien as of What Time against Purchasers.—Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. Weinsenfield v. McLean, 96 N.C. 248, 2 S.E. 56 (1887).

The lien of an execution against the realty dates from the time of the rendition of judgment, provided it is docketed. See § 1-234.

Sale of Realty without Levy.—A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be fully made known at the sale what property is being sold. Farrior v. Houston, 100 N.C. 369, 6 S.E. 72 (1888).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937).

(2) Against Property in Hands of Personal Representative.—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

(3) Against the Person.—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

When Irregular.—An execution is irregular if it does not run in the name of the State and convey its authority to the officers to arrest the defendant. Houston v. Walsh, 79 N.C. 36 (1878).

Should Command the Sheriff. — Executions issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law. Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887).

(4) For Delivery of Specific Property.—If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy

any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(5) For Purchase Money of Land.—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C. S., s. 675.)

Recital in Judgment Conclusive.—If the judgment of the court recites the fact that the debt was contracted for the purchase of land, as prescribed by this clause of this section, such recital is conclusive as between the parties to the record. Durham v. Wilson, 104 N.C. 595, 10 S.E. 683 (1889).

Reason of Recital as to Homestead Interest. — The homestead interest of a defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. Hence the requirement that it shall be set forth in the judgment and execution that the debt sued on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. Toms v. Fite, 93 N.C. 274 (1885).

Same—Sale Not Void.—Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. Durham v. Bostick, 72 N.C. 353 (1875).

§ 1-314. Variance between judgment and execution.—When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (1848, c. 53; R. C., c. 44, s. 13; Code, s. 1347; Rev., s. 628; C. S., s. 676.)

Liberal Construction.—This section is to be liberally construed. Wilson v. Taylor, 98 N.C. 275, 3 S.E. 492 (1887).

Execution for Less Amount than Judgment.—The fact that the execution varied from the judgment in being for a less amount is expressly cured by this section. Maynard v. Moore, 76 N.C. 158 (1877).

Execution for Larger Amount than Judgment. — In the case of Hinton v. Roach, 95 N.C. 106 (1886), the docket showed a judgment in favor of Hinton against Roach for $28, while the execution recited also other judgments and called for a larger sum than $28. It was held that the irregularity was cured by this section.

Technical Variance Immaterial.—Where a judgment was rendered against H for $182.20 and against other defendants, separately mentioned, for various amounts and an execution was issued reciting only the judgment against H for $182.20, and commanding the sheriff to satisfy it out of H's property, it was held, that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. Marshburn v. Lashlie, 122 N.C. 237, 29 S.E. 371 (1898).

§ 1-315. Property liable to sale under execution; bill of sale.—(a) The following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution:

(1) Goods, chattels, and real property belonging to him.

(2) Leasehold estates of three years duration or more owned by him.
(3) Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him, or transferred to a trustee for security by him.
(4) Real property or goods and chattels of which any person is seized or possessed in trust for him.
(5) Choses in action represented by instruments which are indispensable to the chose in action.
(6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property.
(7) Interests as vendee under conditional sales contracts of personal property.

(b) Upon the sale under execution of any property or interest for which no provision is otherwise made under this article for the furnishing of a deed or other instrument of title, the officer holding the sale shall execute and deliver to the purchaser a bill of sale.

(c) No execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P. R.; 1812, c. 830, ss. 1, 2, P. R.; 1822, c. 1172, P. R.; 1844, c. 35; R. C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C. S., s. 677; 1961, c. 81.)

Cross Reference.—See note to § 1-440.4.

Common Law. — An equitable right in land cannot be levied upon and sold under an execution at common law. Payne v. Hubbard, 4 N.C. 195 (1815).

At common law an equity of redemption in land was not subject to levy and sale under execution, and was first made so in this State by acts of 1812, ch. 4, § 2, and this was true also as to the trusts mentioned in acts of 1812, ch. 4, § 1, which changed the law in this respect (see subsection (a) (4)). Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

History.—As to historical development of legislation by which the lands of debtors became subject to execution, thus changing the common-law rule, see Jones v. Edmonds, 7 N.C. 43 (1819).

Rule Prior to Statute. — In Allison v. Gregory & Sons, 5 N.C. 333 (1809), the court held that an equity of redemption in real property was not liable to be sold on execution. This was prior to the act of 1812.

Purpose.—This section did not mean to change the nature of trusts, the relation between the trustee and cestui que trust, or the rights of the latter against the former. The sole purpose of it was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

General Doctrine. — An equity of redemption whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution according to subsection (a) (3). Whitesides v. Williams, 22 N.C. 153 (1838); Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

Public Property and Institutions.—Property held for necessary public uses and purposes, such as courthouses, jails, schoolhouses, etc., cannot be sold under execution. Gooch v. Gregory, 65 N.C. 142 (1871); Vaughan v. Commissioners of Forsyth County, 118 N.C. 636, 24 S.E. 425 (1896); Morganton Hdwe. Co. v. Morganton Graded Schools, 151 N.C. 507, 66 S.E. 583 (1909).

Life Estate.—Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt: Held, the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and under this section may be sold under execution on a judgment against him. Mizell v. Bazemore, 194 N.C. 324, 139 S.E. 453 (1927).

Vested Remainders. — The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. Ellwood v. Plummer, 78 N.C. 392 (1878); Bristol v. Hallyburton, 93 N.C. 384 (1885).

Contingent remainders are not subject to execution while they remain contingent.

Watson v. Dodd, 68 N.C. 528 (1873), aff'd on rehearing, 72 N.C. 240 (1875). See Watson v. Watson, 56 N.C. 400 (1857); Bristol v. Hallyburton, 93 N.C. 384 (1885).

Reversions.—A reversion in fee is liable to be taken and sold under execution. Murrell v. Roberts, 33 N.C. 424 (1850).

Standing matured crops are subject to execution. Shannon v. Jones, 34 N.C. 206 (1851).

Mortgagee Subjecting Mortgagor's Equity of Redemption.—A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the section. Camp v. Coxe, 18 N.C. 52 (1834), in which Ruffin, C.J., points out with great clearness the reasons upon which this exception to this section is based. McPeters v. English, 141 N.C. 491, 54 S.E. 417 (1906).

The interest of a vendee, who holds a bond for the title to land, cannot be subjected to sale under execution upon a judgment rendered for the purchase money. McPeters v. English, 141 N.C. 491, 54 S.E. 417 (1906).

Interest of Cestui Que Trust. — Under this section an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. Patrick v. Beatty, 202 N.C. 454, 163 S.E. 572 (1932).

Must Be Equitable Estate and Not Mere Right.—By this section an equitable estate but not a mere right is subject to execution. Nelson v. Hughes, 55 N.C. 33 (1854). But see Deaton v. Gaines, 4 N.C. 424 (1816).

"A right" to have one declared a trustee is not subject to execution. Nelson v. Hughes, 55 N.C. 33 (1854).

Nature of Trustee's Interest as Affecting Salability under Execution.—When land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905). In other words this section does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the cestui que trust to demand it as a matter of right under the Statute of Uses. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as the mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

Residue of Property Conveyed in Trust for Payment of Debt.—Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. Harrison v. Battle, 16 N.C. 537 (1830); Pool v. Glover, 24 N.C. 129 (1841).

Prior to 1884 and at common law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. Shannon v. Jones, 34 N.C. 206 (1851); Kesler v. Cornelison, 98 N.C. 383, 3 S.E. 839 (1887).

Only property of the judgment debtor may be levied on and sold under execution. A levy made on property of a person other than the judgment debtor constitutes a trespass. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Applicable to Passive Trusts.—The provisions of subsection (a) (4) of this section and § 1-316 do not apply to an active trust. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

The common-law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, but even so, the trustee must be brought in by supplemental proceeding under G.S. 1-360 et seq. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Applied in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

Cited in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

§ 1-316. **Sale of trust estates; purchaser's title.**—Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (1812, c. 830, P. R.; R. C., c. 45, s. 4; Code, s. 452; Rev., s. 630; C. S., s. 678.)

Cross Reference.—See note to § 1-315.

Application to Certain Trusts Only.—This section, as has been repeatedly decided, comprehends those cases only where the whole beneficial estate is in the debtor, and nothing remains in the trustee but a naked legal estate. Deaver v. Parker, 37 N.C. 40 (1841). See also Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936); Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-317. **Sheriff's deed on sale of equity of redemption.**—The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (1812, c. 830, s. 2, P. R.; 1822, c. 1172, P. R.; R. C., c. 45, s. 5; Code, s. 451; Rev., s. 631; C. S., s. 679.)

Provisions Not Mandatory.—The provisions of this section are mandatory. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

§ 1-318. **Forthcoming bond for personal property.** — If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim. (1807, c. 731, s. 3, P. R.; 1828, c. 12, s. 2; R. C., c. 45, s. 21; Code, s. 463; Rev., s. 633; C. S., s. 680.)

Definition.—A forthcoming and delivery bond is a bond given for the security of an officer, conditioned to produce the property levied on when required. Bouvier's Law Dict., vol. 1, p. 834.

Jurisdiction. — It has been held, that a motion upon a forthcoming bond given to secure possession of property taken under an execution, will not be allowed other than in the same court from which the execution issued. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 2 L. Ed. 115 (1803).

Nature and Purpose. — The forthcoming bond is regarded as part of the process of execution; but it cannot be considered as a substitute for the property, as a condition requires its return to the sheriff. Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 9 L. Ed. 470 (1836); Amis v. Smith, 41 U.S. (16 Pet.) 303, 10 L. Ed. 973 (1842).

On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff, but the property is not withdrawn from the custody of the law. The property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff. Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 9 L. Ed. 470 (1836).

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. Gray v. Bowls, 18 N.C. 437 (1836).

Peaceable Production, etc., of the Property.—Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified—otherwise their bond will be forfeited. Poteet v. Bryson, 29 N.C. 337 (1847).

§ 1-319. **Procedure on giving bond; subsequent levies.**—When the forthcoming bond is taken the officer must specify therein the property levied upon and furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on

the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (1844, c. 34; 1846, c. 50; R. C., c. 45, s. 22; Code, s. 464; Rev., s. 634; C. S., s. 682.)

§ **1-320. Summary remedy on forthcoming bond.**—If the condition of such bond be broken, the sheriff or other officer, on giving ten days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before a justice of the peace, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice. (1822, c. 1141, P. R.; R. C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C. S., s. 681.)

§ **1-321. Entry of returns on judgment docket; penalty.**—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last-mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C. S., s. 683.)

Execution Returned Becomes Part of Record.—An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. Walters v. Moore, 90 N.C. 41 (1884).

Applied in Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947).

§ **1-322. Cost of keeping livestock; officer's account.**—The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the justice or court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (1807, c. 731, P. R.; R. C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C. S., s. 684.)

§ **1-323. Purchaser of defective title; remedy against defendant.**—Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the

property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser. (1807, c. 723, P. R.; R. C., c. 45, s. 27; Code, s. 468; Rev., s. 639; C. S., s. 685.)

Editor's Note.—The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, though it be a bare legal title, the equitable title being in some other person, or a defective title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. See Lewis v. McDowell, 88 N.C. 261 (1883).

Judgment Satisfied — Purchaser's Remedy against Execution Debtor.—The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own real owner, is nonetheless satisfied, and the remedy of the creditor is under this section not upon the judgment, but against the judgment debtor for reimbursement. Halcombe v. Loudermilk, 48 N.C. 491 (1856); Wall v. Fairley, 77 N.C. 105 (1877).

Tantamount to Implied Warranty of Title. — This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, and whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. Holliday v. McMillan, 83 N.C. 270 (1880).

Nature of Claim. — The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. Laws v. Thompson, 49 N.C. 104 (1856).

Substitution or Subrogation to the Rights of Execution Creditor. — See Pemberton v. McRae, 75 N.C. 497 (1876). And see Laws v. Thompson, 49 N.C. 104 (1856).

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-324.1. **Judgment against corporation; property subject to execution.**—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66; Rev., s. 1212; C. S., s. 1201; 1955, c. 1371, s. 2.)

Editor's Note. — Session Laws 1955, c. 1371, s. 2, effective July 1, 1957, transferred former G.S. 55-140 through 55-146 to appear as this and the six following sections. Until said date they were effective as article 12 of chapter 55 of the General Statutes.

§ 1-324.2. **Agent must furnish information as to corporate officers and property.**—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C. S., s. 1202; 1955, c. 1371, s. 2.)

§ 1-324.3. **Shares subject to execution; agent must furnish information.**—Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a cer-

tificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C. S., s. 1203; 1955, c. 1371, s. 2.)

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation, and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor and such delivery, with a transfer to the officer in writing, for the use of the creditor and notice to the debtor, shall be a valid assignment thereof, and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and G.S. 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C. S., s. 1204; 1955, c. 1371, s. 2.)

The term "debts" is used in this section in a restricted sense. Any agent or person having custody must deliver any evidence of such debt to the officer with a transfer to the officer in writing, and notice to the creditor shall be a valid assignment thereof. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. Caldlaw, Inc. v. Caldwell, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

And Does Not Include Unliquidated Claim for Damages for Breach of Trust.—A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation for the satisfaction of his claim, and an unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises ex delicto and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. Caldlaw, Inc. v. Caldwell, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

§ 1-324.5. Violations of three preceding sections misdemeanor. — If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C. S., s. 1205; 1955, c. 1371, s. 2.)

§ 1-324.6. Proceedings when custodian of corporate books is a nonresident.—When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the

sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant, and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C. S., s. 1206; 1955, c. 1371, s. 2.)

§ 1-324.7. **Duty and liability of nonresident custodian.**—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in G.S. 1-324.6, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation, and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him, but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218; C. S., s. 1207; 1955, c. 1371, s. 2.)

Article 29.

Execution and Judicial Sales.

§§ **1-325 to 1-328:** Repealed by Session Laws 1949, c. 719, s. 2.

§ **1-329:** Transferred to § 1-339.72 by Session Laws 1949, c. 719, s. 3.

§ **1-330:** Repealed by Session Laws 1949, c. 719, s. 2.

§ **1-331:** Transferred to § 1-339.73 by Session Laws 1949, c. 719, s. 3.

§ **1-332:** Transferred to § 1-339.74 by Session Laws 1949, c. 719, s. 3.

§§ **1-333, 1-334:** Repealed by Session Laws 1949, c. 719, s. 2.

§ **1-335:** Transferred to § 1-339.75 by Session Laws 1949, c. 719, s. 3.

§ **1-336:** Repealed by Session Laws 1949, c. 719, s. 2.

§ **1-337:** Transferred to § 1-339.49 by Session Laws 1949, c. 719, s. 2.

§ **1-338:** Transferred to § 1-339.50 by Session Laws 1949, c. 719, s. 2.

§ **1-339:** Repealed by Session Laws 1949, c. 719, s. 2.

Article 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions. — (a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale
   a. Contained in a mortgage, deed of trust, or conditional sale contract, or
   b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or
(2) A resale ordered with respect to any sale described in subsection (a) (1), where such original sale was not held under a court order, or
(3) An execution sale, or
(4) A sale ordered in a criminal action, or
(5) A tax foreclosure sale, or
(6) A sale made pursuant to article 4 of chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or
(7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or
(8) A sale made in the course of liquidation of an insurance company pursuant to article 17A of chapter 58 of the General Statutes, or
(9) Any other sale the procedure for which is specially provided by any statute other than this article.

(b) As hereafter used in this article, "sale" means a judicial sale. (1949, c. 719, s. 1.)

Cross References.—As to execution sales, see §§ 1-339.41 through 1-339.71. As to sales under power of sale, see §§ 45-21.1 through 45-21.33.

Editor's Note.—For a brief discussion of this article, see 27 N.C.L. Rev. 479.

Cited in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 1-339.2. Application of part 1.—The provisions of part 1 of this article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. Application of article to sale ordered by clerk; by judge; authority to fix procedural details.—(a) The procedure prescribed by this article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this article applies to all sales ordered by a judge of the superior court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property, and not inconsistently with G.S. 1-339.27 (a) and G.S. 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of the superior court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.3a. Judge or clerk may order public or private sale.—The judge or clerk of the superior court having jurisdiction has authority in his dis-

cretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of the superior court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74.)

§ 1-339.4. Who may hold sale.—An order of sale may authorize the persons designated below to hold the sale:

(1) In any proceeding, a commissioner specially appointed therefor; or
(2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;
(3) In a proceeding to sell property of a minor, the guardian of such minor's estate;
(4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;
(5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;
(6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;
(7) In a receivership proceeding, the receiver. (1949, c. 719, s. 1.)

Sale an Official Act. — When an officer of the court, designated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in his official capacity and his sureties undertake for the fidelity of his conduct. Kerr v. Brandon, 84 N.C. 128 (1881), decided under the former statute relating to partition.

§ 1-339.5. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. Place of public sale.—(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real 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. For the purposes of this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the State designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.—The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G.S. 1-339.13 (c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.—(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G.S. 1-339.27.

(b) The report of sale with respect to all sales of separate tracts situated in

different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) The sale, and each subsequent resale, of each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of the superior court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of confirmation to be recorded in the office of the register of deeds of the county where such property is situated, and it shall not be necessary for the clerk of court to probate said certified copy of the order of confirmation. (1949, c. 719, s. 1; 1965, c. 805.)

§ 1-339.9. Sale as a whole or in parts.—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of the superior court having jurisdiction may direct specifically

(1) That it be sold as a whole, or
(2) That it be sold in designated parts, or
(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1.)

§ 1-339.10. Bond of person holding sale.—(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of the superior court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and
(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the prop-

erty is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bonds shall be payable to the State of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1.)

§ 1-339.11. Compensation of person holding sale.—(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of the superior court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1.)

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.—Whenever any person fails to file any report or account, as provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

Part. 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.13. Public sale; order of sale.—(a) Whenever a public sale is ordered, the order of sale shall

(1) Designate the person authorized to hold the sale;
(2) Direct that the property be sold at public auction to the highest bidder;
(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
(4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;
(5) Designate, consistently with G.S. 1-339.6, the county and the place therein at which the sale is to be held; and
(6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale.

(b) The order of public sale may also, but is not required to

(1) State the method by which the property shall be sold, pursuant to G.S. 1-339.9;

(2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous.

(c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale. —An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G.S. 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

§ 1-339.15. Public sale; contents of notice of sale.—The notice of public sale shall

(1) Refer to the order authorizing the sale;

(2) Designate the date, hour and place of sale;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1.)

§ 1-339.16. Public sale; time for beginning advertisement. — An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.—(a) The notice of public sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

(b) When the notice of public sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last

publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated.

(d) In addition to the foregoing, the notice of public sale shall be otherwise posted or the sale shall be otherwise advertised as may be required by the judge or clerk pursuant to the provisions of G.S. 1-339.13 (b) (2). (1949, c. 719, s. 1; 1965, c. 41; 1967, c. 979, s. 1.)

Editor's Note. — The 1967 amendment substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Mandatory or Directory Character of Requirements.—The statement in Palmer v. Latham, 173 N.C. 60, 91 S.E. 525 (1917), that requirements as to advertising are directory only, was not necessary to the decision of the case as the question involved was as to the place of sale, and is in conflict with the decision in Eubanks v. Becton, 158 N.C. 230, 73 S.E. 1009 (1912), and therefore is overruled except so far as applicable to execution sales (Shaffer v. Bledsoe, 118 N.C. 279, 23 S.E. 1000 (1896)). Hogan v. Utter, 175 N.C. 332, 95 S.E. 565 (1918), decided under former provision relating to advertisement of judicial and execution sales.

Person Interested in Notices Is Invitee. —A person interested in notices posted in the courthouse pursuant to this section is not a mere licensee but an invitee when on the courthouse premises. Walker v. County of Randolph, 251 N.C. 805, 112 S.E.2d 551 (1960).

§ 1-339.18. Public sale; posting notice of sale of personal property. —(a) The notice of public sale of personal property, except in the case of perishable property as provided by G.S. 1-339.19, shall be posted, at the courthouse door, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of the superior court pursuant to the provisions of G.S. 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.19. Public sale; exception; perishable property. — If personal property to be sold at public sale is determined by the judge or clerk of the superior court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1.)

§ 1-339.20. Public sale; postponement of sale. — (a) A person authorized to hold a public sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

(1) When there are no bidders, or

(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or

(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of public sale the person authorized to hold the sale shall personally, or through his agent or attorney

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof posted at the courthouse door, as provided by G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of the superior court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.21. Public sale; time of sale.—(a) A public sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No public sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than 5000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1.)

§ 1-339.22. Public sale; continuance of uncompleted sale.—A public sale commenced but not completed within the time allowed by G.S. 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.—(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of the superior court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sales of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be

the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G.S. 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of the superior court having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.—(a) The person holding a public sale shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

(1) The title of the action or proceeding;
(2) The authority under which the person making the sale acted;
(3) The date, hour and place of the sale;
(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and
(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
(6) The names of the purchasers;
(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
(8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G.S. 1-339.31 or G.S. 1-339.32, whichever is applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G.S. 1-339.31 or G.S. 1-339.32, the final report required by those sections shall be subsequently filed. (1949, c. 719, s. 1.)

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten 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; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require a person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid.

The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1; 1963, c. 858; 1967, c. 979, s. 1.)

Editor's Note. — The 1967 amendment inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence of subsection (a).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Upset Bid to Be in Amount Specified. — An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Discretion of Court. — Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion and the refusal to order another sale upon an upset bid of the owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land which was subject to liens in an undisclosed amount, will be affirmed as a proper exercise of judicial discretion by the court. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Advance Bid Held Not to Meet Requirements of Section. — An advance bid entered by the owners of a minority interest in the land and not supported by a cash deposit or bond but only by the interest of the advance bidders in the land, which interests are subject to deeds of trust, judgments and tax liens in an undisclosed amount, does not meet, at least technically, the requirements of this section for an advance bid. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Quoted in Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold at public sale in parts, as provided by G.S. 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.—(a) When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered.

(b) In any case in which a judge has jurisdiction of the original sale, he may provide by order that jurisdiction is retained for resale purposes, and in such case when an upset bid is submitted, the judge having jurisdiction shall make the order of resale. In all cases where the judge does not retain jurisdiction of a sale for resale purposes, and in all cases where a sale is originally ordered by a clerk, the clerk shall make the order of resale and shall have jurisdiction of the proceeding for resale purposes. Whenever the original order of sale is made by the judge, the terms of any resale ordered by the clerk shall be consistent with terms of the original order, and the final order of confirmation shall be made by the judge having jurisdiction of the proceeding.

(c) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal 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.

(d) When the notice of resale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(e) When the real property to be resold is situated in more than one county, the provisions of subsection (c) of this section shall be complied with in each county in which any part of the property is situated.

(f) The person making a resale shall report the resale in the same manner as required by G.S. 1-339.24.

(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(h) Resales may be had as often as upset bids are submitted in compliance with this article.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

Upon the filing of an upset bid under § 1-339.36 (a), this section applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered; a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Authority of Court to Order Resale under Former Statutes. — Under the former statute relating to partition sales, it was held that, where lands were ordered to be sold for partition by a court of equity, the court had authority to set aside an inchoate sale and reopen the biddings, and this authority applied as well to cases where all the parties were adults as where some of them, or all, were infants. Ex parte Post, 56 N.C. 482 (1857).

But, in a suit for partition under the former statute, it was held that the court did not abuse its discretion in refusing to grant a resale upon an offer of an advanced bid on motion of the officer in which none of the parties joined. Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911); Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

Quoted in Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.28. Public sale; confirmation of sale.—(a) No public sale of real property may be consummated until confirmed

(1) By the resident judge of the district or the judge regularly holding the courts of the district, in those cases in which the sale was originally ordered by a judge, or

(2) By the clerk of the superior court in those cases in which the sale was originally ordered by the clerk.

(b) No public sale of real property of a minor or incompetent originally or-

dered by a clerk may be consummated until confirmed both by the clerk and by the resident judge of the district or the judge regularly holding the courts of the district.

(c) No public sale of real property may be confirmed until the time for submitting an upset bid, pursuant to G.S. 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G.S. 1-339.23 (a), or when the order of sale provides for such confirmation. (1949, c. 719, s. 1.)

Effect of Confirmation under Former Statutes.—Under the former statute relating to sale of lands of decedents' estates, it was held that confirmation of the sale was a condition precedent to the exercise of the executor's right to convey title. Joyner v. Futrell, 136 N.C. 301, 47 S.E. 649 (1904). Confirmation was also necessary to divest the title out of the party applying for the order of sale, and to validate the commissioner's deed to the purchaser. Foushee v. Durham, 84 N.C. 56 (1881). And the purchaser acquired no rights under such sale until confirmation —until then he being considered as a mere proposer. The bid might be rejected in the sound discretion of the court at any time before confirmation. Harrell v. Blythe, 140 N.C. 415, 53 S.E. 232 (1906).

After the confirmation of the sale of a decedent's lands, however, the jurisdiction of the court was at an end, and the biddings under such sale might not be opened. Thompson v. Cox, 53 N.C. 311 (1860). Nor could the order to collect and make title be revoked. Evans v. Singletary, 63 N.C. 205 (1869). Nor could the decree be collaterally attacked after confirmation of the sale; for it then became final and could only be assailed, in the absence of substantial irregularity, in a direct and independent proceeding. McLaurin v. McLaurin, 106 N.C. 331, 10 S.E. 1056 (1890); Coffin v. Cook, 106 N.C. 376, 11 S.E. 371 (1890). See Smith v. Gray, 116 N.C. 311, 21 S.E. 200 (1895). And a decree and confirmation of sale would not be set aside as against bona fide purchasers, at the instance of infant heirs not served with process, if not made within a reasonable time, and in the absence of a valid defense to the sale. Glisson v. Glisson, 153 N.C. 185, 69 S.E. 55 (1910).

Under the former statute governing partition sales, it was held that an intending purchaser was a mere preferred proposer, and not a purchaser, until after the sale had been confirmed. Patillo v. Lytle, 158 N.C. 92, 73 S.E. 200 (1911). But after confirmation by the court, the purchaser was regarded as the equitable owner, and the sale, as it affected his interest, could only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. Upchurch v. Upchurch, 173 N.C. 88, 91 S.E. 702 (1917).

When land was sold and the sale confirmed, in proceedings for partition of lands under the former statute, and the record therein was regular in form, and on its face it appeared that plaintiffs were parties, the proceedings could not be collaterally attacked, as the remedy was by petition in the cause. Hargrove v. Wilson, 148 N.C. 439, 62 S.E. 520 (1908).

Advanced Bid.—Under former § 46-36, governing partition sales, before a partition sale had been confirmed, if an advanced bid of 10 percent was offered, the court might, in its discretion, order a resale. Trull v. Rice, 92 N.C. 572 (1885). But where no increased bid was received within twenty days and the purchaser moved promptly for confirmation, an increased bid received thereafter would not prevent confirmation. Ex parte Garrett, 174 N.C. 343, 93 S.E. 838 (1917).

Inadequacy of the bid or its being for the benefit of the administrator, warranted the exercise of the court's discretion to reject the bid, under the former statute relating to sale of lands belonging to decedents' estates. Shearin v. Hunter, 72 N.C. 493 (1875); Harrell v. Blythe, 140 N.C. 415, 53 S.E. 232 (1906).

As to exceptions filed to commissioner's report under former § 46-32, dealing with confirmation of partition sales, see McCormick v. Patterson, 194 N.C. 216, 139 S.E. 225 (1927).

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

When a guardian of an incompetent person sells real property under order of court, he is merely an agent of the court and the sale is not consummated until it is confirmed by the resident judge or the judge regularly holding courts in the dis-

trict. (When the sale is originally ordered by the clerk, his confirmation is also required.) This confirmation represents the consent of the court and is granted or refused in the discretion of the court. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

Stated in North Carolina State Highway Comm'n v. Moore, 3 N.C. App. 207, 164 S.E.2d 385 (1968).

§ 1-339.29. Public sale; real property; deed; order for possession. —(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

(1) The authority for making the sale,
(2) The title of the action or proceeding in which the sale was had,
(3) The name of the person authorized to make the sale,
(4) The fact that the sale was duly advertised,
(5) The date of the sale,
(6) The name of the highest bidder and the price bid,
(7) That the sale has been confirmed,
(8) That the terms of the sale have been complied with, and
(9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

When Title Passes. — Where, under a petition of tenants in common, lands were sold for division, under the provisions of former § 46-30, relating to partition sales, title to the lands held in common would not pass to the purchaser until the purchase price had been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. Crocker v. Vann, 192 N.C. 422, 135 S.E. 127 (1926).

Purchaser Need Not Look Beyond Decree.—A purchaser at a judicial sale, if not a party to the proceeding, is not bound to look beyond the decree if the facts necessary to give jurisdiction appear on the face of the proceedings. If there has been an irregularity, or the jurisdiction has been improvidently exercised, it will not be corrected at his expense. Herbin v. Wagoner, 118 N.C. 656, 24 S.E. 490 (1896), decided under the former statute relating to partition sales.

Estoppel of Persons Parties to Sale.—One who was a party to ex parte partition proceedings under the former statute, was present at the sale, and received her share of the purchase money could not thereafter have the judgment and sale set aside for division as to her. Hargrove v. Wilson, 148 N.C. 439, 62 S.E. 520 (1908); In re Wilson, 161 N.C. 211, 75 S.E. 1086 (1912).

Recital of Authority in Deed.—Under the former statute governing sale of lands belonging to decedents' estates, it was held that when the representative exercised the power of sale conferred under an order of the court, but failed to recite in the deed the source of his authority, the implication was that he exercised the power so conferred. Coffin v. Cook, 106 N.C. 376, 11 S.E. 371 (1890).

Formal Direction to Make Title Unnecessary.—Under the former statute governing partition sales, it was held that a formal direction to make title was not necessary when the order of sale reserved the title as an additional security for the purchase money, and the money had been paid. Latta v. Vickers, 82 N.C. 501 (1880).

When Purchaser Entitled to Order of Possession.—Under the former statute relating to sale of lands belonging to decedents' estates, it was held that the purchaser was not entitled to an order for possession if the defendants were not in possession when the order of sale was made. Marcom v. Wyatt, 117 N.C. 129, 23 S.E. 169 (1895).

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), decided under the former statute relating to partition sales.

When Judgment Creditor Not Made Party. — Where judgment creditors of a tenant in common were not made parties to a partition proceeding under the former statute, the purchaser bought subject to their liens. Holley v. White, 172 N.C. 77, 89 S.E. 1061 (1916).

Deed Erroneously Made to Husband and Wife.—Where, in a suit for partition under the former statute, the wife alone was entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, and in proceedings thereunder it was erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title would inure only to her under a resulting trust, and the husband could not acquire by survivorship. Crocker v. Vann, 192 N.C. 422, 135 S.E. 127 (1926).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.—(a) If an order of public sale requires the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within ten days after notice given by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale of real property is the same in every respect as is provided by this article in the case of an original public sale of real property except that the provisions of G.S. 1-339.27 (c), (d) and (e) apply with respect to the posting and publishing of the notice of such resale.

(e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

The doctrine of caveat emptor applies to a judicial sale, and while the court has equity jurisdiction to protect the purchaser from imposition because of fraud or mistake, when the evidence discloses that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser may not seek relief from his bid on the ground of shortage in acreage or lack of access to the property. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Tender of Deed.—The commissioner is required by this section to tender a deed for the property or make a bona fide attempt to tender such deed. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Where the highest bidder was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that the highest bidder comply with the terms of sale, this indicated that the commissioner, who was under order of court to

convey upon receipt of purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when the bidder failed to comply, since the law does not require the doing of a vain thing. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Order Held Not a Void Conditional Judgment.—Order issued in a judicial sale proceeding that, upon refusal of the last and highest bidder to comply with his bid, the land should be resold and that the defaulting bidder be held liable for the costs and for any amount that the final sale price is less than his bid, is not a void conditional judgment, since it is unequivocal and the determination of the liability is a simple matter of arithmetic and an administrative duty, and such order is a final judgment deciding the matter on its merits without need for further direction of the court. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Enforcement of Bid under Former Statute Relating to Partition Sales.—Upon acceptance by court's commissioner of a bid, whether at public or private sale, for land involved in partition proceedings under the former statute, the court had jurisdiction over the purchaser to enforce the bid. Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916).

Where a purchaser of land under decree of court fails to pay the price, the title will not be made even though there be a confirmation of the sale. And if the land in such case be sold under an execution against said purchaser, the purchaser thereof takes subject to the equities against the defendant in the execution. Burgin v. Burgin, 82 N.C. 197 (1880), decided under the former statute relating to partition sales.

The purchaser of land at a judicial sale for partition under the former statute could be required by summary proceedings to pay into court the amount of his bid which remained unpaid after the confirmation of the sale and delivery of the deed, such proceedings not being unconstitutional as depriving the purchaser of his right to a jury trial. Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

Under the former statute governing sale of lands of decedents' estates before a purchaser could be held to his bid, the sale must be confirmed by the court, and then in the same proceedings a rule issued to show cause why he should not be compelled to comply with his bid. An independent action for damages would not lie against him. Hudson v. Coble, 97 N.C. 260, 1 S.E. 688 (1887).

§ 1-339.31. **Public sale; report of commissioner or trustee in deed of trust.**—(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G.S. 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

(1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;

(2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;

(3) When the commissioner or trustee is required to collect deferred payments,

a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and

b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall file an annual report of his receipts and disbursements, and

c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

Effect of Failure to File Report.—Upon the commissioner's failure to file a report and final account with the clerk, as provided by former § 46-32, relating to partition sales, the demand upon the commissioner or his administrator, for the

disbursement of the funds, would be considered to have been made as a matter of law, and limitations upon an action to recover the funds began to run at that time. Peal v. Martin, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.—An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this article unless so directed by the judge or clerk of the superior court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale. — Whenever a private sale is ordered, the order of sale shall

(1) Designate the person authorized to make the sale;
(2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
(3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
(4) Prescribe such terms of sale as the judge or clerk of the superior court ordering the sale deems advisable. (1949, c. 719, s. 1.)

Discretion of Court under Former Statute to Order Public or Private Sale.—Under the former statute governing partition sales, the superior court might, in the exercise of its discretion, order a sale of lands in proceedings for partitions, where minors were interested and represented by guardian ad litem, either to be publicly or privately made. Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917). And where no abuse of this discretion was shown on appeal, the action of the lower court would not be reviewed. Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

Under the former statute relating to partition proceedings, the court might authorize its commissioner in a proceeding for sale for partition to receive and report to it a private offer or bid for the land. Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916).

Under the former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian ad litem, either at public or private sale. The court has similar discretion under this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section does not specify conditions under which a private sale may be ordered. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Hence, it is a discretionary matter for the court in a particular case. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Court May Lay Down Guidelines and Give Directions.—There is nothing in this section which restricts the court in laying down guidelines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Sale of Timber.—In the sale of large bodies of timber, a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects without being restricted by the formal requirements of a public sale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

§ 1-339.34. Private sale; exception; certain personal property. — (a) Notwithstanding any provisions of this article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

(1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or

(2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or

(3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ **1-339.35. Private sale; report of sale.**—(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(5) The name or names of the person or persons to whom the property was sold;

(6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and

(7) The date of the report. (1947, c. 719, s. 1.)

§ **1-339.36. Private sale; upset bid; subsequent procedure.** — (a) Every private sale of real or personal property, except a sale of personal property as provided by G.S. 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G.S. 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid has been submitted, except that the notice of resale of personal property need not be published in a newspaper, but shall be posted as provided by G.S. 1-339.17. (1949, c. 719, s. 1.)

Every Private Sale Is Subject to Upset Bids.—Every private sale of real property under order of the court is subject to upset bids. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Upon the filing of an upset bid under subsection (a), § 1-339.27 (a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered, a notice of the resale shall be posted at the courthouse door for fifteen days immediately preceding the sale, and published in a newspaper once a week for

two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Section 1-339.25 Also Applies.—An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by § 1-339.25. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

§ 1-339.37. Private sale; confirmation. — If no upset bid for property sold at private sale is submitted within ten days after the report of sale is filed, the sale may then be confirmed, and the provisions of G.S. 1-339.28 (a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confirmation is required of any sale held as provided by G.S. 1-339.34. (1949, c. 719, s. 1.)

Jurisdiction under Former Statute.—The superior court in a partition action under the former statute, having general jurisdiction in law and equity, had power to order and confirm a private as well as a public sale. McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906); Thompson v. Rospigliosi, 162 N.C. 145 77 S.E. 113 (1913).

§ 1-339.38. Private sale; real property; deed; order for possession. —(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale. —Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G.S. 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.40. Private sale; final report.—(a) A commissioner or a trustee in a deed of trust authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.31.

(b) Any other person authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.32. (1949, c. 719, s. 1.)

Article 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.—(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Cross References.—As to judicial sales, see §§ 1-339.1 through 1-339.40. As to sales under power of sale, see §§ 45-21.1 through 45-21.33.

Editor's Note. — For a brief discussion of this article, see 27 N.C.L. Rev. 479.

§ 1-339.42. Clerk's authority to fix procedural details. — The clerk of the superior court who issues an execution has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

Validity of Sale Not Made at Time and Place Provided by Statute.—The question whether a sale, not effected in strict compliance with the time and place at which a statute requires that it should be effected, is void, so as to render the title of the purchaser invalid, has at various times given great difficulty to the court, which has resulted in conflicting decisions. Thus in Mayers v. Carter, 87 N.C. 146 (1882), it was held that an execution sale made at an improper time and place is void. To the same effect, see State v. Rives, 27 N.C. 297 (1844). The abstract principle of law announced by these cases is that the nonobservance, by the officer making the sale, of those provisions of law which are directory merely and relate to matters in pais, in the absence of notice on the part of the purchaser, will not affect the title acquired under an execution sale. Thus it is stated in the last cited case that third persons need not show affirmatively the observance on the part of the sheriff of all legal prerequisites for the sale, nor are they charged to take notice of all the irregularities. But no case can be found which dares to answer in definite terms the specific question whether requirements as to time and place of the sale are mandatory with the necessary result of avoiding the purchaser's title, or merely directory, the disregard of which will merely subject the sheriff to an action for damages. The decision reached in Mayers v. Carter, 87 N.C. 146 (1882), tends to indicate that they are mandatory and yet the case cites with approval. Mordecai v. Speight, 14 N.C. 428 (1832); Brooks v. Ratcliff, 33 N.C. 321 (1850), in which it was held that a sale made on Tuesday and Wednesday of the week, in violation of the statute in effect at the time, would pass title, and the case of Wade v. Saunders, 70 N.C. 270 (1874), to the same effect.

In action to foreclose land for delinquent taxes, order was issued appointing a commissioner to sell the lands and directing the sale might be had "on any day except Sunday." The commissioner sold the land on a Tuesday of a week during which there was no term of the superior court in the county. It was held that the sale was void as a matter of law since, by virtue of the statute then in effect, sales of land could only be made on any Monday or during the first three days of any term of the superior court. Bladen County v. Breece, 214 N.C. 544, 200 S.E. 13 (1938), followed in Caswell County v. Scott, 215 N.C. 185, 1 S.E.2d 364 (1939). See now the validating sections, §§ 1-339.72 through 1-339.76.

Assent of Debtor Validates Sale.—The debtor may waive the benefit of the law which requires that the sale be made at a certain place and time, and assent to the sale at a place and time other than that prescribed by law, in which case the sale will be valid. Kader Biggs & Co. v. Brickell, 68 N.C. 239 (1873); Mayers v. Carter, 87 N.C. 146 (1882).

§ 1-339.44. Place of sale.—(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

Cross Reference.—As to validity of sale not made at place required by statute, see note to § 1-339.43.

§ 1-339.45. Presence of personal property at sale required.—A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. Sale as a whole or in parts.—When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. Sale to be made for cash.—Every sale shall be made for cash. (1949, c. 719, s. 1.)

§ 1-339.48. Life of execution.—If an execution is issued on a judgment, within the time provided by G.S. 1-306, and a sale, by authority of that execution, is commenced within the time provided by G.S. 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G.S. 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G.S. 1-306. For the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G.S. 1-339.52, or first posted in the case of personal property as required by G.S. 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one half for his own use and the other half to the use of the county where the offense is committed. (1820, c. 1066, s. 2, P. R.; 1822, c. 1153, s. 3, P. R.; R. C., c. 45, s. 18; Code, s. 461; Rev., s 649; C. S., s. 696; 1949, c. 719, s. 2.)

Cross Reference.—As to liability on sheriff's bond, see §§ 162-8, 162-18.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (1815, c. 887, P. R.; R. C., c. 45, s. 19; Code, s. 462; Rev., s. 650; C. S., s. 697; 1949, c. 719, s. 2.)

Cross Reference. — As to penalty for false return, see § 162-14.

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.—The notice of sale shall

(1) Refer to the execution authorizing the sale;
(2) Designate the date, hour and place of sale;
(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and

(5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

Statutes Contemplate Sale at Fair Value. —The statutes regulating execution sales contemplate a sale at which the thing sold will bring its fair value. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

§ 1-339.52. Posting and publishing notice of sale of real property. —(a) The notice of sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having general circulation in the county.

(b) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — The 1967 amendment rewrote paragraph b in subdivision (2) of subsection (a) and substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (b).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Requirements of Former Statute Held Directory. — The requirements of former § 1-325, relating to advertisement of execution sales, were held to be only directory. It is well settled, as a general rule, that a purchaser at an execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. Mordecai v. Speight, 14 N.C. 428 (1832); McEntire v. Durham, 29 N.C. 151 (1846). It follows from this, that a purchaser may as a general rule get a good title at a sheriff's sale when there has been no advertisement of the sale. But when at such sale the plaintiff in the execution, or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding for that purpose. Burton v. Spiers, 92 N.C. 503 (1885).

§ 1-339.53. Posting notice of sale of personal property.—The notice of sale of personal property, except in the case of perishable property as specified in G.S. 1-339.56, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the date of sale. (1949, c. 719, s. 1.)

Purchaser with Notice of Lack of Advertisement.—A purchaser at an execution sale of personalty, who had full knowledge of such irregularities as absence of advertisement, etc., as required by former § 1-336, relating to advertisement of sales of

personal property, was held not an innocent purchaser, and the rule that a purchaser at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, was held not applicable to his case, for the rule presupposes that the purchaser is a bona fide purchaser. Phillips v. Hyatt, 167 N.C. 570, 83 S.E. 804 (1914).

§ 1-339.54. Notice to judgment debtor of sale of real property.—In addition to complying with G.S. 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

(1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or

(2) If the judgment debtor is not found in the county,

a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and

b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

Effect of Noncompliance.—A failure to comply with this section, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated. Walston v. W.H. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

Requirements of Former Statute Held Directory.—The requirements of former § 1-325, that a sheriff advertise a sale under execution, and of former § 1-330, that he serve a copy upon the defendant ten days before the sale, were held to be directory, and when not followed would not render the sale void as against a stranger without notice of the irregularity. Williams v. Dunn, 163 N.C. 206, 79 S.E. 512 (1913).

Notice Required of Resale. — Under former § 1-330, relating to the same subject matter as this section, it was held that where after sale of property under execution the judgment creditor posted an advance bid within ten days and resale was ordered, and no notice of the resale was given the judgment debtor or the purchaser at the first sale, the judgment debtor was entitled to an order for a resale of his property upon motion aptly made, the requirement of the notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. Bank of Pinehurst v. Gardner, 218 N.C. 584, 11 S.E.2d 872 (1940).

Liability of Sheriff for Failure to Give Notice.—If the sheriff failed to give the notice provided by former § 1-330, relating to the same subject matter as this section, he was liable in damages for any loss the defendant suffered through his failure to notify. Williams v. Johnson, 112 N.C. 424, 17 S.E. 496 (1893).

Procedure to Set Aside Sale for Failure to Give Notice.—The procedure to set aside a sale of lands under an execution which had not been advertised, and where notice had not been given the defendant in compliance with former § 1-330, relating to the same subject matter as this section, was, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale could not be collaterally attacked. Williams v. Dunn, 163 N.C. 206, 79 S.E. 512 (1913).

§ 1-339.55. Notification of Governor and Attorney General.—When the State is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the Governor and the Attorney General at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the State. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.—If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a

description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other nonperishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.—If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.—(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

(1) When there are no bidders, or
(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
(4) When he is unable to hold the sale because of illness or for other good reason, or
(5) When other good cause exists.

(b) Upon postponement of a sale, the sheriff shall

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 1-339.52 in the case of real property or G.S. 1-339.53 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,
(2) State the hour and date to which the sale is postponed,
(3) State the reason for the postponement, and
(4) Be signed by the sheriff.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable, but nothing herein contained shall be deemed to relieve the sheriff of liability for the nonperformance of his official duty. (1949, c. 719, s. 1.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provided by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1.)

Cross Reference.—As to validity of sale not made at time required by statute, see note to § 1-339.43.

§ 1-339.61. Continuance of uncompleted sale.—A sale commenced but not completed within the time allowed by G.S. 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes necessary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.—A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.—(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;
(2) The authority under which the sheriff acted;
(3) The date, hour and place of the sale;
(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
(6) The name or names of the person or persons to whom the property was sold;
(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
(8) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.64. Upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten 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; such deposit to be made

with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — The 1967 amendment inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence in subsection (a) and added at the end of that sentence the language following the semicolon.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold in parts, as provided by G.S. 1-339.46, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.66. Resale of real property; jurisdiction; procedure.—(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(c) When the notice of resale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The sheriff shall report the resale in the same manner as required by G.S. 1-339.63.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resale. (1949, c. 719, s. 1.)

Order for Resale Does Not Prolong Life of Judgment.—Where the bid for real estate offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment, upon which the execution issued, was raised and resales were ordered successively under the provisions of a former statute of similar import, by which the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of lien of the judgment within the provisions and the meaning of § 1-234. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

§ 1-339.67. Confirmation of sale of real property.—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.64, has expired. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — The 1967 amendment, substituted "G.S. 1-339.64" for "G.S. 1-339.65."

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

When Clerk May Decline to Confirm Sale.—If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

The high bidder acquires no right until his bid is accepted, and the sale confirmed. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Doctrine of Caveat Emptor.—While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of a court to prevent a manifest injustice not due to the fault or neglect of the purchaser. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.—(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held.

(c) Orders for possession of real property sold pursuant to this article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued

by the clerk of the superior court of the county in which such property is sold, when:

(1) The purchaser is entitled to possession, and
(2) The purchase price has been paid, and
(3) The sale or resale has been confirmed, and
(4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
(5) Application is made to such clerk by the purchaser of the property. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — The 1967 amendment added subsection (c).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Rights and Estate Which May Be Sold.—A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Compelling Sheriff to Make Title.—A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. Fox v. Kline, 85 N.C. 174 (1881), decided under a former statute relating to execution sales.

Where the purchaser is implicated in the sheriff's derelictions, he is not entitled to call for a conveyance. Skinner v. Warren, 81 N.C. 373 (1879), decided under a former statute relating to execution sales.

Necessity of Seal.—A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. Fisher v. Owens, 132 N.C. 686, 44 S.E. 369 (1903), decided under a former statute relating to execution sales.

Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. Miller v. Miller, 89 N.C. 402 (1883), decided under a former statute relating to execution sales.

The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. Wainwright v. Bobbitt, 127 N.C. 274, 37 S.E. 336 (1900), decided under a former statute relating to deeds in execution sales.

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.69. **Failure of bidder to comply with bid; resale.**—(a) When the highest bidder at a sale of personal property fails to pay the amount of his bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(b) When the highest bidder at a sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the provisions of G.S. 1-339.66 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(c) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

Action by Execution Debtor against Defaulting Bidder.—If the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor is not entitled to bring an action to enforce the

bid against a defaulting bidder, notwithstanding subsection (d) of this section, and the action is properly brought by the sheriff. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Under a former statute it was held that if a purchaser at sheriff's sale failed to pay his bid the sheriff might resell immediately, or he might apply for a rule of court to compel payment, or he might at his own peril as to the plaintiff indulge the purchaser. The sheriff was not obliged to resell immediately, but might give the purchaser time in which to pay the purchase money, if neither party to the execution objected or complained. Maynard v. Moore, 76 N.C. 158 (1877), citing McKee v. Lineberger, 69 N.C. 217 (1873).

§ 1-339.70. Disposition of proceeds of sale.—(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. Special proceeding to determine ownership of surplus.—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-391, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of $200.00, or otherwise comply with the provisions of G.S. 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1; 1967, c. 705, s. 2.)

Editor's Note.—The 1967 amendment inserted the reference to § 105-391 in subsection (a).

Article 29C.

Validating Sections.

§ 1-339.72. Validation of certain sales. — All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where notice of the original sale was published for four successive weeks, and notice of any resale was published for two successive weeks, shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3; 1955, c. 1286; 1965, c. 786.)

Local Modification.—Nash: 1955, c. 1075.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.—All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any

month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; Code, s. 454; Rev., s. 643; C. S., s. 690; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3.)

§ **1-339.74. Sales on other days validated.**—All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

§ **1-339.75. Certain sales validated.**—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (1901, c. 742; Rev., s. 646; C. S., s. 693; 1949, c. 719, s. 3.)

§ **1-339.76. Validation of sales when payment deferred more than two years.**—All sales of land conducted prior to February 10, 1927, under authority of G.S. 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; C. S., s. 86; 1927, c. 16; 1949, c. 719, s. 3.)

§ **1-339.77. Validation of certain sales confirmed prior to time prescribed by law.**—From and after June 1, 1953 no action shall be brought to contest the validity of a decree filed on or before December 31, 1950, confirming the sale of real or personal property in any special proceeding on the grounds that the decree of confirmation was entered prior to the expiration of the period of time as required by law following the report of sale. (1953, c. 1089.)

Article 30.

Betterments.

§ **1-340. Petition by claimant; execution suspended; issues found.**—A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allow-

ance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (1871-2, c. 147; Code, s. 473; Rev., s. 652; C. S., s. 699.)

Cross References.—As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to judgment for betterments having priority over homestead right, see note to § 1-369.

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969). For an article on trespass to land in North Carolina, see 47 N.C.L. Rev. 31 (1968).

Rule Stated. — One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If it was enhanced in value by improvements, made under the belief that one was the owner, he ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. Wharton v. Moore, 84 N.C. 479 (1881); Barker v. Owen, 93 N.C. 198 (1885).

And plaintiff is not confined to a common-law action for improvements, if indeed such right may be enforced by independent action. Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944).

Constitutionality. — This section contravenes no part of the organic law, federal or State. Barker v. Owen, 93 N.C. 198 (1885).

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice. Searl v. School Dist. No. 2, 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890).

An action under this section is not the same as an action for unjust enrichment. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section creates no independent cause of action. It merely declares that the owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements made by another under the belief that he was the owner the true owner ought not to take the increased value without some compensation to the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

The right under this section is a defensive right. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

It Accrues When Owner Seeks to Enforce Right to Possession. — The right under this section accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. The law awards to the owner the land and his rents and to the occupant the value of his improvements. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Owner Must Have Obtained Judgment Entitling Him to Eject Occupant. — The wording of this section clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant—though the last sentence of this section would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

No Claim against Remaindermen Until Falling in of Life Estate.—Where remaindermen had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance

of the life estate by the tax foreclosure was not affected, persons in possession under the tax foreclosure were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Claim Cannot Defeat Plaintiff's Title.—A claim for betterments, under this section, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. Wood v. Tinsley, 138 N.C. 507, 51 S.E. 59 (1905). See also Rumbough v. Young, 119 N.C. 567, 26 S.E. 143 (1896); Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

What Claimant Must Show.—This section has been interpreted to impose on claimant the burden of establishing (1) that he made permanent improvements, (2) bona fide belief of good title when the improvements were made, and (3) reasonable grounds for such belief. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

Evidence Sufficient to Show "Permanent Improvements".—Evidence that the land in question was farm land which had been abandoned and had become a piece of waste-land, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, is sufficient to show "permanent improvements" within the purview of this section. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

Sheriff's Return of Writ as Execution.—The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. Boyer v. Garner, 116 N.C. 125, 21 S.E. 180 (1895).

Color of Title.—Under this section one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918).

This section applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

Same—Parol Contract to Convey. — A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. Baker v. Carson, 16 N.C. 381 (1830); Albea v. Griffin, 22 N.C. 9 (1838); Hedgepeth v. Rose, 95 N.C. 41 (1886); Luton v. Badham, 127 N.C. 96, 37 S.E. 143 (1900).

The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. Vann v. Newsom, 110 N.C. 122, 14 S.E. 519 (1892).

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. Hedgepeth v. Rose, 95 N.C. 41 (1886).

Same — Defective Deed of Married Woman.—In Scott v. Battle, 85 N.C. 185 (1881), it was held that the purchaser of lands from a feme covert, who was not privily examined, and whose husband did not join in the conveyance, was charged by implication of law with the invalidity of his title, and could not maintain a claim for betterments. In 1883, after the decision was published, the legislature changed the wording of the law so as to meet the decision and remove this objectionable construction of the law. From early days in North Carolina, a married woman's deed defectively executed has been held to constitute good color of title. Greenleaf v. Bartlett, 146 N.C. 495, 60 S.E. 419 (1908). And such a deed, while not binding on the feme, has been held sufficient for a claim for betterments under this section. Gann v. Spencer, 167 N.C. 429, 83 S.E. 620 (1914).

Same — Fraudulent Misrepresentations.—Where, by fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. Hill v. Brower, 76 N.C. 124 (1877).

Same—Unregistered Deed. — One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. Eaton v. Dorib, 190 N.C. 14, 128 S.E. 494 (1925).

Same—Notice Required. — Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a

diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. Carolina Cent. R.R. v. McCaskill, 98 N.C. 526, 4 S.E. 468 (1887).

Where the title to the land was in a feme covert who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, the doctrine of constructive notice from registration did not apply to such party, and he is entitled to compensation under the section for permanent improvements made by him on the land. Justice v. Baxter, 93 N.C. 405 (1885).

Same—Reasonable Belief. — The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had reasonable grounds for such belief. Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918); Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Where the grantee knows that his grantor has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments as against a remainderman, since they were not made under the belief that his color of title to the interest of the remainderman was good. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Separate Claim Should Be Filed by Each Group of Interveners. — This article requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Writ of Ouster Should Not Issue Until Judgment for Betterments Is Satisfied.— The plaintiff who establishes a superior title is entitled to judgment for the land, but no writ of ouster should issue until defendant's judgment for betterments is satisfied. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Effect of Agreement to Hold in Trust and Reconvey.—Where defendant acquired the legal title to certain lands (originally belonging to plaintiff) at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, defendant is not entitled to the value of improvements placed upon the land by him while holding same upon such trust. Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

Court Must Be Satisfied of Probable Truth.—The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required that the courts impanel a jury to ascertain the value of the betterments. Hallyburton v. Slagle, 132 N.C. 957, 44 S.E. 659 (1903).

One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a bona fide holder of the premises under a color of title believed by him to be good, and is therefore not entitled to the value of improvements placed thereon by him. Hallyburton v. Slagle, 132 N.C. 957, 44 S.E. 659 (1903).

Same—Evidence. — A defendant in possession of land under the belief that he has a good title, has the right to show in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. Merritt v. Scott, 81 N.C. 385 (1879).

Either Party Entitled to Jury Assessment.—Either party is entitled to have the issue as to the value of betterments assessed by the jury, if they so desire. Fortesque v. Crawford, 125 N.C. 29, 10 S.E. 910 (1890).

Not Applicable to Tenants in Common. —The section does not apply to tenants in

common. Pope v. Whitehead, 68 N.C. 191 (1873).

But while this and the following sections of this article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee. Layton v. Byrd, 198 N.C. 466, 152 S.E. 161 (1930). See Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938).

§ 1-341. Annual value of land and waste charged against defendant.—The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (1871-2, c. 147, ss. 2-3; Code, ss. 474, 475; Rev., ss. 653, 654; C. S., s. 700.)

Where defendants disclaim all right and title to a part of the locus, in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948).

Rents and Rental Values as Related to Betterments.—Under this section, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements. Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

Three-Year Limitation Inapplicable. — Where one in possession of lands is entitled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912); Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918).

But this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

When Remaindermen May Not Recover. —When one holding under a tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

Erroneous Instruction. — Under this section, it is error for the court to give a charge which fails to instruct the jury that in making the assessment the use of the improvements made on the premises by the defendant should be excluded. Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

Cited in Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

§ 1-342. Value of improvements estimated.—If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (1871-2, c. 147, s. 4; Code, s. 476; Rev., s. 655; C. S., s. 701.)

Value of Property Permanently Enhanced.—The sole matter for consideration is embraced in one proposition, and that is, "how much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the

betterments put thereon by the labor and expenditure of the bona fide holder of the same?" Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

Same—Fact for the Jury to Find.—It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his business. Carolina Cent. R.R. v. McCaskill, 98 N.C. 526, 4 S.E. 468 (1887).

Same—"Permanent" Defined.—The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the Century Dictionary as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like, and it was held in Simpson v. Robinson, 37 Ark. 132, that an improvement does not mean a general enhancement in value from the occupant's operations. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

How Value of Improvements Estimated.—The rule for estimating the value of improvements is not what they have cost the defendant, but how much they have added to the value of the premises. Wetherell v. German, 74 N.C. 603 (1876); Daniel v. Crumpler, 75 N.C. 184 (1876).

The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended. Garland v. Arrowood, 179 N.C. 697, 103 S.E. 2 (1920).

Cited in Barrett v. Williams, 220 N.C. 32, 16 S.E.2d 405 (1941).

§ 1-343. Improvements to balance rents.—If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (1871-2, c. 147, s. 5; Code, s. 477; Rev., s. 656; C. S., s. 702.)

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Barker v. Owen, 93 N.C. 198 (1885); Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912).

§ 1-344. Verdict, judgment, and lien.—After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (1871-2, c. 147, ss. 6, 7; Code, ss. 478, 479; Rev., ss. 657, 658; C. S., s. 703.)

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. Barker v. Owen, 93 N.C. 198 (1885).

In ejectment a writ of ouster should not issue until a judgment for betterments has been paid. Bond v. Wilson, 129 N.C. 325, 40 S.E. 179 (1901).

Cited in Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

§ 1-345. Life tenant recovers from remainderman.—If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the

value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (1871-2, c. 147, s. 8; Code, s. 480; Rev., s. 659; C. S., s. 704.)

General Rule.—It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. Northcott v. Northcott, 175 N.C. 148, 95 S.E. 104 (1918).

Mistaken Belief as to Rights under Contract.—The section does not apply to a situation where the tenant makes improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor does the fact that the lessor silently acquiesced in the putting up the improvements change the situation. Dunn v. Bagby, 88 N.C. 91 (1883).

§ 1-346. Value of premises without improvements.—When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (1871-2, c. 147, ss. 10-11; Code, ss. 482, 483; Rev., ss. 661, 662; C. S., s. 705.)

Betterments Ignored in Assessing Rents.—The rents should be assessed upon the basis of the property without the betterments. Barker v. Owen, 93 N.C. 198 (1885); Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912).

The sole question is: How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same? Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

§ 1-347. Plaintiff's election that defendant take premises. — The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (1871-2, c. 147, s. 12; Code, s. 484; Rev., s. 663; C. S., s. 706.)

If the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. Barker v. Owen, 93 N.C. 198 (1885).

§ 1-348. Payment made to court; land sold on default.—The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (1871-2, c. 147, s. 13; Code, s. 485; Rev., s. 664; C. S., s. 707.)

Application of Section.—If the payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. Barker v. Owen, 93 N.C. 198 (1885).

§ 1-349. Procedure where plaintiff is under disability.—If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (1871-2, c. 147, s. 14; Code, s. 486; Rev., s. 665; C. S., s. 708.)

§ 1-350. Defendant evicted, may recover from plaintiff.—If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (1871-2, c. 147, s. 15; Code, s. 487; Rev., s. 666; C. S., s. 709.)

§ 1-351. Not applicable to suit by mortgagee.—Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (1871-2, c. 147, s. 9; Code, s. 481; Rev., s. 660; C. S., s. 710.)

When Section Inapplicable.—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, this section does not apply. Metropolitan Life Ins. Co. v. Allen, 208 N.C. 13, 179 S.E. 15 (1935).

In Wharton v. Moore, 84 N.C. 479, (1881), it was said: "It is very probable the legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 Washburn Real Prop., it is laid down that, 'if the mortgagor or anyone standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can claim the surplus, if any, upon such sale being made after satisfying the debt.'"

Article 31.

Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C. S., s. 711.)

Cross Reference. — As to execution against debts due corporate defendants, see § 55-143.

Editor's Note. — For note on supplemental proceedings or creditor's bill in North Carolina, see 35 N.C.L. Rev. 414 (1957).

Purpose of Proceedings Supplemental.—The purpose is to give supplemental proceedings only in case the debtor has no property liable to execution, or to what is in the nature of execution, viz: proceedings to enforce its sale. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872); Hutchison v. Symons, 67 N.C. 156 (1872); Rand v. Rand, 78 N.C. 72 (1878).

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881).

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. International Harvester Co.

of America v. Brockwell, 202 N.C. 805, 164 S.E. 322 (1932).

Same—Substitute for Creditor's Bill. — In Carson v. Oates, 64 N.C. 115 (1870), it was said: "Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law." Such proceedings are held to be a substitute for the former creditor's bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. Rand v. Rand, 78 N.C. 12 (1878). See Dillard v. Walker, 204 N.C. 67, 167 S.E. 632 (1933).

Such proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. Righton v. Pruden, 73 N.C. 61 (1875).

Same — Complete Determination of Action. — Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. Rand v. Rand, 78 N.C. 12 (1878).

Nature of Proceedings—Final Process.— The proceedings under this section are in the nature of equitable proceedings. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

They are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable fi. fa. Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904).

Same—Equitable Execution.—Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. Coates Bros. v. Wilkes, 92 N.C. 377 (1885); Vegelahn v. Smith, 95 N.C. 254 (1886).

Judgment Conclusive. — A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

Lunatic Liable. — Supplemental proceedings lie against a lunatic in aid of execution. Blake v. Respass, 77 N.C. 193 (1877).

Proceedings Lie against Private Corporations.—Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature, and organized for the purposes of the private gain for its shareholders. LaFountain v. Southern Underwriters' Ass'n, 79 N.C. 514 (1878).

Not Applicable to Supreme Court.—The provisions respecting supplemental proceedings are not applicable to the Supreme Court, and no power has been given it to issue an attachment in such case. Phillips v. Trezevant, 70 N.C. 176 (1874).

Manner of Instituting Proceedings—Demand Unnecessary.—A personal demand or the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a sufficient demand. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

Same—What Must Be Made to Appear. —To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise, to wit: the want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied," the nonexistence of any equitable estates in land within the lien of the judgment, and the existence of property, choses in action and things of value unaffected by any lien and incapable of levy. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872); Hutchison v. Symons, 67 N.C. 156 (1872); Hinsdale v. Sinclair, 83 N.C. 339 (1880).

Same — Who Entitled to Benefits. — Those creditors only are entitled to the benefit of supplementary proceedings who bring themselves within the provisions of the statute by instituting such proceedings. Righton v. Pruden, 73 N.C. 61 (1875).

The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

A judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay

debt of the corporation. Such suit was a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution. Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881).

Action against an Administrator. — A judgment creditor whose execution has been returned unsatisfied cannot maintain an action against an administrator or to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by supplemental proceedings. Rand v. Rand, 78 N.C. 12 (1878).

Three-Year Limitation.—Where the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. Vegelahn v. Smith, 95 N.C. 254 (1886).

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation he should be required to produce them. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Accounting of Partnership Affairs. — In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Authority of Clerk. — This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, when the clerk was properly informed that a similar proceeding was then pending before the judge, he should have refused to proceed, and failing to do so, the judge had the power to order that he desist from further action. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906).

Same—Appeal.—From an order requiring the debtor to appear made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk cannot allow or disallow it. Bank v. Burns, 107 NC. 465, 12 S.E. 252 (1890).

Choses in Action.—In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of setoff when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922).

A bank may apply the deposits of its customer to the payment of his note after maturity, by way of setoff, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922).

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this State by supplemental proceedings under this section which are in the nature of an equitable fi. fa. or creditor's bill. Newberry v. Davison Chem. Co., 65 F.2d 724 (4th Cir. 1933).

Notice Required. — If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted. Rood on Garnishment, § 280,

quoted in Wright v. Railroad, 141 N.C. 164, 53 S.E. 831 (1906).

Ten Days' Notice Not Required. — The requirement of ten days' notice of motions generally, has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

Part of Judgment Owned by Person Other than Defendant Cannot Be Attached. — In Armour Fertilizer Works v. Newbern, 210 N.C. 9, 185 S.E. 471 (1936), it was held that at the time of the rendition of a judgment another person was the equitable owner of a stipulated part thereof, so defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant.

Applied in Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Cited in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

§ **1-353. Property withheld from execution; proceedings.**—After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section [§ 1-352], although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 2; Rev., s. 668; C. S., s. 712.)

Sufficiency of Affidavit.—Such extraordinary proceedings will not be ordered, unless a necessity for it is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action, or things of value, "which he unjustly refuses to apply to the satisfaction of the judgment." Hutchison v. Symons, 67 N.C. 156 (1872). See First & Citizens Nat'l Bank v. Hinton, 213 N.C. 162, 195 S.E. 359 (1938).

An affidavit by a judgment creditor, his agent or attorney, that an execution has been issued upon his judgment — though it has not been returned—and that the defendant has not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient to support an order from the examination of the debtor, and persons alleged to be indebted to him. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Same — Must Negative Existence of Property Liable to Execution. — An affidavit is insufficient to warrant the examination of the judgment debtor, if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amendment at the hearing. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879); Hackney v. Arrington, 99 N.C. 110, 5 S.E. 747 (1888).

Same—Objection as to Property of Defendant. — Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant has other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit without denial. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Clerk's Finding of Fact Sufficient. — Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of execution does not affect. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Alias Execution Unreturned.—The fact that the sheriff has an alias execution in

his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. Vegelahn v. Smith, 95 N.C. 254 (1886).

Sufficient Service of Order to Appear.— Leaving a copy of an order on a judgment debtor, to appear and answer in supplemental proceedings, with the debtor's wife, is a sufficient notice. Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

Court to Apply Property to Judgment.— The section intends that when the debtor refuses to apply such property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Plaintiff need not proceed under this section before he can apply for a receiver under § 1-363. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Applied in Richard Couture, Inc. v. Rowe, 263 N.C. 234, 139 S.E.2d 241 (1964).

§ 1-354. Proceedings against joint debtors. — Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 669; C. S., s. 713.)

Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.—Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (1868-9, c. 148, s. 4; c. 277, s. 8; Code, s. 488, subsec. 4; Rev., s. 671; C. S., s. 714.)

§ 1-356. Examination of parties and witnesses.—On examination under this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; Code, ss. 488 [subsec. 2], 491, 492; Rev., ss. 670, 676; C. S., s. 715.)

Cross-Examination. — Where the judgment debtor is examined the creditor does not make him his witness, but may cross-examine and contradict him. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

Evidence Taken Down in Writing. — In supplemental proceedings the evidence should be taken down in writing. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

Production of Documents.—Where, on

examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.—No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 5; Rev., s. 672; C. S., s. 716.)

Witness Must Answer Questions. — A witness must answer the questions and he cannot shield himself behind his declaration that they involve self-crimination. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

So when called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, he cannot excuse himself on the ground the evidence thus elicited might be used on the trial of indictments pending against him and others for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Not Available for Criminal Proceedings. —Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899).

§ 1-358. Disposition of property forbidden.—The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, ss. 488 [subsec. 6], 494; Rev., s. 673; C. S., s. 717.)

Section Refers to Property of Debtor at Time of Order.—When this section and § 1-360 are read either singly or as a component part of this article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are Not Property. —Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Only Parties May Be Restrained.—In supplemental proceedings, the court cannot restrain the transfer of property owned by one not a party to the action. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party in some way to the proceeding. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

§ 1-359. Debtors of judgment debtor may satisfy execution.—After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (C. C. P., s. 265; Code, s. 489; Rev., s. 674; C. S., s. 718.)

Protection to Debtors of Judgment Debtor.—The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. Parks v. Adams, 113 N.C. 473, 18 S.E. 665 (1893).

Authority of Sheriff. — A sheriff is authorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. Smith v. McMillan, 84 N.C. 593 (1881).

§ 1-360. Debtors of judgment debtor, summoned.—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 675; C. S., s. 719.)

Section Applies Only to Debts Due at Time of Order.—When this section and § 1-358 are read either singly or as a component part of this article it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are neither Property nor Debt.—Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

When Proceedings May Commence.—The proceedings given by the section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872).

Purpose of Appearance and Answer.—The purpose of the appearance and answer required by the section is to determine whether the sum alleged, or any part thereof is due the judgment debtor. Rice v. Jones, 103 N.C. 226, 95 S.E. 571 (1889).

Assignee May Be Examined.—An order for examination may issue against the defendant's assignee. Bruce v. Crabtree, 116 N.C. 528, 21 S.E. 194 (1895).

Procedure.—The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may properly suggest so. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922); Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Where one, who is charged in supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. Carson v. Oates, 64 N.C. 115 (1870).

When this section and G.S. 1-362 are read singly or as an integral part of Article 31, Supplemental Proceedings, Chapter 1, Civil Procedure, of the General Statutes, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Same—Notice to Defendant.—Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894); Wright v. Railroad, 141 N.C. 164, 53 S.E. 831 (1906).

Applied in Marx v. Maddrey, 106 F. Supp. 535 (E.D.N.C. 1952).

Cited in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

§ 1-361. Where proceedings instituted and defendant examined.—Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must

appear and answer must be within the county where he resides. (Rev., s. 677; C. S., s. 720.)

Editor's Note.—This section is a substantial enactment of the rule laid down in Hasty v. Simpson, 77 N.C. 69 (1877). In Hutchison v. Symons, 67 N.C. 156 (1872), it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. Hasty v. Simpson, supra, quoted, and approved this holding, but in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence. Thus a beneficial rule was formulated which was, apparently, followed by the legislature in enacting this section.

Order for Condemnation of Debtor's Property. — In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Property Subject to Sale. — The court may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. Rand v. Rand, 78 N.C. 12 (1878).

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so much thereof as may be necessary, to be applied to the satisfaction of the judgment against the judgment debtor. Rice v. Jones, 103 N.C. 226, 95 S.E. 571 (1889).

Sale Required.—Where it appears from an examination under supplementary proceedings that the judgment debtor holds a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it is error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order is to sell the corn and apply the proceeds to the debt. In re Davis, 81 N.C. 72 (1879).

When Final Order Made. — No final order can be made appropriating to the creditor any property discovered under § 1-360 until the property previously levied on is exhausted, for until that is done it cannot be known whether anything is still owing. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872).

Earnings for Sixty Days.—The exemption of earnings for sixty days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and not for taxes due. City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894).

The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment by this section. Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904), cited in Wierse v. Thomas, 145 N.C. 261, 59 S.E. 58 (1907).

Salaries of Public Officers and Employees. — For reasons of public policy, the salaries of officers and the pay of employees of the State cannot be reached by creditors by proceedings supplementary to execution. Swepson v. Turner, 76 N.C. 115 (1877).

Gratuitous Services. — While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

Where supplemental proceedings are instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance, the judgment debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife. Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton, 204 N.C. 441, 168 S.E. 505 (1933).

§ **1-362. Debtor's property ordered sold.**—The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding

the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (C. C. P., s. 269; 1870-1, c. 245; Code, s. 493; Rev., s. 678; C. S., s. 721.)

Cross Reference.—See note to § 1-360.

Quoted in Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-363. Receiver appointed. — The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 494; Rev., s. 679; C. S., s. 722.)

Cross Reference. — As to duty of receiver generally, see §§ 1-501 through 1-504.

Plaintiff need not proceed under § 1-353 before he can apply for a receiver under this section. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

In a race of diligence between creditors under the supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. Parks v. Sprinkle, 64 N.C. 637 (1870).

Action as a Prerequisite to Appointment. — Where supplemental proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. Ross v. Ross, 119 N.C. 109, 25 S.E. 792 (1896).

Evidence with Application. — The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

Motion Pending Appeal. — The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

Subject to Review. — The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

Reasonable Ground. — It is sufficient for the appointment of a receiver if there is reasonable ground to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

A receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment—if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient; or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Judge to Ascertain if Other Proceedings Pending.—While it is the duty of a judge appointing a receiver under this

section to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin v. Berry, 83 N.C. 28 (1880).

There Shall Be But One Receiver.—This section prescribes that there shall be but one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. Corbin v. Berry, 83 N.C. 28 (1880).

Consolidation of Several Proceedings.—Where several supplemental proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. Monroe Bros. v. Lewald, 107 N.C. 655, 12 S.E. 287 (1890).

Cited in Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

§ 1-364. Filing and record of appointment; property vests in receiver.—When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C. C. P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C. S., s. 723.)

When Property Vests in Receiver.—The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. Turner v. Holden, 94 N.C. 70 (1886).

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

In proceedings supplementary to execution if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. Rankin v. Minor, 72 N.C. 424 (1875).

Remedy of Debtor When Receiver Is Negligent. — If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty, he cannot interfere with the receiver's collection and control of the property. Turner v. Holden, 94 N.C. 70 (1886).

Control and Direction of Court. — A receiver may be appointed who is invested with all the property and effects of the debtor, and may collect, preserve, and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N.C. 12 (1878).

While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. Weill v. First Nat'l Bank, 106 N.C. 1, 11 S.E. 277 (1890).

A receiver, in supplemental proceedings, may bring actions to recover the

judgment debtor's property without special leave or direction of the court. Weill v. First Nat'l Bank, 106 N.C. 1, 11 S.E. 277 (1890). See Coates Bros. v. Wilkes, 92 N.C. 377 (1885).

§ 1-365. Where order of appointment recorded.—Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (C. C. P., s. 270; Code, s. 496; Rev., s. 681; C. S., s. 724.)

Death of Judgment Debtor before Order Filed. — When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judgment creditor has no lien on his property as against the administrator of the debtor. Rankin v. Minor, 72 N.C. 424 (1875).

Cited in Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

§ 1-366. Receiver to sue debtors of judgment debtor.—If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction on such security as he directs. (C. C. P., s. 271; 1870-1, c. 245; Code, s. 497; Rev., s. 682; C. S., s. 725.)

Cross Reference. — As to execution against debts due corporate defendants, see § 55-143.

Court May Restrain Transfer of Property.—Under this section when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. Ross v. Ross, 119 N.C. 109, 25 S.E. 792 (1896).

Same — Notice Required. — In Coates Bros. v. Wilkes, 94 N.C. 174 (1886), it was said that very clearly this section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest," may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right.

Third Parties May Interplead.—In supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund. Held, that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. Wilson v. Chichester, 107 N.C. 386, 12 S.E. 139 (1890).

Fraudulent Transactions of Debtor Set Aside.—A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. Pender v. Mallett, 123 N.C. 57, 31 S.E. 351 (1898).

§ 1-367. Reference.—The court or judge may, in his discretion, order a reference to the referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (C. C. P., s. 272; Code, s. 498; Rev., s. 683; C. S., s. 726.)

Cross References. — As to examination before referee, see § 1-356. As to disobedience of orders of referee, see § 1-368, and note thereto.

Definition. — A reference has been defined as the act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. 2 Bouv. Law Dict., title Reference.

What Law Governs.—The general rule that whatever constitutes part of the procedure is determined by the law of the forum, applies to references, and the validity of a reference, and the proceedings and judgment upon it must be tested by the laws of the forum. Alexandria Canal Co. v. Swann, 46 U.S. (5 How.) 83, 12 L. Ed. 60 (1847).

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the inquiry which the evidence would tend to elucidate or explain. Vestal v. Sloan, 83 N.C. 555 (1880).

§ 1-368. Disobedience of orders punished as for contempt.—Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just. (C. C. P., s. 274; 1869-70, c. 79, s. 3; Code, s. 500; Rev., s. 684; C. S., s. 727.)

Cross Reference.—As to contempt generally, see §§ 5-1 through 5-9.

Court May Enforce Its Lawful Orders.—It is an essential attribute of a court to enforce by proper process its lawful orders, and without this its essential functions would be paralyzed or destroyed. Pain v. Pain, 80 N.C. 322 (1879); LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

As to whether the violation of a void order of a court constitutes contempt, see note in 12 N.C.L. Rev. 260.

Paying Salary Accruing after Issuance of Order.—An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Contempt of Referee Punished by Court.—When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

Judge Passes on Inability to Comply.—Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. Childs v. Wiseman, 119 N.C. 497, 26 S.E. 126 (1896).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

Article 32.

Property Exempt from Execution.

§ 1-369. Property exempted.—The homestead and personal property exemptions as defined and declared by the article of the State Constitution entitled Homesteads and Exemptions are exempt from sale under execution and other final process, as provided in the State Constitution: Provided, the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. (1844, c. 32; 1846, c. 53; 1848, c. 38; R. C., c. 45, ss. 7, 8; 1866-7, c. 61, s. 7; 1876-7, c. 263; 1879, c. 256; Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; Rev., s. 685; C. S., s. 728.)

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As to conveyance of homestead, see § 1-370 and note thereto. See also N.C. Const., Art. X, §§ 1, 2, 3, 4, 5 and 8.

I. GENERAL CONSIDERATION.

Editor's Note.—For article on homestead exemption, see 29 N.C.L. Rev. 143.

In Poe v. Hardie, 65 N.C. 447 (1871), the homestead was called a "determinable fee," and in Littlejohn v. Egerton, 77 N.C. 379 (1877), it is spoken of as "a quality annexed to land whereby the estate is exempted from sale under execution." These inadvertent expressions, as to the effect produced upon the debtor's estate in the exempt land, have led to serious difficulties in interpreting the beneficent provisions of the Constitution and subsidiary statutes in securing a home to the debtor and his family, without trenching needlessly upon the rights of creditors. Markham v. Hicks, 90 N.C. 204 (1884).

The correct view is expressed by Bynum, J., in Citizens Nat'l Bank v. Green, 78 N.C. 247 (1878): "Their legal effect is simply to protect the occupant in the enjoyment of the land, set apart as a homestead, unmolested by his creditors." No new estate is conferred upon the owner, and no limitation is imposed upon his old estate. It is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. It cannot be contended that the assignment is in any sense a conveyance of land, nor does it profess to pass title. It only serves to indicate where the homestead is and whether there is any excess subject to levy and sale to pay judgment creditors. Markham v. Hicks, 90 N.C. 204 (1884), citing Keener v. Goodson, 89 N.C. 273 (1883); Mebane v. Layton, 89 N.C. 396 (1883).

For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

Favored by Law.—The law favors the homestead. Every safeguard is given the homesteader and the courts have carefully protected his rights as guaranteed by the Constitution. Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

Estoppel to Claim. — Under certain circumstances the homesteader is estopped from claiming the homestead exemption. Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928), citing Caudle v. Morris, 160 N.C. 168, 76 S.E. 17 (1912); Simmons v. McCullin, 163 N.C. 409, 79 S.E. 625 (1913); Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928).

Equity of Redemption.—It is well settled that the homestead may be allotted in an equity of redemption. Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928), citing Cheatham v. Jones, 68 N.C. 153 (1873); Gaster v. Hardee, 75 N.C. 460 (1876); Burton v. Spiers, 87 N.C. 87 (1882); Hinson v. Adrian, 92 N.C. 122 (1885); Thurber v. La Roque, 105 N.C. 301, 11 S.E. 460 (1890); Montague v. Raleigh Sav. Bank, 118 N.C. 283, 24 S.E. 6 (1896); Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928).

Cited in Sample v. Jackson, 225 N.C. 380, 35 S.E.2d 236 (1945).

II. NATURE OF HOMESTEAD.

Definition of Homestead.—In Hager v. Nixon, 69 N.C. 108 (1873), it is said: "No precise definition of a homestead is given

in the Constitution, and we must look to our own legislation alone to ascertain what it is."

Homestead Is Not Offspring of Judgment Debt.—The homestead, whether allotted on the voluntary petition of the owner or by the sheriff under execution, is not the offspring of and does not draw its life blood from a judgment debt. It stems from the Constitution and "it is not the condition of the homesteader that creates the homestead condition, but the force of the Constitution, attaching to and acting upon the land." Thomas v. Fulford, 117 N.C. 667, 23 S.E. 635 (1895); Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 670 (1949).

Not an Estate.—A homestead is not an estate at all, but merely an exemption. Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889); Thomas v. Fulford, 117 N.C. 667, 23 S.E. 635 (1895); Chadbourn Sash, Door & Blind Co. v. Parker, 153 N.C. 130, 69 S.E. 1 (1910); Caudle v. Morris, 160 N.C. 168, 76 S.E. 17 (1912). See Hicks v. Wooten, 175 N.C. 597, 96 S.E. 107 (1918).

In Thomas v. Fulford, 117 N.C. 667, 23 S.E. 635 (1895), it was said: "In some of the earlier decisions it is treated as an estate and called a determinable fee, but this doctrine has long since been abandoned."

Not Color of Title.—The assignment of a homestead does not constitute color of title. Keener v. Goodson, 89 N.C. 273 (1883).

Exceptions to Homestead Exemption.—A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted in the purchase of the premises; (3) for mechanics and laborer's lien; (4) for debts contracted prior to the Constitution. Mebane v. Layton, 89 N.C. 396 (1883). See Cumming v. Bloodworth, 87 N.C. 83 (1882).

Time of Application.—The "poor debtor" is in time if he makes his application and procures the assignment to be made at any time before the property is changed and converted by a sale. State ex rel. Hathaway v. Floyd, 33 N.C. 496 (1850).

Allotment by Sheriff Not Necessary to Vest Right. — Title to the homestead is vested in the owner by the Constitution and no allotment by the sheriff is necessary to create the right or vest the title. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

The action of a sheriff in assigning a homestead by metes and bounds is not needed to any extent to vest the right, but merely to find the quantum so as to enable him to ascertain the excess, if any. Gheen v. Summey, 80 N.C. 188 (1879). See Littlejohn v. Egerton, 77 N.C. 379 (1877).

Sale by Homesteader of Estate in Reversion.—A sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. Jenkins v. Bobbitt, 77 N.C. 385 (1877).

III. NATURE AND DURATION OF EXEMPTIONS.

Effect of Exemption Laws.—Exemption laws have no extraterritorial force or effect. Balk v. Harris, 122 N.C. 64, 30 S.E. 318 (1898); Sexton v. Phoenix Ins. Co., 132 N.C. 1, 43 S.E. 479 (1903); Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904).

The exemption laws of this State protect the property of a debtor in this State from exemptions issuing from the courts of this State, and (by congressional action) from the courts of the United States. Balk v. Harris, 122 N.C. 64, 30 S.E. 318 (1898).

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum. Sexton v. Phoenix Ins. Co., 132 N.C. 1, 43 S.E. 479 (1903); Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904).

Same—Remedial in Nature.—Exemption laws are remedial in their nature and should always receive a liberal construction. Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904).

Same—Exchange of Exempt Goods.—If an article of property, which has been exempt from execution, is exchanged for another article, the one received in exchange is not exempt. Lloyd v. Durham, 60 N.C. 282 (1864).

Presumption in Favor of Exemption.—There is a presumption of fact in favor of the exemption, and the creditor who seeks to subject the homestead to the payment of his debt, must bring himself within one of the exceptions by proper averment and proof. Mebane v. Layton, 89 N.C. 396 (1883).

Duration of Exemption. — The personal property exemption exists only during the life of the homesteader. Johnson v. Cross, 66 N.C. 167 (1872); Smith v. McDonald, 95 N.C. 163 (1886).

How Choses in Action Made Available.—Except in case of attachment proceedings wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable

fi. fa. or by the statutory method of supplemental proceedings, both of which remedies in proper instances are here still open to claimants. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922); McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922).

IV. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Favored by Constitution. — The homestead interest is favored by the Constitution. Leak v. Gay, 107 N.C. 468, 12 S.E. 312 (1890).

Purpose of Homestead Provisions.—The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and if there were children then during the minority of the children or any one of them. The leading idea, if not the only one, was to create an exemption and not an estate, and an exemption for a limited period only, leaving the estate which the debtor already had in the land unimpaired. Joyner v. Sugg, 132 N.C. 580, 44 S.E. 122 (1903).

The homestead law is a beneficent provision for the protection of a wife and children against the neglect and improvidence of the father and husband. Hughes v. Hodges, 102 N.C. 236, 9 S.E. 437 (1889).

The purpose of the homestead provision of the Constitution is to surround the family home with certain protection against the demands of urgent creditors. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Preexisting Debt.—The second section of Article X of the Constitution of 1868, which exempts from execution real property of a resident debtor not exceeding in value one thousand dollars, was declared void as to preexisting debts, being in contravention of Article I, § 10 of the federal Constitution. Edwards v. Kearzey, 96 U.S. 595, 24 L. Ed. 793 (1877). For the law governing cases which arose subsequent to this one concerning preexisting debts, see Richardson v. Wicker, 80 N.C. 172 (1879); Earle v. Hardie, 80 N.C. 177 (1879); Gamble v. Rhyne, 80 N.C. 183 (1879).

Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead. Leak v. Gay, 107 N.C. 468, 12 S.E. 312 (1890).

Homestead Is Vested Right. — The homestead right is a right vested by the Constitution, and cannot be destroyed by any irregularity in the proceedings for its allotment. Formeyduval v. Rockwell, 117 N.C. 320, 23 S.E. 488 (1895). See Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

B. Who Entitled to Homestead and Exemptions.

Only Residents Entitled to Homestead and Exemptions. — The homestead and personal property exemptions can be claimed only by residents of this State. Jones v. Alsbrook, 115 N.C. 46, 20 S.E. 170 (1894); Goodwin v. Claytor, 137 N.C. 225, 49 S.E. 173 (1904).

Same—Constitutional Purpose. — The right of homestead provided and secured by the Constitution (Art. X, §§ 2, 5, 8), is incident to residence in this State. Only residents have and are entitled to such right. A nonresident has no such right, although he may be the owner of real property situated in the State. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to exempt the homes of those who have or can acquire them "from sale under execution or other final process obtained on any debt." He has no home within the State for himself or his family, and the reason for the exemption as to him does not exist. Baker v. Legget, 98 N.C. 304, 4 S.E. 37 (1887).

Same—Forfeiture of Right.—If the person claiming a homestead voluntarily removes from the State, with a purpose to make his home elsewhere, he forfeits his right in this respect. Finley v. Saunders, 98 N.C. 462, 4 S.E. 516 (1887).

Where a debtor ceased to be a resident of the State before his property became applicable to a creditor's claim, the general exemption laws of the State do not operate in his favor. Wierse v. Thomas, 145 N.C. 261, 59 S.E. 58, 15 L.R.A. (n.s.) 1008 (1907).

A resident, after executing a deed of trust of his property, with a recital reserving his personal property exemptions, and after assigning his exemptions so reserved, became a nonresident without having his exemptions allotted to him. Neither the assignee nor the attaching creditors could get the benefit of the exemptions. Latta v. Bell, 122 N.C. 639, 30 S.E. 15 (1898). See Norman v. Craft, 90 N.C. 211 (1884).

Residents Defined. — The leading purpose of the N.C. Const., Art. X, §§ 1, 2, 3, 8, is to secure the homestead to the debtor and his family and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. Chitty v. Chitty, 118 N.C. 647, 24 S.E. 517 (1896).

The words "a resident of this State," employed in the N.C. Const., Art. X, § 2, in respect to homesteads, have a more restricted meaning than that usually given to domicile. Lee v. Mosely, 101 N.C. 311, 7 S.E. 874 (1888).

The residence must be actual, and not constructive. Munds v. Cassidy, 98 N.C. 558, 4 S.E. 353 (1887).

Right Not Destroyed by Fraud.—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them, and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Rankin v. Shaw, 94 N.C. 405 (1886); Rose v. Bryan, 157 N.C. 173, 72 S.E. 960 (1911).

When Wife and Children Succeed to Homestead.—The wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal from the State, though they may remain. Finley v. Saunders, 98 N.C. 462, 4 S.E. 516 (1887).

A widow is not entitled to a homestead in the lands of her husband if he die leaving children—minors or adults. Wharton v. Leggett, 80 N.C. 169 (1879). See Hager v. Nixon, 69 N.C. 108 (1873). But see later case under "Purpose of Homestead Provisions," supra.

When Dower Right Paramount to Homestead Right.—In Watts v. Leggett, 66 N.C. 197 (1872), Pearson, C.J., speaking for the court, said: "If the homestead had been laid off in the lifetime of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling house in which the husband had usually resided and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower, until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and land appertaining thereto as is not covered by the dower." See Gregory v. Ellis, 86 N.C. 579 (1882).

Reversionary Interest. — The reversionary interest in a homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate. Hinsdale v. Williams, 75 N.C. 430 (1876). See Maynard v. Moore, 76 N.C. 158 (1877); Mebane v. Layton, 89 N.C. 396 (1883); Barnes v. Cherry, 190 N.C. 772, 130 S.E. 611 (1925).

Collateral Attack.—The allotment of a homestead to one having no right thereto is void, and may be attacked collaterally. Williams v. Whitaker, 110 N.C. 393, 14 S.E. 924 (1892).

But the allotment cannot be attacked collaterally by the judgment debtor or anyone claiming under him. Formeyduval v. Rockwell, 117 N.C. 320, 23 S.E. 488 (1895).

Mortgage or Deed of Trust Paramount.—As against a mortgage or deed of trust, the grantor has no right of homestead. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Adverse Possession under Sheriff's Deed.—Where there is an actual adverse possession under a sheriff's deed, the appellate court, in order to give full effect to the constitutional provision, will remand the case to the end that the superior court may have the homestead laid off. Littlejohn v. Egerton, 77 N.C. 379 (1877).

C. Homestead in Land Only.

Not Applicable to Proceeds of Sale.—The law confers a homestead right only in land, and not in the proceeds of the sale of land. Utley v. Jones, 92 N.C. 261 (1885).

Where a homestead is sold, the proceeds lose the quality of homestead exemptions, and become subject to the personal property exemption. Lane v. Richardson, 104 N.C. 642, 10 S.E. 189 (1889).

Lands Subject to Homestead Right.—To claim a homestead in land it must be owned and occupied by and allotted to the

claimant at the time of the issuance of the execution; and the vendee of a judgment debtor cannot claim and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed. Chadbourn Sash, Door & Blind Co. v. Parker, 153 N.C. 130, 69 S.E. 1 (1910).

The owner of land is not restricted to the tract of land on which he resides. Mayho v. Cotton, 69 N.C. 289 (1873).

Reservation of Right.—A reservation of an indefinite right of homestead in land from a conveyance thereof is valid. Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

V. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Limitations.—The running of the statute of limitations on a judgment is not suspended until there has been an actual allotment of a homestead. Farrar v. Harper, 133 N.C. 71, 45 S.E. 510 (1903). See Cleve v. Adams, 222 N.C. 211, 22 S.E.2d 567 (1942).

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Same—As to Judgments. — When the judgment debtor's homestead is allotted, the allotment, as to all property therein embraced, suspends the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. Formeyduval v. Rockwell, 117 N.C. 320, 23 S.E. 488 (1895); Barnes v. Cherry, 190 N.C. 772, 130 S.E. 611 (1925).

Same—Judgments Docketed.—The statute of limitations does not run against a debt of a homesteader during the existence of his interest in the homestead, provided it has been actually laid off; and then only as to debts affected by the allotment, that is, judgments docketed in the county where the land is situated and solely with reference to the lien of such judgments upon the reversionary interest. McDonald v. Dickson, 85 N.C. 248 (1881); Morton v. Barber, 90 N.C. 399 (1884).

In Cotten v. McClenahan, 85 N.C. 254 (1881), it was said: "There is no stay to the statute until there has been an allotment of the homestead, and then only to the enforcement of the liens of docketed judgments upon the interest in reversion. As to all other debts and for all other purposes the statute runs." Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. Watters v. Hedgpeth, 172 N.C. 310, 90 S.E. 314 (1916).

In Davenport v. Fleming, 154 N.C. 291, 70 S.E. 472 (1911), it was said: "It follows that when the ownership of a tract of land and any and all interests therein, except the homestead interest, has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance, and where such conveyance has become effective before a judgment is docketed, there is no estate in the debtor to which a judgment lien could attach and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise." Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

Same—Ten-Year Limitation. — Under a statute limiting the life of the docketed judgment to ten years, a lien of such judgment is not prolonged by the allotment and recording of the homestead to the debtor after the expiration of ten years, though the judgment was kept revived. Wilson v. Beaufort County Lumber Co., 131 N.C. 163, 42 S.E. 565 (1902).

The Judgment Lien. — The Acts of 1885, ch. 359, restored the lien of a docketed judgment upon land set apart as a homestead. Rankin v. Shaw, 94 N.C. 405 (1886).

In Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889), it was said: "The condition and measure of the state of the owner of the homestead in the land is not changed by, or because of, the homestead — the estate, unchanged, continues —and the restriction, the limitation that distinguishes the homestead, is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land."

This lien is not meaningless and nuga-

tory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt, as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true and sincere; it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. He is allowed to live upon and use it, but not destroy or impair the substance of it, as against the creditor having a lien. Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889).

Under this section a docketed judgment has a lien upon the homestead even after it has been set apart. Summers Hdwe. Co. v. Jones, 222 N.C. 530, 23 S.E.2d 883 (1943).

Lien by Attachment. — The lien of an attachment levied upon land of a nonresident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. Watkins v. Overby, 83 N.C. 165 (1880).

Merger of Judgments. — Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. Springs v. Pharr, 131 N.C. 191, 42 S.E. 590, 92 Am. St. R. 775 (1902).

Payment of Judgment Does Not Extinguish Homestead. — Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not start the running of the statute against judgments then of record or thereafter docketed. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Judgments Obtained Prior to 1868.— A judgment obtained on an obligation incurred prior to the Constitution of 1868, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations. Blow v. Harding, 161 N.C. 375, 77 S.E. 340 (1913).

As against the liens of judgment creditors, a mortgagor of lands is entitled to his homestead exemption in his equity of redemption and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

§ 1-370. Conveyed homestead not exempt.—The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by anyone for him, but when conveyed by him in the mode authorized by the Constitution, article X, § 8, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (1905, c. 111; Rev., s. 686; C. S., s. 729.)

History of Section. — See Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Intention of Legislature.—See Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

If one is to read this section intelligently, he should read first § 1-371, then § 1-375, and then this section. Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Construction of Constitution. — This section is in accordance with the views of the court, and expresses the proper construction of the N.C. Const., Art. X, § 2. Chadbourn Sash, Door & Blind Co. v. Parker, 153 N.C. 130, 69 S.E. 1 (1910).

This section seems to deal with "allotted homesteads." Equitable Life Assurance Soc'y of the United States v. Russos, 210 N.C. 121, 185 S.E. 632 (1936), citing Chadbourn Sash, Door & Blind Co. v. Parker, 153 N.C. 130, 69 S.E. 1 (1910); Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928); Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

Conveyance of Homestead.—The homestead exemption ceases upon its conveyance by the homesteader. Caudle v. Morris, 160 N.C. 168, 76 S.E. 17 (1912); Crouch v. Crouch, 160 N.C. 447, 76 S.E. 482 (1912).

Same—Examination of Wife. — As to former holding, see Dalrymple v. Cole, 170 N.C. 102, 86 S.E. 988 (1915).

Same — By Mortgage. — The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. Cleve v. Adams, 222 N.C. 211, 22 S.E.2d 567 (1942).

Section Not Retroactive. — By its express terms this section does not have a retroactive effect, and has no application to homesteads allotted prior to 1905. Watters v. Hedgpeth, 172 N.C. 310, 90 S.E. 314 (1916).

Under the section a vendee cannot ac-

quire title under color until seven years adverse possession since 1905. Crouch v. Crouch, 160 N.C. 447, 76 S.E. 482 (1912).

Cited in Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928); Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929).

§ 1-371. Sheriff to summon and swear appraisers. — Before levying upon the real estate of any resident of this State who is entitled to a homestead under this article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Caswell, Chatham, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rockingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147; 1955, c. 20; 1967, c. 202.)

Cross References.—As to the form of a certificate to be endorsed on return, see § 1-392, No. 4. As to resident within the meaning of this section, see note under § 1-369.

Editor's Note.—The 1967 amendment inserted "Caswell" in the list of counties.

Intention of Legislature. — See Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Purpose of Allotment by Sheriff. — No sale can be had until the homestead is first ascertained and set apart to the judgment debtor. The allotment by the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead which is subject to sale under execution. Lambert v. Kinnery, 74 N.C. 348 (1876); Littlejohn v. Egerton, 77 N.C. 379 (1877); Gheen v. Summey, 80 N.C. 187 (1879). The issuance of the execution and the levy thereunder merely set in motion the machinery through which the homestead is valued and set apart to the owner. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Allotment Does Not Create Homestead Right.—When a sheriff is seeking to collect a judgment under execution issued to him he must, before levying upon the real property of the debtor proceed to have the debtor's homestead allotted as required by this section. But this does not create the homestead right. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Duty of Officer Mandatory.—This section enjoins upon the sheriff the mandatory duty of summoning three discreet persons to appraise and allot a homestead to any judgment debtor who is entitled to such exemption, before levying an execution in his hands upon the land. Neither his ignorance of the rights of a debtor nor his obstinate refusal to recognize them will be allowed to defeat the latter's claim to the benefit of a homestead for which the Constitution provides, though the presumption of law prevails in favor of the legality of his action in selling until a party attacking it shows its invalidity because made in disregard of a statute enacted to carry into effect the organic law. Dickens v. Long, 112 N.C. 311, 17 S.E. 150 (1893).

This section, by express language, commands the sheriff to lay off a homestead to the judgment debtor before any levy is made. The provisions of the statute are mandatory. Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Appraisers—Qualifications. — There is no requirement that appraisers in order to allot the homestead shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," i.e., as ordinary or regular jurors. Hale Bros. v. Whitehead, 115 N.C. 28, 20 S.E. 166 (1894).

Same—Exception. — An exception on the ground of the disqualification of an appraiser of a homestead exemption should be taken before the appraisers enter upon the discharge of their official duties. Burton v. Spiers, 87 N.C. 87 (1882).

Same—May Be Appointed by Clerk. — For the allotment of a homestead, the court may direct the clerk to appoint three commissioners for that purpose. Benton v. Collins, 125 N.C. 83, 34 S.E. 242 (1899).

Same—Constable May Summons. — A constable, to whom an execution from the court of a justice of the peace has been delivered, may summons appraisers and administer to them the prescribed oaths. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

Necessity That Appraisers Be Sworn.— Appraisers appointed to lay off a homestead must be sworn; and unless it appears that they were sworn the proceedings may be treated as a nullity. Smith v. Hunt, 68 N.C. 482 (1873).

Same—Oath Administered by Deputy Sheriff. — That appraisers laying off a homestead were sworn by a deputy sheriff is, at most, an irregularity, and cannot be taken advantage of in a collateral proceeding if exceptions were not taken in apt time. Oates v. Munday, 127 N.C. 439, 37 S.E. 457 (1900).

Sale under Execution Void for Noncompliance.—Sales made under execution merely for the purpose of providing funds to pay a debt are, when the homestead of the judgment debtor has not been allotted, void. Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

§ 1-372. Duty of appraisers; proceedings on return.—The appraisers shall value the homestead with its dwelling and buildings thereon, and lay off to the owner or to any agent or attorney, in his behalf, such portion as he selects not exceeding in value one thousand dollars, and must fix and describe the same by metes and bounds. They must then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, and said clerk must likewise file and make minute of the same as above directed. In all judicial proceedings the original return or a certified copy may be read in evidence. Provided, that the return of the appraisers of their proceedings as described in this section shall be invalid, void, and of no effect as to the rights of third persons or parties or as to the rights of persons, firms or corporations who are not parties to the judgment or proceedings unless said return is filed with the judgment roll in the action, and the minutes of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. (1868-9, c. 137, ss. 3-4; 1877, c. 272; Code, ss. 503-4; Rev., ss. 688, 689; C. S., s. 731; 1945, c. 912.)

Cross References.—As to appeal as to reallotment, see § 1-374. As to reallotment for increase of value, see § 1-373. As to form of appraisers' return, see § 1-392. As to costs of laying off and appraising homestead, see § 6-28.

Interpretation of Section.—The section, prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by implication or otherwise, as to any debt or class of debts; it allows, and in legal effect requires, that the homestead shall be valued and laid off in every case where it may be done. Long v. Walker, 105 N.C. 90, 10 S.E. 858 (1890).

Valuation of Land and Buildings. — The section provides that "the appraisers shall thereupon proceed to value the homestead with its dwellings and buildings thereon, and lay off," etc. This evidently means that the land and buildings there shall be valued together in making up the estimate of a thousand dollars. Ray v. Thornton, 95 N.C. 571 (1886).

Same — Must Not Exceed $1,000. — Where lands belonging to a judgment

creditor are indivisible, he is not entitled to have the whole of it allotted to him as a homestead, if it exceeds one thousand dollars in value. Campbell v. White, 95 N.C. 491 (1886).

Where the jury value the tract as $2,000 the land should be divided into two parts of equal value, and the homesteader will take his choice. Shoaf & Co. v. Frost, 123 N.C. 343, 31 S.E. 653 (1898).

Same—When Less than $1000.—An allotment of a homestead to the value of $800, laid off under execution, does not render the allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. Carstarphen v. Carstarphen, 193 N.C. 541, 137 S.E. 658 (1927).

Same — Conclusive. — The valuation placed on the tract of land by the jury is conclusive. Shoaf & Co. v. Frost, 123 N.C. 343, 31 S.E. 653 (1898).

Same — May Take Present Value. — Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. Leak v. Gay, 107 N.C. 482, 12 S.E. 315 (1890).

Same — Duty of Appraisers. — The duty of the appraisers extends no further than the valuation and allotment by bounds of the homestead. Aiken v. Gardner, 107 N.C. 236, 12 S.E. 250 (1890).

In the allotment of a homestead the appraisers should estimate the value of the interest of the homesteader in the land, taking into consideration any encumbrances thereon, and assign to him his interest in the land, and not the corpus itself. McCaskill v. McKinnon, 125 N.C. 179, 34 S.E. 273 (1899).

Manner of Allotment.—The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him for that purpose, and this without reference to whether it embraces the dwelling house or not. Generally the dwelling house and buildings used therewith, must be embraced, but there may be reasons why this cannot be done, as when the land on which they are situated is encumbered for all or more than its value. Flora v. Robbins, 93 N.C. 38 (1885).

Where a judgment debtor owned several town lots, some of which, including the one on which his dwelling was situated, in which he resided — were encumbered by prior liens (mortgages) to the extent of their full value, and the others were unencumbered, it was held, that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling and other buildings. Flora v. Robbins, 93 N.C. 38 (1885).

Same—Must Be in Severalty. — There must be a specific allotment of the homestead in severalty without any community of interest between the homesteader and the purchaser of the excess. Campbell v. White, 95 N.C. 491 (1886).

Debtor's Right to Select.—A judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the face of the return that he was not present, by no fault of his own, the appraisal and allotment of a homestead under an execution is void. McGowan v. McGowan, 122 N.C. 164, 29 S.E. 372 (1898); McKeithen v. Blue, 142 N.C. 360, 55 S.E. 285 (1906).

Same—What Constitutes. — Where a mortgagor conveyed his personal property, more than $500 in value, with a clause in the deed reserving his "personal property exemption and to be selected by him" the title to the whole of it passed to the mortgagee and remained in him, until the exempted articles were legally set apart; and the act of executing a second mortgage conveying a part of said property is not a selection of such part, nor a separation of the same from the bulk. Norman v. Craft, 90 N.C. 211 (1884).

Description of Allotment. — When the land is sufficiently identified the allotment is not open to the objection that the homestead should have been fixed and described by metes and bounds. Ray v. Thornton, 95 N.C. 571 (1886); Kelly v. McLeod, 165 N.C. 382, 81 S.E. 455 (1914).

Report of Appraisers.—The omission of appraisers to insert in their report the date of the allotment is not a sufficient ground for vacating it. Bevans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887).

It is allowable for appraisers of a homestead to amend their return before it has been filed. Gudger v. Penland, 118 N.C. 832, 23 S.E. 921 (1896).

Same—Registration. — As to when registration not necessary prior to the 1945 amendment, see Bevan v. Ellis, 121 N.C. 224, 28 S.E. 471 (1897); Crouch v. Crouch, 160 N.C. 447, 76 S.E. 482 (1912); Carstarphen v. Carstarphen, 193 N.C. 541, 137 S.E. 658 (1927); Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Prior to the 1945 amendment it was held that the unregistered allotment of a homestead was competent evidence, un-

less objected to in apt time. Gudger v. Penland, 118 N.C. 832, 23 S.E. 921 (1896).

Same—As Notice of Extent. — The direction contained in the section as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set it aside. Burton v. Spiers, 87 N.C. 87 (1882).

Cited in Cheek v. Walden, 195 N.C. 752, 143, S.E. 465 (1928); Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-373. Reallotment for increase of value.—A judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which the homestead lies for an order for its reallotment, if there is in the hands of the sheriff of that county an execution issued from the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of its service and show cause why his homestead should not be reallotted. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the affidavits filed, as heretofore required, and any additional affidavits filed by either party, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to reallot to the judgment debtor his homestead, in the same manner as if no homestead had been allotted. If upon the reallotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. This section does not prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a reallotment of the homestead of his judgment debtor in any case. (1893, c. 149; Rev., s. 691; C. S., s. 732.)

Cross Reference.—As to costs, see § 6-21.

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

Where in bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment the court held that as against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallotment of homestead either by suit in equity or by application to the clerk under this section, but could proceed by levy of execution and allotment of homestead. Sample v. Jackson, 226 N.C. 408, 38 S.E.2d 155 (1946).

Procedure for Reallotment.—If the increase is 50 percent or more, the creditor may have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 percent, the judgment creditor can proceed by suit in the nature of an equitable action to subject the excess to his debt. Vanstory v. Thornton, 110 N.C. 10, 14 S.E. 637 (1892); McCaskill v. McKinnon, 125 N.C. 179, 34 S.E. 273 (1899).

Where a portion of the land included in the allotment was subject to a mortgage prior thereto, and has since been sold thereunder, in making the reallotment it must clearly appear that this portion was not included in the revaluation. McCaskill v. McKinnon, 125 N.C. 179, 34 S.E. 273 (1899).

Same—Intrinsic and Market Value.—If it appears, upon a reallotment of the homestead, that the value thereof has increased, it is immaterial in point of law whether the increase had come in the market value or in the intrinsic value, the effect is the same—the homestead is not to exceed in value the sum of $1,000. McCaskill v. McKinnon, 125 N.C. 179, 34 S.E. 273 (1899).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

§ 1-374. Appeal as to reallotment.—From the order of the clerk commanding or refusing a reallotment, either party may appeal to the judge resident in or holding the courts of the district, who shall hear the matter in chambers in any county of the judicial district to which belongs the county in which the proceedings were instituted. In other respects the proceedings upon such appeal are

as now provided for appeals from the clerk on issues of law. (1893, c. 149; Rev., s. 691; C. S., s. 733.)

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

§ 1-375. Levy on excess; return of officer.—The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who set off to X. Y. the homestead exempt by law. Levy made upon the excess." (1868-9, c. 137, s. 5; Code, s. 505; Rev., s. 692; C. S., s. 734.)

The levy must be only upon the excess. Gardner v. McConnaughey, 157 N.C. 481, 73 S.E. 125 (1911).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-376. When appraisers select homestead.—If no selection is made by the owner, or anyone acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection for him, including always the dwelling and buildings used therewith. (1868-9, c. 137, s. 6; Code, s. 506; Rev., s. 693; C. S., s. 735.)

When No Buildings on Land.—If the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there is no dwelling house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provisions of the Constitution. Spoon v. Reid, 78 N.C. 244 (1878); Murchison v. Plyer, 87 N.C. 79 (1882); Flora v. Robbins, 93 N.C. 38 (1885); McCracken v. Odler, 98 N.C. 400, 4 S.E. 138 (1887).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-377. Homestead in tracts not contiguous.—Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars. (1868-9, c. 137, s. 15; Code, s. 509; Rev., s. 694; C. S., s. 736.)

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

Application of Section. — While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling place and the surrounding land, his choice is not positively restricted to that, nor to contiguous land. Flora v. Robbins, 93 N.C. 38 (1885); Hughes v. Hodges, 102 N.C. 236, 9 S.E. 437 (1889); Fulton v. Roberts, 113 N.C. 421, 18 S.E. 510 (1893).

A homestead may be laid off in two tracts of land not contiguous, the two not exceeding $1,000 in value. Martin v. Hughes, 67 N.C. 293 (1872).

§ 1-378. Personal property appraised on demand.—When the personal property of any resident of this State is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the Constitution of the State, in no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption. (1868-9, c. 137, ss. 12, 13; Code, s. 507; Rev., s. 695; C. S., s. 737.)

Cross References. — As to summons, oath, and qualification of appraisers, see § 1-371, and note thereto. As to return made by appraisers, see § 1-372. As to appraiser's oath and fees, see § 1-379. As to residents, see note under § 1-369. As to persons entitled to exemptions, see note to § 1-369. As to costs of appraisal and laying of exemptions, see § 6-28.

Editor's Note.—As to right to claim in-

come from life insurance policies as exempt, see note in 12 N.C.L. Rev. 67.

Section Subsidiary to Constitution. — This section was enacted to carry out the provisions of N.C. Const., Art. X, § 1. Jones v. Allsbrook, 115 N.C. 46, 20 S.E. 170 (1894).

Continuation of Levy. — In Shepherd v. Murrill, 90 N.C. 208 (1884), the language of the section, "whenever the personal property of any resident of this State shall be levied upon," etc., is held to mean, at any time, while it is levied upon, and the levy continues to the day of sale.

Same—Time of Allotment. — The complete capacity to make the allotment would always remain until the day of sale, and we can see no reason, certainly no substantial reason, why it might not be done of the day of the levy, or on any day before the sale, or on that day. Shepherd v. Murrill, 90 N.C. 208 (1884). See Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

Unlike the homestead exemption, which must be allotted before levying upon the land, the right to personal property exemption may be insisted on at any time before sale, or appropriation of the property by the court. Chemical Co. v. Sloan, 136 N.C. 122, 48 S.E. 577 (1904); Befarrah v. Spell, 178 N.C. 231, 100 S.E. 321 (1919).

So long as an execution is in the officer's hands and in force, the preliminary action of the appraisers is in fieri and capable of correction and amendment, and it is a right both of the debtor and the creditor that the exemption shall be ascertained up to and just before the process is executed by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appears at the sale that he is not entitled to the same. Jones v. Allsbrook, 115 N.C. 46, 20 S.E. 170 (1894).

Order of Court as Final Process.—The order of the court directing the payment of money is "final process," within the meaning of the Constitution and this section. Befarrah v. Spell, 178 N.C. 231, 100 S.E. 321 (1919).

Debtor's Right of Selection.—It is immaterial how much, or what other personal estates, the debtor possessed, the statute gives him the right, when his property is seized under execution, to select such, not exceeding the limits in value, as he may prefer to retain as exempt. Scott v. Kenan, 94 N.C. 298 (1886).

Property from Which Exemption Is Made.—In laying off the personal property exemption of a debtor, the property upon which there is no lien must be first exempted. Cowan v. Phillips, 122 N.C. 72, 28 S.E. 961 (1898). See Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

Same—Choses in Action. — A chose in action may be chosen by a debtor as a part of his exemption. Frost v. Naylor, 68 N.C. 325 (1873).

A judgment is personal property, and, if it was required to make up the amount to which the person, in whose favor it was rendered, is entitled to exemption, it is the duty of the officer having the execution to so allot it. Curlee v. Thomas, 74 N.C. 51 (1876).

Property Not Subject to Exemption. — A tenant cannot claim his personal property exemption out of the crops, as against his landlord, until the rents are paid. Hamer v. McCall, 121 N.C. 196, 28 S.E. 297 (1897).

Fines and Costs in Criminal Action. — The personal property exemption cannot be claimed as against a fine and costs in a criminal action. State v. Williams, 97 N.C. 414, 23 S.E. 370 (1887).

Value of Exemption. — The section merely follows the language of the N.C. Const., Art. X, § 1, in giving each resident of the State a personal property exemption of $500, against execution or any other final process. Befarrah v. Spell, 178 N.C. 231, 100 S.E. 321 (1919).

A debtor is entitled to $500 of personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other personal property he may have exempted, up to the prescribed limit. Campbell v. White, 95 N.C. 344 (1886).

Right Personal to Debtor.—As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred. Lane v. Richardson, 104 N.C. 642, 10 S.E. 189 (1889).

Appraisers' Report. — When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. Gardner v. McConnaughey, 157 N.C. 481, 73 S.E. 125 (1911).

Same—Made to Clerk.—The return of the appraisers of personal property exemptions should be made to the clerk of the superior court, but an allotment is not

vitiated by making it returnable to another place. The court has power to direct the return to be made to the proper office, and it should exercise that power instead of dismissing the proceedings for defect in the return. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

When Exception Not Regular.—Where a defendant's exceptions to an allotment did not comply with the requirements of the section and while the proceeding was not, in some respects, regular, but when it appears that the defendant's constitutional right has not been preserved, the matter of form becomes immaterial, and the facts having been found by the judge and all the parties are before the court, the proceeding may be treated as a motion in the cause and relief administered. McKeithen v. Blue, 142 N.C. 360, 55 S.E. 285 (1906).

Both Creditor and Debtor Are Entitled to Have Procedure Conform to Statute. — In the allotment of the personal property exemption, the creditor as well as the debtor is entitled to have the procedure conform to the constitutional provisions and the statutes enacted pursuant thereto. Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

§ 1-379. Appraiser's oath and fees. — The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers must lay off both, and are entitled to but one fee. (1868-9, c. 137, s. 14; Code, s. 508; Rev., s. 696; C. S., s. 738.)

Cross Reference.—As to oaths required of homestead appraisers, see § 1-371.

Necessity of Oath. — Freeholders appointed to allot personal property exemptions must be sworn, and it must appear that they were sworn. Smith v. Hunt, 68 N.C. 482 (1873).

Cited in Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-380. Returns registered.—It is the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register. (1868-9, c. 137, s. 9; Code, s. 513; Rev., s. 698; C. S., s. 739.)

§ 1-381. Exceptions to valuation and allotment; procedure.—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues at that term. The sheriffs shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (1883, c. 357; Code, s. 519; 1887, c. 272, s. 2; Rev., s. 699; C. S., s. 740.)

Cross Reference.—As to costs of reassessment, see § 6-29.

Editor's Note.—As to early provision for review of allotment of appraisers by township trustees, see Hartman v. Spiers, 94 N.C. 150 (1886). And see Jones, Gaskill & Co. v. Commissioners of Rowan, 85 N.C. 278 (1881); Hartman v. Spiers, 87 N.C. 28 (1882); Burton v. Spiers, 87 N.C. 87 (1882).

Estopped from Claiming Additional Allotment.—An allotment of a homestead to the debtor of lands less in value than one

thousand dollars, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. Whitehead v. Spivey, 103 N.C. 66, 9 S.E. 319 (1889).

Time of Application. — The application for a reassessment of a homestead by the township board of trustees (now the superior court) must be made before the sale of the excess by the sheriff. Heptinstall v. Perry, 76 N.C. 190 (1877).

Service of Notice. — Notices of dissatisfaction with allotment of personal property exemption under the section cannot be served by mail or given orally. Allen v. Strickland, 100 N.C. 225, 6 S.E. 780 (1888).

Where Exception Filed.—Exceptions to the allotment of a homestead or personal property exemptions, in all cases, must be filed in the office of the clerk of the superior court of the county where the allotment is made, together with a transcript of the allotment or appraisement. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

The section does not require that the exception be filed in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

Appraisers' Return. — The return of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the superior court of the county in which the appraisal was made, and filed there as directed in the statute; but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

Collateral Attack of Allotment.—An allotment of a homestead cannot be collaterally attacked by the judgment debtor or anyone claiming under him. Welch v. Welch, 101 N.C. 565, 8 S.E. 156 (1888); Formeyduval v. Rockwell, 117 N.C. 320, 23 S.E. 488 (1895).

If he is dissatisfied therewith, he must present his objections in the manner prescribed by this section. Welch v. Welch, 101 N.C. 565, 8 S.E. 156 (1888).

Where a homesteader acquiesces in allotment of his homestead for many years, a grantee of the homesteader will not be permitted to defeat judgment creditors by proof of purchase in good faith for a full price. Oates v. Munday, 127 N.C. 439, 37 S.E. 457 (1900).

Applied in Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

§ 1-382. Revaluation demanded; jury verdict; commissioners; report.—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallotment is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto. (1885, c. 347; Rev., s. 700; C. S., s. 741.)

When Valuation by Jury Unnecessary.—Where the debtor designated the particular land which he desires to have allotted him as "an increase of exemption" and the creditors assent thereto, neither party can demand that the property shall be valued by a jury. Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887).

Appointment and Summons of Commissioners. — Upon an appeal from the appraisal of homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemptions in accordance with the verdict must be appointed by the court and summoned by the sheriff. Shoaf & Co. v. Frost, 116 N.C. 675, 21 S.E. 409 (1895).

Valuation by Jury Is Final. — Upon an appeal from an appraiser the valuation as

determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation. Shoaf & Co. v. Frost, 116 N.C. 675, 21 S.E. 409 (1895); Shoaf & Co. v. Frost, 121 N.C. 256, 28 S.E. 412 (1897).

§ 1-383. Undertaking of objector. — The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as are adjudged against him. (Code, s. 522; Rev., s. 701; C. S., s. 742.)

§ 1-384. Set aside for fraud, or irregularity.—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Code, s. 523; Rev., s. 702; C. S., s. 743.)

Cross References. — As to reallotment for increase of value, see § 1-373. As to appeal as to reallotment, see § 1-374.

When Reason Not Sufficient.—An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the homesteader. Ray v. Thornton, 95 N.C. 571 (1886).

Where the homestead has once been regularly allotted and set apart, it cannot be reallotted at the instance of a judgment creditor whose debt was in existence when the allotment was made, except for fraud or other irregularity. Gully v. Cole, 96 N.C. 447, 1 S.E. 520 (1887). This case was decided before the enactment of §§ 1-373, 1-374.

§ 1-385. Return registered; original or copy evidence.—When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Code, s. 524; Rev., s. 703; C. S., s. 744.)

Object of Section. — The object of the section is to give notice to all persons dealing with the owner of the homestead, that it is his homestead, not subject to be sold "under execution" or other final process obtained on any debt against him. Gully v. Cole, 96 N.C. 447, 1 S.E. 520 (1887).

§ 1-386. Allotted on petition of owner.—When any resident of this State desires to take the benefit of the homestead and personal property exemption as guaranteed by article X of the State Constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds. (1868-9, c. 137, ss. 7, 8; Code, ss. 511, 512; Rev., ss. 697, 704; C. S., s. 745.)

Cross References.—As to form of petition, see § 1-392, No. 2. As to form for return, see § 1-392, No. 3. As to who is a resident within the meaning of the section, see note under § 1-369. As to qualifications of assessors, see note under § 1-371. As to procedure generally, see notes under §§ 1-369 through 1-372.

Insolvency or the need for protection against sale is not a prerequisite to a homestead's allotment. While the homestead may have real beneficial value only when

the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Nature of Proceedings. — The allotment of a homestead is a quasi in rem proceeding. Williams v. Whitaker, 110 N.C. 393, 14 S.E. 924 (1892).

Return of Appraisers.—A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the section requires. Ray v. Thornon, 95 N.C. 571 (1886).

Same — Descriptive List. — Appraisers of personal property for exemption, must make such a descriptive list of the property as will enable creditors to ascertain what property is exempt. Smith v. Hunt, 68 N.C. 482 (1873).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

§ 1-387. **Advertisement of petition; time of hearing.**—When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than twelve months from the day of making advertisement as above required. (1868-9, c. 137, s. 11; Code, s. 515; Rev., s. 705; C. S., s. 746.)

Who Are Bound. — The allotment of homestead is a quasi in rem proceeding and only those persons having actual or constructive notice are bound thereby. Williams v. Whitaker, 110 N.C. 393, 14 S.E. 924 (1892).

§ 1-388. **Exceptions, when allotted on petition.** — When the homestead or personal property exemption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days' notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and personal property exemptions set off under execution. (Code, s. 520; Rev., s. 706; C. S., s. 747.)

§ 1-389. **Allotted to widow or minor children on death of homesteader.**—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (1868-9, c. 137, s. 10; Code, s. 514; 1893, c. 332; Rev., s. 707; C. S., s. 748.)

Cross References.—As to constitutional provisions, see N.C. Const., Art. X, §§ 3 and 5. As to widows and minor children entitled to homestead, see note under § 1-369.

Editor's Note. — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

Purpose and Constitutionality. — The manifest purpose of the section is to prevent the widow and minor children from being prejudiced by the failure of one entitled to a homestead to cause it to be laid off

in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution when its professed object is to carry into effect its provisions. Watts v. Leggett, 66 N.C. 197 (1872).

Widow Entitled to Homestead. — A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even though no homestead was allotted to him during his life. Smith v. McDonald, 95 N.C. 163 (1886).

But a widow cannot, under this section, have a homestead laid off for herself and minor children after the death of her husband when he died without leaving debts. Hager v. Nixon, 69 N.C. 108 (1873).

Unborn Child Entitled to Allotment.—A child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of its father. In re Seabolt, 113 F. 766 (W.D.N.C. 1902).

When to "Widow and Minor Children". —The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow. Formeyduval v. Rockwell, 117 N.C. 320, 23 S.E. 488 (1895).

When Homestead Cannot Be Divested. —A homestead, whether laid off to a husband in his lifetime, or to his widow (there being no children), after his death, cannot be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. Tucker v. Tucker, 103 N.C. 170, 9 S.E. 299 (1889).

Widow Not Entitled to Exemption of Personalty. — The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. Smith v. McDonald, 95 N.C. 163 (1886).

Cited in Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953).

§ 1-390. Liability of officer as to allotment, return and levy.—Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (1868-9, c. 137, s. 17; Code, s. 516; Rev., ss. 708, 3584; C. S., s. 749.)

Officer's Breach of Duty. — The section subjects the sheriff to indictment and to liability on his official bond for disregard or nonperformance of his duty under the provisions of the law relating to homestead and personal property exemptions. Richardson v. Wicker, 80 N.C. 172 (1879); Mebane v. Layton, 89 N.C. 396 (1883); Welch v. Welch, 101 N.C. 565, 8 S.E. 176 (1888); State ex rel. Hobbs v. Barefoot, 104 N.C. 224, 10 S.E. 170 (1889).

And for such a breach of duty, an action on the officer's official bond lies in favor of the debtor. State ex rel. Scott & Burton v. Kenan, 94 N.C. 296 (1886).

Where a complaint alleges that a judgment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond. State ex rel. Scott & Burton v. Kenan, 94 N.C. 296 (1886).

Same — Measure of Damages. — The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. Jones v. Allsbrook, 115 N.C. 46, 20 S.E. 170 (1894).

Cited in Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

§ 1-391. Liability of officer, appraiser, or assessor, for conspiracy or fraud.—Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action. (1868-9, c. 137, ss. 18, 19; Code, ss. 517, 518; Rev., ss. 690, 3585, 3586; C. S., s. 750.)

Duty of Sheriff. — It is the duty of a sheriff to lay off the homestead of the defendant in the execution, and to sell the excess in a prudent and just manner so as to realize a fair price. Andrews v. Pritchett, 72 N.C. 135 (1875).

§ **1-392. Forms.**—The following forms must be substantially followed in proceedings under this article:

[No. 1]

Appraisers' Return.

When the homestead is valued at one thousand dollars or less, and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of ..... Township, ... County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of ..... and ..... is therefore exempted from sale under execution according to law. At the same time and place we viewed and apprasied at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this ..... day of ....., 19.....

O. K. ..... [L. S.]
L. M. ..... [L. S.]
R. S. ..... [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. ....., (Sheriff or Constable).

[No. 2]

Petition for Homestead before a Justice of the Peace.

Before ....., J. P.
..... County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of ..... Township, ... County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of per-

sonal property selected by the said A. B., to wit: ..... which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this ..... day of ....., 19.....

O. K. ..... [L. S.]
L. M. ..... [L. S.]
R. S. ..... [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. ....., (Sheriff or Constable).

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the ..... exemption of the said A. B., under an execution in favor of X. Y., this ..... day of ....., 19.....

C. D. ..... (Sheriff).

[No. 5]

Minute on Execution Docket.

X ..... Y .....
vs.
A ..... B .....
Execution issued ....., 19 .....
Homestead appraised and set off and return made ....., 19.....
(Code, s. 524; Rev., s. 709; C. S., s. 751.)

Cited in Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Article 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.—The Rules of Civil Procedure and the provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C. S., s. 752; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment added "The Rules of Civil Procedure and" at the beginning of this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Regular Action Bars Right to Special Proceedings.—Where an action in the nature of a creditor's bill was brought by the plaintiff (a creditor of defendant's testatrix) to the superior court at term time, and after the institution of the action the defendant commenced a special proceeding in the probate court for a sale of the land of his testatrix for assets, it was held, that the superior court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the probate court. Haywood v. Haywood, 79 N.C. 42 (1878).

Abandonment of Proceedings. — By virtue of this section petitioners in condemnation proceedings may abandon the proceedings and take a voluntary nonsuit even after the commissioners have made their appraisal and report and petitioners have filed exceptions thereto, provided petitioners abandon the proceedings before confirmation of the commissioners' report.

Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

A judgment may be either interlocutory or final in a special proceeding as well as in a civil action. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

A condemnation proceeding is a special proceeding and hence, "except as otherwise provided," the rules respecting procedural notice and the other provisions of the chapter on civil procedure are applicable to a condemnation proceeding. Collins v. North Carolina State Highway & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953). See § 40-11.

Stated in Seawell v. Purvis, 232 N.C. 194, 59 S.E.2d 572 (1950).

§ 1-394. Contested special proceedings; commencement; summons. —Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4 (a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service, whether by the sheriff or by publication, shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within thirty (30) days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted "The summons shall notify the defendant or defendants to appear and answer the complaint" for "The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint" at the beginning of the second sentence, rewrote the third sentence, and substituted "Rule 4 of the Rules of Civil Procedure" for "§ 1-89" in the fifth sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

Condemnation Proceedings. — A special proceeding for the purpose of condemning land for railroad purposes must be begun by the issuance of a summons. Carolina & N.W.R.R. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903).

No Sessions of Court in Proceedings before Clerk. — There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad. Hartsfield v. Bryan, 177 N.C. 166, 98 S.E. 379 (1919).

Duty of Clerk to Issue Execution.—It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887).

Some form of action or special proceeding is essential to the rendition of a judgment and in this State it must always be commenced by summons or attachment. Morris v. House, 125 N.C. 550, 34 S.E. 712 (1899).

Where Service Made Returnable to Court in Term. — Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it return-

able before the clerk on a day certain. Simmons v. Norfolk & Baltimore Steamboat Co., 113 N.C. 147, 18 S.E. 117 (1893).

Less than Ten Days' Notice Given.—A judgment under a service of less than ten days, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked. Nall v. McConnell, 211 N.C. 258, 190 S.E. 210 (1937). When the time between service and return day of the summons is less than the time allowed by statute, the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. Stafford v. Gallops, 123 N.C. 19, 31 S.E. 265 (1898).

Cited in Green v. Chrismon, 223 N.C. 723, 28 S.E.2d 215 (1943); Burlington City Bd. of Educ. v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1956).

§ 1-395. Return of summons.—The person to whom the summons is delivered for service shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (C. C. P., s. 75; Code, s. 280; Rev., s. 713; C. S., s. 754; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted "person" for "officer" and "delivered for service" for "addressed."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The failure of the clerk to note the summons the day it was received is irregular but does not render the summons void. Strayhorn v. Blalock, 92 N.C. 292 (1885).

Before Whom Returnable. — The summons in special proceedings is returnable before the clerk. Tate v. Powe, 64 N.C. 644 (1870).

"Service" Prima Facie Sufficient.—When the sheriff returns that he has "served" the summons, this is prima facie sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. Strayhorn v. Blalock, 92 N.C. 292 (1885).

Fees.—Under the practice of the Code of Civil Procedure a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the court, and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. Jones v. Gupton, 65 N.C. 48 (1871); Johnson v. Kenneday, 70 N.C. 436 (1874).

§ 1-396. When complaint filed.—The complaint or petition of the plaintiff must be filed in the clerk's office at or before the time of the issuance of the summons, unless time for filing said complaint or petition is extended as provided by § 1-398. (C. C. P., s. 76; 1876-7, c. 241, s. 4; Code, s. 281; Rev., s. 714; C. S., s. 755; 1943, c. 543.)

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398. Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (C. C. P., s. 79; Code, s. 283; Rev., s. 716; C. S., s. 757.)

Power of Clerk after Remand. — Where an application was filed to remove an administrator, and no answer having been filed, the clerk refused the motion, and on appeal the judge reversed the order and remanded the case, the clerk has power to allow an answer to be filed. Patterson v. Wadsworth, 94 N.C. 538 (1886).

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view

to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (1903, c. 566; Rev., s. 717; C. S., s. 758.)

Clerk Must Transfer Case Where Equitable Defense Pleaded. — When a party shall plead any equitable or other defense, or ask for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

In Smith v. Johnson, 209 N.C. 729, 184 S.E. 486 (1936), it was held that defendant could plead the equitable relief of mutual mistake and when this plea was filed the clerk properly transferred the cause to the civil issue docket.

Questions of Fact Decided by Clerk. — Questions of fact are first determined by the clerk and on appeal they are subject to review by the judge. Vanderbilt v. Roberts, 162 N.C. 273, 78 S.E. 156 (1913).

Clerk May Not Grant Affirmative Equitable Relief.—The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. Vance v. Vance, 118 N.C. 864, 24 S.E. 768 (1896).

Right to Jury Trial. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury. Chowan & S.R.R. v. Porter, 105 N.C. 246, 11 S.E. 328 (1890).

Same — Alimony without Divorce. — When in special proceedings for alimony without divorce the pleadings raise the issues of the validity of the marriage, or whether the husband has abandoned the wife, or whether the husband is a drunkard or spendthrift, the right of trial by jury arises and the case should be transferred by the judge to the civil issue docket for the purpose. Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918).

Same—Waiver.—Where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury. Chowan & S.R.R. v. Porter, 105 N.C. 246, 11 S.E. 328 (1890).

Boundary Disputes.—For full treatment of partitioning of land and settlement of boundary disputes, see § 38-1 et seq. and the notes thereto.

Where in a special proceeding under chapter 38 of General Statutes, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads the twenty years' adverse possession under § 1-40, as a defense, the proceeding is assimilated to an action to quiet title (§ 41-10) and the clerk, as directed by this section, should "transfer the cause to the civil issued docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions originally instituted in that court. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet title as provided by § 41-10. When the question of title is raised, the clerk should transfer the proceeding to the superior court in term. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where, in a special proceeding under § 38-1 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 this section, the clerk "shall transfer the cause to the civil issued 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).

Ejectment. — When tenancy in common is denied and there is a plea of sole seizin, non tenent insimul, the proceeding in legal effect is converted into an action in ejectment and should be transferred, by virtue of this section, to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. Gibbs v. Higgins, 215 N.C. 201, 1 S.E.2d 554 (1939); Murphy v. Smith, 235 N.C. 455, 70 S.E.2d 697 (1952).

Partition.—While the clerk has original jurisdiction of special proceedings for the

partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of non tenent insimul or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Amendments on Appeal. — In cases of appeal from the probate court (now the clerk of the superior court) to the superior court the judge has the same right to allow amendments as if the case had been constituted in his court. Sudderth v. McCombs, 67 N.C. 353 (1872).

Judicial Admission Removing Defense from Field of Issuable Matters.—Where defendants' answer to a petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants, but upon the hearing, defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement, the judicial admission effectively removed the defense from the field of issuable matters, since the alleged agreement was void under the statute of frauds, and it was not required that the clerk transfer the issue to the civil docket. Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954).

Evidence Considered upon Appeal. — 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; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. Mills v. McDaniel, 161 N.C. 112, 76 S.E. 551 (1912).

Applied in Jernigan v. Jernigan, 226 N.C. 204, 37 S.E.2d 493 (1946).

Cited in Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955); Jackson v. Jernigan, 216 N.C. 401, 5 S.E.2d 143 (1939).

§ 1-400. Ex parte; commenced by petition.—If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (1868-9, c. 93; Code, s. 284; Rev., s. 718; C. S., s. 759.)

Judgment Creditors May Become Parties. — Where the executor has filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make themselves parties and proceed therein accordingly, the procedure being ex parte on the part of the executor and an independent action by them will not lie for fraud until after final judgment in the proceedings. Wadford v. Davis, 192 N.C. 484, 135 S.E. 353 (1926).

Petition Need Not Be Verified. — It is not necessary for a petition in an ex parte proceeding to be verified. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

§ 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.—In cases under § 1-400, if all persons to be affected by the decree or their attorney have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. All of the petitioners must sign the petition, or must sign written application to clerk of court to be made petitioners and file same with the clerk or must sign a written authorization to the attorney which authorization must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C. S., s. 760; 1953, c. 246.)

All Parties Interested Must Be Joined.— When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by attorney, and they have in no way waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. Moore v. Rowland Lumber Co., 150 N.C. 261, 63 S.E. 953 (1909).

§ 1-402. Judge approves when petitioner is infant.—If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judg-

ment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (C. C. P., s. 420; 1868-9, c. 93, s. 3; Code, s. 286; 1887, c. 61; Rev., s. 720; C. S., s. 761.)

Infants Represented by Guardian. — In an ex parte proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1897).

Same—Where Represented by Administrator. — While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1898).

Who May Approve. — An emergency judge has the same jurisdiction for making approvals under this section as has the regular judge of the superior court. See discussion in 1 N.C.L. Rev. 284.

One who joins as infant in a petition is bound by the judgment, though it is not approved by the judge of the court. Lindsay v. Beaman, 128 N.C. 189, 38 S.E. 811 (1901).

Court Presumed to Have Protected Interests of Infants. — Where the lands of infants are sold under an order of the superior court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N.C. 112, 9 S.E. 634 (1889).

Irregularities Render Judgment Voidable but Not Void.—A judgment rendered in an ex parte proceeding approving the compromise and settlement of claims for personal injuries suffered by an infant is not void but only voidable, regardless of how irregular the proceedings may have been. It is binding until set aside by motion in the cause and is not subject to collateral attack. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

Cited in Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927).

§ 1-403. Orders signed by judge.—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C. S., s. 762.)

Section, While Directory, Should Always Be Observed. — There is a plain provision in North Carolina statute law requiring every judgment granted by a judge to be signed by him. And this court has held that this statute, apparently mandatory, should always be observed; still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge. Rollins v. Henry, 78 N.C. 342 (1878); Matthews v. Joyce, 85 N.C. 258 (1881); Keener v. Goodson, 89 N.C. 273 (1883); Spencer v. Credle, 102 N.C. 68, 8 S.E. 901 (1889); Bond v. Wool, 113 N.C. 20, 18 S.E. 77 (1893); Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

§ 1-404. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within ten days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (1893, c. 209; Rev., s. 723; C. S., s. 763; 1945, c. 778.)

Confirmation Discretionary with Court. —The confirmation by the court, if no exception is filed to the report within the twenty (now ten) days after it is filed with the clerk, lies within the discretion of the court. But in partition proceedings it is obligatory for the court to confirm the same. Ex parte Garrett, 174 N.C. 343, 93 S.E. 838 (1917).

Proceedings to Sell Land Appealable.— A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such addi-

tional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Same—Jurisdiction of Judge.—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the superior court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties require it. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Power of Clerk. — The clerk has no power to confirm a sale reported by a commissioner until the expiration of twenty (now ten) days from the date on which the report was filed. Vance v. Vance, 203 N.C. 667, 166 S.E. 901 (1932).

The provisions of this section are not applicable to a condemnation proceeding, because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated. Collins v. North Carolina State Highway & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

Applied in County of Buncombe v. Arbogast, 205 N.C. 745, 172 S.E. 364 (1934).

§ **1-405. No report set aside for trivial defect.**—No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (1868-9, c. 93, s. 7; Code, s. 289; Rev., s. 724; C. S., s. 764.)

Report Conclusive until Set Aside.—The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage, is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. Norfolk S.R.R. v. Ely, 101 N.C. 8, 7 S.E. 476 (1888).

Substantial Rights Affected.—The omission in a report of commissioners to make partition of lands to state affirmatively that the allotments in their opinion were equal in value, affects the substantial rights of the parties, and the clerk or judge may set it aside with directions, either that the commissioners shall make a reallotment, or that others shall be appointed to do so. Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891).

Description of Land Unnecessary. — A report of the commissioners is not invalid because it does not contain a description. Nor is it mandatory that such report be under seal. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

§ **1-406. Commissioner of sale to account in sixty days.**—In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceedings before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (1901, c. 614, ss. 1, 2; Rev., s. 725; C. S., s. 765; 1933, c. 98.)

Applied in Peal v. Martin, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.—Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale, and the proceeds of such sale are held by a commissioner or other officer designated by the court to receive such money for purposes of reinvestment, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling and reinvestment of said funds and for the faithful and final accounting of the same to the parties interested. (1919, c. 259; C. S., s. 766; 1935, c. 45; 1957, c. 80.)

Local Modification.—Duplin: 1935, c. 45.

Applicability of Section to Trustees. — Where the court decrees a sale of trust property for reinvestment, the trustee 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 trustee 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).

Bond.—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.; 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. 836 (1923). See also Poole & Blue, Inc. v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922).

Applied in Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 1-407.1. Bond required to protect interest of infant or incompetent.—In the case of any sale of real estate, the court may, in its discretion, require a good and sufficient bond to protect the interests of any infant or incompetent. (1957, c. 80.)

§ 1-407.2. When court may waive bond; premium paid from fund protected.—The court, in its discretion, may waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1957, c. 80.)

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.—In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree or judgment, which fee shall be taxed as a part of the costs in such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1923, c. 66; s. 1; C. S., s. 766(a).)

This section sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Section 27-170 Does Not Divest Clerk of Powers under This Section. — Section 28-170 does not divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of this section 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).

Commissioner Entitled to Review of Order Fixing Compensation.—Since the commissioner is an agent of the court and accountable to it for his actions in connection with the discharge of his duties as commissioner, and entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. Welch v. Kearns, 259 N.C. 367, 130 S.E.2d 634 (1963).

But He Cannot Interfere in Litigation.—A special commissioner in a chancery cause, or a receiver of the court, is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands. He cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Applied in Welch v. Kearns, 261 N.C. 171, 134 S.E.2d 155 (1964).

§ 1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.—In all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if, in his opinion, all parties to the action or proceedings will benefit thereby, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for his services, which fee, along with other costs of the survey, shall be taxed as a part of the costs in such action or proceedings. Any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1955, c. 373.)

Definition of Boundaries in Judicial Sale of Land. — The court-appointed commissioner to conduct a judicial sale is empowered only to sell the land and distribute the proceeds, and has only such powers as may be necessary to execute the decree of the court, and therefore is not under duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under this section. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.—No person may be arrested in a civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt. (C. C. P., s. 148; Code, s. 290; Rev., s. 726; C. S., s. 767.)

Cross References. — As to execution against the person, see § 1-311. As to persons taken in arrest and bail proceeding being entitled to insolvent debtor's oath, see § 23-29. As to arrest in criminal actions, see §§ 15-39 through 15-47.

Constitutional Provision. — North Carolina Const., Art. I, § 16 provides that "There shall be no imprisonment for debt in this State except for fraud." This provision has no application to actions of tort but is confined to actions arising ex contractu. Long v. McLean, 88 N.C. 3 (1883).

The words "except in cases of fraud" are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but embraces also fraud in making the contract, false representations, for instance, and fraud in increasing the liabilities, as when an administrator, by applying the funds of the estate to his own use, paying his own debts, and the like. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888), quoting Melvin v. Melvin, 72 N.C. 384 (1875).

Now, in order to avoid a violation of this section of the Constitution and at the same

time protect honest creditors against dishonest debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This is done in this and the following sections. Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Section 23-13 Applies.—Parties arrested and in custody, in pursuance of the provisions contained in this and the following sections, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in § 23-13. Wingo v. Watson, 98 N.C. 482, 4 S.E. 463 (1887); Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Application to Partnership.—Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one partner against the other, and if the facts bring the claim within the provisions of this article on arrest and bail, the plaintiff is entitled to this ancillary remedy. Ledford v. Emerson, 140 N.C. 288, 52 S.E. 641 (1905).

Where Judgment of Nonsuit Reversed.—Where there has been a motion for an order of arrest and bail under this section, and a judgment of nonsuit is reversed, the motion may be renewed. Hensley v. Helvenston, 189 N.C. 636, 127 S.E. 625 (1925).

For definition of arrest see Journey v. Sharpe, 49 N.C. 165 (1856); State ex rel. Lawrence v. Buxton, 102 N.C. 129, 8 S.E. 774 (1889); Hadley v. Tinnin, 170 N.C. 84, 86 S.E. 1017 (1915).

Cited in Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937); Brannon v. Wood, 239 N.C. 112, 79 S.E.2d 256 (1953); Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

§ 1-410. In what cases arrest allowed. — The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for willfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

(2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(3) In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

(5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P. R.; R. C., c. 31, s. 54; C. C. P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 727; C. S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1152, s. 6; c. 1153, s. 4.)

Cross Reference.—See note under § 1-311.

Editor's Note.—The first 1967 amendment added the second sentence in subdivision (5).

The second 1967 amendment added the last sentence in subdivision (5).

Purpose.—This section is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases

where the relation of trust and confidence, in respect to money received by, or personal property in the possession of one party for the benefit of another, is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. Chemical Co. v. Johnson, 98 N.C. 123, 3 S.E. 723 (1887); Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888); Travers v. Deaton, 107 N.C. 500, 12 S.E. 373 (1890); Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Remedy of Arrest and Bail.—The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness, and it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Effect on Right to Execution against Person. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under this section, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Execution against Person for Cause Specified in Subdivision (1).—If a judgment is rendered against a defendant for a cause of action specified in subdivision (1) of this section, § 1-311 authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Privilege against Self-Incrimination Inapplicable Where Remedy under This Section Relinquished.—In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of subdivision (1) of this section and to issue an execution against their persons by virtue of the provisions of § 1-311, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Discharge of Insolvent Debtor.—The provisions of § 23-29 (2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of this section, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of § 1-311. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Punitive Damages.—For acts under subdivision (1) of this section, when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Mere Negligence Insufficient.—A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and § 1-311, the injury must have been intentionally or maliciously inflicted, i.e., with some element of violence, fraud or criminality. Oakley v. Lasater, 172 N.C. 96, 89 S.E. 1063 (1916).

Malpractice.—In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. Olinger v. Camp, 215 N.C. 340, 1 S.E.2d 870 (1939).

Wrongful Conversion.—Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

Libel.—An arrest in an action for libel is not within the provisions of the Constitution (Art. I, § 16) prohibiting imprisonment for debt. Moore v. Green, 73 N.C. 394 (1875).

Slander of Title.—Although it was not necessary in the case to decide the precise point, the court stated in Sneeden v. Harris, 109 N.C. 349, 13 S.E. 920 (1891), that it was questionable whether an action for slander of title was embraced by this article on arrest and bail.

Seduction.—The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his

person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. Hoover v. Palmer, 80 N.C. 313 (1879). It involves also fraud and deceit ex vi termini. Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892).

This section was mentioned as applying to injury to character in Michael v. Leach, 166 N.C. 223, 81 S.E. 760 (1914). As applying to injury to person in Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911).

Complaint May Allege Facts Necessary to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. Long v. Love, 230 N.C. 535, 53 S.E.2d 661 (1949).

Thus a motion to strike allegations that the injury was willful, wanton or malicious is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. Long v. Love, 230 N.C. 535, 53 S.E.2d 661 (1949).

Applications of the Section.—Where a firm of merchants gave to manufacturers of fertilizers its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. Durham Fertilizer Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892). As to parent bringing action, see Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887).

A defendant, in an action for money received or property fraudulently misapplied by him as agent, may be arrested under the provisions of this section. Gossler v. Wood, 120 N.C. 69, 27 S.E. 33 (1897).

This section applies to arrest for alienating the affections of a wife. Edwards v. Sorrell, 150 N.C. 712, 64 S.E. 898 (1909).

Fraud Committed in Another State.—The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest, under this section, authorizing arrests for frauds in fiduciary transactions. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

When Partner Liable.—Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance, or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts, for all the purposes of arrest and bail. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Insolvent May Be Arrested.—An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. Carroll v. Montgomery, 128 N.C. 278, 38 S.E. 874 (1901).

Nonresident Liable.—A nonresident of this State may be arrested and held to bail for fraud under this section. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

No Arrest unless Action Pending. — Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause and it was removed from the docket, no order of arrest was permissible under this section since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. Stewart v. Bryant, 121 N.C. 46, 28 S.E. 18 (1897).

Contract Action Not Affected.—Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. Copeland v. Fowler, 151 N.C. 353, 66 S.E. 215 (1909).

Fraud Necessary for Arrest under Section.—A defendant cannot be arrested under this section, unless he has been guilty of fraud in contracting the debt for which the action is brought. McNeely v. Haynes, 76 N.C. 122 (1877).

Section Applies to Subsequent Fraud.—A person may be arrested and held to bail for a fraud committed after the contracting of the debt, e.g., by concealing prop-

erty, or other devices for the purpose of defeating his creditor. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Partner Must Have Knowledge.—One partner cannot be arrested for the fraud of his copartner of which he had no knowledge, and in which he in nowise connived. McNeely v. Haynes, 76 N.C. 122 (1877); Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

The words "removed, or disposed of" used in this section are of different and broader meaning than the words in subdivision (2), and are broad enough to comprehend real estate. Durham Fertilizer Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

Arrest on Sunday.—That there can be no arrest on Sunday, see White v. Morris, 107 N.C. 93, 12 S.E. 80 (1890).

Fraudulent Conveyance. — One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. Durham Fertilizer Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

Arrest for "Willful Injury".—For the arrest of a woman under the provisions of this section, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. Weathers v. Baldwin, 183 N.C. 276, 111 S.E. 183 (1922).

Applied, as to subdivision (1), in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 1-411. Order and affidavit.—An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article. (C. C. P., ss. 150, 151; Code, ss. 292, 293; Rev., ss. 728, 729; C. S., s. 769.)

The Order.—The order of arrest must proceed from the court in which the action is brought or from a judge thereof. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

Same—Jurisdiction.—An order of arrest under this section is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. Bryan v. Stewart, 123 N.C. 93, 31 S.E. 286 (1898).

Same—Voidable Only.—An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. Tucker v. Davis, 77 N.C. 330 (1877).

Grounds May Be Stated in Complaint.—The grounds for the arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in § 1-410. Roulhac v. Brown, 87 N.C. 1 (1882). The cause of arrest may be stated in the complaint but the statement must be as explicit as if set forth in an affidavit and properly verified. Peebles v. Foote, 83 N.C. 102 (1880).

Positive Statement of Facts Desirable.—The affidavit should state the facts positively, when this can be done. Peebles v. Foote, 83 N.C. 102 (1880); Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Grounds of Belief Should Be Stated.—If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. Peebles v. Foote, 83 N.C. 102 (1880).

Examples—Sufficient Statement.—In an action for arrest and bail, the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property: Held, sufficient to justify the order of arrest. Paige v. Price, 78 N.C. 10 (1878).

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors," it was held to be sufficient. Hughes v. Person, 63 N.C. 548 (1869).

Same—Insufficient Statement. — An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. Melvin v. Melvin, 72 N.C. 384 (1875).

General Rumor.—Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe

that the facts existed upon which he based his application. Tucker v. Wilkins, 105 N.C. 272, 11 S.E. 575 (1890).

Court Must Be Convinced.—It is not sufficient that the cause of action may exist—this must not be left to conjecture or bare probability—the court must be satisfied from the evidence before it that a cause does exist. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Allowing Second Affidavit.—The refusal to allow a second affidavit to be filed is an exercise of discretion, which cannot be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. Wilson v. Barnhill, 64 N.C. 121 (1870).

Question of Law.—The question of the sufficiency of the affidavit is one of law, addressed to the court alone. Wood v. Harrell, 74 N.C. 338 (1876).

§ 1-412. Undertaking before order.—Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars, with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (C. C. P., s. 152; 1868-9, c. 277, s. 7; Code, s. 294; Rev., s. 730; C. S., s. 770.)

Cross Reference.—As to giving the bond of a surety company as surety, see § 109-17.

Applies to Suits in Forma Pauperis.—A plaintiff who is allowed to sue, in forma pauperis, has no right to an order of arrest, without first filing the undertaking required by this section. Rowark v. Homesley, 68 N.C. 91 (1873).

Judge Can Increase Bond.—The trial court has power to increase or diminish the bond, and an order increasing the bond cannot be questioned unless abuse of discretion is shown. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917).

Amount of Bond Not Subject to Review.—The discretion of the court in fixing the amount of the bond is not subject to review. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917).

Cited in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958).

§ 1-413. Issuance and form of order.—The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. (C. C. P., s. 153; Code, s. 295; Rev., s. 731; C. S., s. 771.)

Cross Reference. — As to execution against the person of a debtor after judgment, see § 1-311.

The words "before judgment," as used in this section, mean "final judgment" upon the matters put in issue by the pleadings, and hence the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878); Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Process Can Be Served on Prisoner in Jail.—The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary" and service of process upon a prisoner there is valid. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Written Warrant Necessary.—For the benefit of the citizen, that he may at all times be able to call upon the officers to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. Lutterloh v. Powell, 2 N.C. 395 (1796).

Defendant under Criminal Process. — A defendant, who has been brought into court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the courtroom. Moore v. Green, 73 N.C. 394 (1875).

The exemption of witnesses and jurors from civil arrest accorded by §§ 8-64 and 9-18, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to

parties arrested in criminal proceeding. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Suitor Attending Court.—The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this State. Hammerskold v. Rose, 52 N.C. 629 (1860).

Nonresident Attending as Witness.—A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. Ballinger v. Elliott, 72 N.C. 596 (1875).

Cited in Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

§ 1-414. Copies of affidavit and order to defendant.—The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (C. C. P., s. 154; Code, s. 296; Rev., s. 732; C. S., s. 772.)

§ 1-415. Execution of order.—The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (C. C. P., s. 155; Code, s. 297; Rev., s. 733; C. S., s. 773.)

§ 1-416. Vacation of order for failure to serve.—The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (C. C. P., s. 153; Code, s. 295; Rev., s. 734; C. S., s. 774.)

An order of arrest issued after final judgment in an action is illegal and void. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

§ 1-417. Motion to vacate order; jury trial.—A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (C. C. P., s. 174; Code, s. 316; 1889, c. 497; Rev., s. 735; C. S., s. 775.)

In General.—This section and §§ 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in § 23-29 et seq. are in addition to those given in this section and § 1-419. Edward v. Sorrell, 150 N.C. 712, 64 S.E. 898 (1909).

Motion Must Be Made before Judgment.—A motion to vacate the order of arrest can only be made before judgment. And where such a motion has been once refused, and no appeal taken, the matter is res adjudicata and a similar motion will not be entertained. Roulhac v. Brown, 87 N.C. 1 (1882).

Motion Heard Anywhere in District.—A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893). See also Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Clerk Can Hear Motion.—It would be perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge, as was done in Roulhac v. Brown, 87 N.C. 1 (1882). But the clerk might be dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

New Matter Not to Be Considered.—The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit, and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. Wm. Devries & Co. v. Summit, 86 N.C. 126 (1882).

Where Jury Trial Demanded.—If the defendant demanded the jury trial per-

mitted by this section the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

Lower Court's Finding of Fact Conclusive. — In arrest and bail proceedings, where a motion was made by the defendant to vacate the order of arrest and the court found that the facts were sufficient to sustain the order, the findings of fact by the court below are final, and will not be reviewed unless it be objected properly that there was no evidence to support them. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888); Travers v. Deaton, 107 N.C. 500, 12 S.E. 373 (1890); Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised. Wingo v. Watson, 98 N.C. 482, 4 S.E. 463 (1887).

Irregular or False Order Will Be Vacated.—An order of arrest will be vacated by a judge without any undertaking by the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N.C. 511 (1871).

Supplemental Affidavit Sufficient.—Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental one by the plaintiff which was duly verified, it was held, that the judge below erred in vacating the order. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

Rendition of judgment prior to hearing is not reversible error. Allison v. Maddrey, 114 N.C. 421, 19 S.E. 646 (1894).

Prior Acquittal in Another State.—It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Procuring Reduction of Bail Held to Constitute General Appearance.—When a consent order authorizing the reduction of bail, as authorized in this section, was signed, defendants invoked the power of the court in their behalf and for their benefit, which constituted a general appearance and waived any defect in connection with the service of process. Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

Appeal.—An order vacating an order of arrest "affects a substantial right claimed" and hence an appeal from such order lies. Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894).

But where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and cannot be reviewed. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. Patton v. Gash, 99 N.C. 280, 6 S.E. 193 (1888).

§ **1-418. Counter affidavits by plaintiff.**—If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (C. C. P., s. 175; Code, s. 317; Rev., s. 736; C. S., s. 776.)

Simple Denial Insufficient.—If the order was properly granted it ought not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Facts Must Be Fully Controverted.—When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly, otherwise the order of arrest will be continued. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Additional Evidence. — Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

§ **1-419. How defendant discharged.**—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or

upon depositing the amount mentioned in the order of arrest, as provided in this article. (C. C. P., s. 156; Code, s. 298; Rev., s. 737; C. S., s. 777.)

Rights of Nonresidents.—Where nonresidents are arrested under the provisions of this article they are entitled to the benefit of §§ 23-29 through 23-42, relating to insolvent debtors, in securing their discharge. Burgwyn v. Hall, 108 N.C. 489, 13 S.E. 222 (1891).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-420. Defendant's undertaking. — The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (C. C. P., s. 157; Code, s. 299; Rev., s. 738; C. S., s. 778.)

The word "amenable" as used in this section means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Voluntary Appearance. — The condition of the undertaking that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. Stepp v. Robinson, 203 N.C. 803, 167 S.E. 147 (1933).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

Cited in Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

§ 1-421. Defendant's undertaking delivered to clerk; exception.— Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (C. C. P., s. 162; Code, s. 304; Rev., s. 739; C. S., s. 779.)

§ 1-422. Notice of justification; new bail.—On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C. C. P., s. 163; Code, s. 305; Rev., s. 741; C. S., s. 780.)

§ 1-423. Qualifications of bail.—The qualifications of bail must be as follows:

(1) Each of them must be a resident and freeholder within the State.

(2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (C. C. P., s. 164; Code, s. 306; Rev., s. 740; C. S., s. 781.)

Definition.—Bail are those persons who become sureties for the appearance of a defendant in court. Bouvier's Law Dict., Vol. 2, p. 209.

Bond Should Show Facts. — A bail bond should show on its face that the surety is a resident and freeholder within the State, or his justification should establish these facts. Howell v. Jones, 113 N.C. 429, 18 S.E. 672 (1893).

§ **1-424. Justification of bail.**—For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C. C. P., s. 165; Code, s. 307; Rev., s. 742; C. S., s. 782.)

§ **1-425. Allowance of bail.**—If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C. C. P., s. 166; Code, s. 308; Rev., s. 743; C. S., s. 783.)

Purpose of Bail.—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

§ **1-426. Deposit in lieu of bail.**—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (C. C. P., s. 167; Code, s. 309; Rev., s. 744; C. S., s. 784.)

§ **1-427. Deposit paid into court; liability on sheriff's bond.**—Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (C. C. P., s. 168; Code, s. 310; Rev., s. 745; C. S., s. 785.)

Cross Reference. — As to payment by sheriff of money collected on execution, see § 162-18.

§ **1-428. Bail substituted for deposit.**—If money is deposited, as provided in §§ 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C. C. P., s. 169; Code, s. 311; Rev., s. 746; C. S., s. 786.)

§ **1-429. Deposit applied to plaintiff's judgment.**—When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (C. C. P., s. 170; Code, s. 312; Rev., s. 747; C. S., s. 787.)

§ **1-430. Defendant in jail, sheriff may take bail.**—If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and

shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R. C., c. 11; s. 8; Code, s. 318; Rev., s. 748; C. S., s. 788.)

§ 1-431. When sheriff liable as bail.—If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liabiilty by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (C. C. P., s. 171; Code, s. 313; Rev., s. 749; C. S., s. 789.)

In General. — A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. Howell v. Jones, 113 N.C. 429, 18 S.E. 672 (1893).

In State v. Brittain, 25 N.C. 17 (1842), it is said that after once taking the bail the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case is justified in resisting the arrest. State v. Queen, 66 N.C. 615 (1872).

Escape of Prisoner. — A sheriff having permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to the liability as bail. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

Same — Defendant's Insolvency Immaterial.—When the sheriff is sued as bail he cannot give in evidence, in mitigation of damages, the defendant's insolvency. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

Notice and Exceptions Unnecessary.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. Adams v. Jones, 60 N.C. 198 (1864).

Defective Bond Does Not Satisfy Section.—A paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. Adams v. Jones, 60 N.C. 198 (1864).

§ 1-432. Action on sheriff's bond.—If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (C. C. P., s. 172; Code, s. 314; Rev., s. 750; C. S., s. 790.)

§ 1-433. Bail exonerated. — At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (C. C. P., s. 161; Code, s. 303; Rev., s. 751; C. S., s. 791.)

Meaning of "State Prison". — The term "State prison," as used in this section, applies to either the penitentiary or the county jail. Sedberry v. Carver, 77 N.C. 319 (1877).

When Imprisonment Does Not Exonerate.—Where the imprisonment of a defendant under this section, expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking: Held, that such imprisonment does not exonerate the bail. Adrian v. Scanlin, 77 N.C. 317 (1877); Sedberry v. Carver, 77 N.C. 319 (1877).

Imprisonment on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment nisi was entered and sci. fa. and capias issued. Upon the hearing of the sci. fa., the surety showed that at the time of the call of the case defendant was incarcerated in another county of his State on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured capias and filed same with the officials of the State's prison so that defendant would be surrendered to the court to stand trial upon the expiration of his sentence. Held; Notwithstanding that this section relates only to

bonds executed in arrest and bail proceedings, the bail will be exonerated during defendant's detention, since only the State and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the sci. fa. continued until the surety has had opportunity to produce defendant after his release from prison. State v. Eller, 218 N.C. 365, 11 S.E.2d 295 (1940).

Exoneration by Surrender of Principal. — The obligors on the bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

When Absolute Judgment Error. — Where a defendant and the sureties on his appearance bond appear in answer to a scire facias and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to a federal court by a prior bondsman and that defendant was then serving a sentence imposed by that court, it is error for the court to enter absolute judgment on the bond, the cases against defendant as well as the hearing on the scire facias being subject to continuance. State v. Welborn, 205 N.C. 601, 172 S.E. 174 (1934).

§ 1-434. Surrender of defendant.—At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

(1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

(2) Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (C. C. P., s. 158; Code, s. 300; Rev., s. 752; C. S., s. 792.)

Cross References. — As to surrender of defendant when he appears upon motion against the surety, see § 1-436 and note. As to claim and delivery, see §§ 1-472 through 1-484.

Where Prisoner Again Arrested. — Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, semble, upon the refusal of the sheriff to receive the prisoner from the obligors on the bail bond that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of North Carolina courts as being prior to those of other jurisdiction, and hold the prisoner to answer in North Carolina courts. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-435. Bail may arrest defendant.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so. (C. C. P., s. 159; Code, s. 301; Rev., s. 753; C. S., s. 793.)

In General.—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or another state, upon the Sabbath or

otherwise, and, if necessary, break and enter his house for that purpose. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Stated in Hightower v. Thompson, 231 N.C. 491, 57 S.E.2d 763 (1950).

§ 1-436. Proceedings against bail by motion.—In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to them. (C. C. P., s. 160; Code, s. 302; Rev., s. 754; C. S., s. 794.)

Motion Must Be Brought within Three Years. — Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meantime. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892). See § 1-52, subdivision (7).

Principal's Insolvency No Defense.—Insolvency of the principal is no defense to an action against the bail. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

When Action against Bail Lies.—Where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; and should the latter writ be returned "non est inventus," the plaintiff may move on ten days' notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Where the defendant, appeared in open court, in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal thus to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, for failure to surrender him. Stepp v. Robinson, 203 N.C. 803, 167 S.E. 147 (1933).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-437. Liability of bail to sheriff.—The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (C. C. P., s. 173; Code, s. 315; Rev., s. 755; C. S., s. 795.)

§ 1-438. When bail to pay costs.—When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (R. C., c. 11, s. 10; Code, s. 319; Rev., s. 756; C. S., s. 796.)

Certain Costs Not Allowed.—The costs allowed against bail, notwithstanding a surrender, etc., do not include such as are incurred on account of an improper and ineffectual appeal. Clark v. Latham, 53 N.C. 1 (1860).

§ 1-439. Bail not discharged by amendment. — No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (R. C., c. 11, s. 11; Code, s. 320; Rev., s. 757; C. S., s. 797.)

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440: Superseded by Session Laws 1947, c. 693, codified as § 1-440.1 et seq.

§ 1-440.1. Nature of attachment. — (a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution

against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless personal jurisdiction has been acquired as provided in G.S. 1-75.3.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in § 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted the words "personal jurisdiction has been acquired as provided in G.S. 1-75.3" in subsection (b) for former subdivisions (1) and (2) of such subsection, which pertained to personal service and general appearance as prerequisites for a personal judgment.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Most of the cases in the following note were decided under earlier statutes.

Definitions and Object.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. See Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 19 L. Ed. 109 (1868).

Attachment is a mesne process, merely an incident to a suit. Ex parte Railway Co., 103 U.S. 794, 26 L. Ed. 461 (1880).

The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained. Roller v. Holly, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900).

Origin of Writ.—Attachment, other than the common-law writ which issued out of the common pleas upon the nonappearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Grocery Co. v. Bag Co., 142 N.C. 174, 55 S.E. 90 (1906). See Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Nature and Function.—An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. Marsh v. Williams, 63 N.C. 371 (1869); Toms v. Warson, 66 N.C. 417 (1872). Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. Ditmore v. Goins, 128 N.C. 325, 39 S.E. 61 (1901). See Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Conflict between State and Federal Jurisdiction.—In case of conflict of authority under a state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized, whether the one is paramount to the other, but upon the question as to which jurisdiction has first attached by the seizure and custody of the property under its process. Covell v. Heyman, 111 U.S. 176, 4 S. Ct. 355, 28 L. Ed. 390 (1884).

And this rule applies notwithstanding the fact that the property has been brought into custody by illegal means. Gumbel v. Pitkin, 124 U.S. 131, 8 S. Ct. 379, 31 L. Ed. 374 (1888).

There is a marked distinction between the ordinary writ and an attachment. In this latter the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, the statute requires all the material facts to be set out in an affidavit, which is

made the groundwork of this proceeding. Webb v. Bowler, 50 N.C. 362 (1858).

Attachment is the creature of local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. Harris v. Balk, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905).

Statutes Strictly Construed. — In 2 Lewis's Sutherland on Statutory Construction (2 Ed.), § 566, p. 1049, it is stated: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intendment. . . . The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And the decisions of this State are in full approval of this position. President & Dirs. v. Hinton, 12 N.C. 397 (1828); Skinner v. Moore, 19 N.C. 138 (1836); Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

In President & Dirs. v. Hinton, 12 N.C. 397 (1828), it was said by the court, in speaking of the attachment law, that "there is no law in the statute book which more imperiously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect." Leak v. Moorman, 61 N.C. 168 (1867).

The provisions of the Code, authorizing the attachment of the property of a nonresident defendant upon constructive service of a summons by publication, have many of the features of the foreign attachment. Such proceeding is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the United States, and cannot be recognized in a case commenced in a federal court. Even in a state court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. Lackett v. Rumbaugh, 45 F. 23 (W.D.N.C. 1891).

Substantial Compliance.—Where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. Grant v. Burgwyn, 79 N.C. 513 (1878); Best v. British & Am. Co., 128 N.C. 351, 38 S.E. 923 (1901); Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment by the fact that the affidavit may have been defective, or that the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities. Copper v. Reynolds, 77 U.S. (10 Wall.) 308, 19 L. Ed. 931 (1870).

Proceeding Is Quasi in Rem. — Attachment of the property of nonresident defendants in this State is a proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the State court for the purpose of determining the controversy in the action brought against him, when properly constituted. Mohn v. Cressey, 193 N.C. 568, 137 S.E. 718 (1927).

Applied in Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948); Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966).

Cited in Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action. (1947, c. 693, s. 1; 1967, c. 1152, s. 4; c. 1153, s. 3.)

Editor's Note.—The first 1967 amendment eliminated "by a wife" preceding "or alimony."

The second 1967 amendment inserted "or an action for the support of a minor child."

History of the Statute.—Under the Code of 1868, as originally enacted, attachment was allowed in actions on a contract for the recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the court, construing the first clause of the statute, held that an attachment was only permissible for breaches of contract involving the recovery of liquidated damages, or damages, which could be limited and defined by some standard or data contained in the contract itself. See Price v. Cox, 83 N.C. 261 (1880); Wilson v. Louis Cook Mfg. Co., 88 N.C. 5 (1883). Shortly after these decisions were announced, the statute was

amended so as to provide the remedy for breach of contract (express or implied), wrongful conversion of personal property, any other injury to personal property in consequence of negligence, fraud or other wrongful act. Code 1883, § 347. The legislature of 1893 (chapter 77) added "injuries to real property" to the section, and in 1901 there was another amendment adding, "or any injury to the person, caused by negligence or other wrongful act." Worth v. Knickerbocker Trust Co., 151 N.C. 191, 65 S.E. 918 (1909).

In chapter 7 § 16 of the Rev. Code it was provided that an attachment would lie against the property of one who injured the person or property of another, and within three months thereafter absconded from the State. The attachment had to be issued within three months from the time of the injury. For cases under this old provision, see Webb v. Bowler, 50 N.C. 362 (1858); Blankinship v. McMahon, 63 N.C. 180 (1869).

Right Coextensive with Demand for Judgment in Personam. — The history of legislation as to attachments shows a legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921). See Tisdale v. Eubanks, 180 N.C. 153, 104 S.E. 339 (1920).

Action for Unliquidated Damages.—Previous to 1893, in a number of cases arising under the section, it was held that the remedy of attachment was confined to actions upon contracts in which the amount of damages could be specified in the affidavit, and that the remedy would not apply if the action be one for unliquidated damages. See Price v. Cox, 83 N.C. 261 (1880); Wilson v. Louis Cook Mfg. Co., 88 N.C. 5 (1883); Mullen v. Norfolk & Carolina Canal Co., 114 N.C. 8, 19 S.E. 106 (1894). But since the 1893 amendment to the attachment statute the issuance of the writ has been upheld in actions for money, and for unliquidated damages in the cause specified, and for none other. Winfree v. Bagley, 102 N.C. 515, 9 S.E. 198 (1889); Long v. Home Ins. Co., 114 N.C. 465, 19 S.E. 347 (1894); Judd v. Crawford Gold Mining Co., 120 N.C. 397, 27 S.E. 81 (1897); Tisdale v. Eubanks, 180 N.C. 153, 104 S.E. 339 (1920).

An attachment could be granted under superseded § 1-440 in an action for unliquidated damages before judgment. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Death by Wrongful Act. — The attachment statute (former §§ 1-440 through 1-471) is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect or default of another." Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Slander. — The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and would sustain a proceeding for an attachment within the intent and meaning of former § 1-440, as an "injury to the person by . . . wrongful act." Tisdale v. Eubanks, 180 N.C. 153, 104 S.E. 339 (1920).

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. Alexander v. Taylor, 62 N.C. 36 (1866).

Injury to Plaintiff's Interest or Investment in Power Company. — An action is clearly one in which the writ of attachment is allowed where the wrong alleged is an injury by which the plaintiff's interest and investment in a power company has been wrongfully destroyed or very greatly impaired. Worth v. Knickerbocker Trust Co., 151 N.C. 191, 65 S.E. 918 (1909).

An action to cancel judgment of retraxit would not support the service of process by publication and attachment, since it was not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in former § 1-440. Stevens v. Cecil, 216 N.C. 350, 4 S.E.2d 879 (1939).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 1-440.3. Grounds for attachment.—In those actions in which attachment may be had under the provisions of § 1-440.2, an order of attachment may be issued when the defendant is

(1) A nonresident, or

(2) A foreign corporation, or

(3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or

(4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,

a. Has departed, or is about to depart, from the State, or
b. Keeps himself concealed therein, or

(5) A person or domestic corporation which, with intent to defraud his or its creditors,

a. Has removed, or is about to remove, property from this State, or
b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Cross Reference.—As to attachment of goods covered by a negotiable document, see § 25-7-602 and note.

Editor's Note.—Most of the cases in the following note were decided under earlier statutes.

Section Is Exclusive. — The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Grounds Must Appeal by Affidavit. — The grounds upon which an ancillary writ of attachment is issued must be made to appear by affidavit. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Absence of Defendant.—It was not requisite under the former statute, and therefore need not be averred, that the defendant could not be found in the State in order to procure a warrant of attachment. Luttrell v. Martin, 112 N.C. 593, 17 S.E. 573 (1893).

When One Is a Nonresident. — Where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such a one is a nonresident of this State for the purpose of an attachment, and that notwithstanding he may occasionally visit this State, and that he may have the intent to return at some uncertain future time. Wheeler v. Cobb, 75 N.C. 21 (1876).

But the fact that a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Domicile is not determinative of the question whether one is a nonresident. Nor is the cause of the absence, such as severe illness, material if such absence prevents personal service of summons upon him during an indefinite period of time. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident notwithstanding he may intend to return at some time in the future, and his motion made by special appearance to vacate the attachment on the ground of residence will be denied. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

But if upon the levy of an attachment on his property such person promptly returns to the State, and thereby subjects himself to personal service of process, his motion to vacate the attachment on the ground that he is not a nonresident would seem generally to be well sustained. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

Fraudulent Intent Unnecessary. — In Abrams v. Pender, 44 N.C. 260 (1853), it was decided that, under the attachment statute as it then read, it was required that the removal of the defendant should have been fraudulent or with intent to evade the process before an attachment lay. But an attachment is now made a provisional remedy in the progress of a cause and can be sued out whenever the defendant is a nonresident regardless of intent. Wheeler v. Cobb, 75 N.C. 21 (1876).

Fraudulent Disposition of Property. — The statute authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of and not to the manner in which the property is acquired. Howland v. Marshall, 127 N.C. 427, 37 S.E. 462 (1900).

Service of Process.—A resident of the State who has departed with intent to defraud his creditors or to avoid service of process, or a resident who keeps himself concealed in the State with like intent, is amenable to service of process by publication under § 1-98.2 (6). Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

Applied in Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 (1967); Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-440.4. Property subject to attachment.—All of a defendant's property within this State which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a

judgment for money, is subject to attachment under the conditions prescribed by this article. (1947, c. 693, s. 1.)

Cross Reference. — As to exemption of earnings, see § 1-362.

Editor's Note.—Most of the cases in the following note were decided under earlier statutes.

All property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of the attachment statute, is liable to attachment. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1949).

Meaning of "Property".—Webb v. Bowler, 50 N.C. 362 (1858) was an action where the validity of an attachment was in question, and it was held that the term "property" should be confined to tangible property, and that a false warranty or deceit in the sale of personal property was not an injury to the property of another, within the meaning of the statute. Since these decisions were rendered, however, and probably in consequence of them, this restricted significance of the word "property," when used in statutes or the rule of interpretation on the question presented, has been altered by express enactment. See § 12-3. Worth v. Knickerbocker Trust Co., 151 N.C. 191, 65 S.E. 918 (1909).

Only property which is subject to execution is attachable. Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936), citing Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924).

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936), citing Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924).

Interest in Land under Spendthrift Trust Not Subject to Attachment.—Plaintiff attached property which had belonged to defendant's mother prior to her death. Thereafter the will was probated which devised the property in trust for defendant under a spendthrift trust. It was held that defendant took nothing as heir at law of her mother, and her interest in the land under the spendthrift trust was not subject to attachment, and the fact that the attachment was attempted to be levied prior to the probate of the will created no lien on the land. Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Possession of Goods.—As a general rule it matters not in whose possession the property is found, if the taking be otherwise rightful. Livingston v. Smith, 30 U.S. (5 Pet.) 90, 8 L. Ed. 57 (1831).

A defendant's property or choses in action in the hands of third persons may be attached. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Custody of the Law. — Property in custodia legis is not subject to levy under process which would have the effect of taking it out of his possession and control. Gumbel v. Pitkin, 124 U.S. 131, 8 S. Ct. 379, 31 L. Ed. 374 (1888).

Cash Deposited as Security in Lieu of Bond.—The right of a nonresident defendant in the cash voluntarily deposited by him as security in lieu of bond for his appearance to answer a criminal charge preferred against him is liable to garnishment; and the purposes for which the cash was deposited having been accomplished by defendant's appearing, and later giving a new recognizance for his appearance, the entire amount of the deposit is subject to the lien of the attachment. White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948).

Tax Books of Sheriff Not Liable. — Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the debts thus due him, cannot be attached by a creditor to whom he is indebted. Davie v. Blackburn, 117 N.C. 383, 23 S.E. 321 (1895).

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, cannot be subjected to the payment of the husband's debts in this State by means of an attachment in equity. McLean v. McPhaul, 59 N.C. 15 (1860).

Stock in Foreign and Domestic Corporations.—The intention of the legislature, as clearly expressed, in former § 1-441, was to authorize the attachment of stock in foreign corporations, and also in the case of individuals or domestic corporations which are removing their property from the State with the intent to defraud creditors, or doing any other act for which attachment would lie, and to authorize the attachment of stock in domestic corporations also. And former § 1-458 stated that "The rights or shares of the defendant in the stock of any association or corporation . . . are liable to be attached." Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923). As to attachment of stock in a foreign corporation, see 3 N.C.L. Rev. 103.

Property Absorbed by Nonresident Corporation. — Where a nonresident express

company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company, the one continuing to do business here was subject to attachment under the provisions of former §§ 1-458, 1-459, 1-461 et seq., where the cause of action arose here; and, the fact that the certificates of stock were not physically in the jurisdiction of the courts of this State was immaterial. Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923).

Unpaid Balances Due to Corporation. — Under former § 1-458, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State were property of such a corporation, and subject to attachment for the payment of its debts. Cooper v. Adel Sec., Co., 122 N.C. 463, 30 S.E. 348 (1898).

The bare interest of a creditor in his chattel security is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Any interest an agent may have by reason of the possession of his principal's property is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.—(a) An order of attachment may be issued by

(1) The clerk of the superior court in which the action has been, or is being, commenced, or by

(2) The resident judge, the judge regularly holding the superior courts of the district, or any judge holding a term of superior court in the county in which the action has been, or is being, commenced.

(b) An order of attachment issued by a judge may be issued as follows:

(1) The resident judge of the district, or the judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, at term or in vacation, and within or without the district.

(2) Any other judge holding a term of superior court in the county may issue the order in open court.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by § 1-440.10 and the affidavit required by § 1-440.11 to be filed promptly with the clerk of the superior court of the county in which the action is pending. (1947, c. 693, s. 1.)

Editor's Note. — All of the cases in the following note were decided under earlier statutes.

The clerk only acts ministerially in issuing the process for attachment. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Clerk May Grant When He Is Plaintiff. —A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Issuance of Blank Forms Not Permitted. —When an attachment form in blank, including a form for the affidavit, had been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give sufficient bond, the writ and the levy thereunder were both void, though subsequently approved by the clerk. Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

Clerk Can Grant Attachment Out of Term Time.—The clerk of the court, acting as and for the court, has authority out of term time to grant the warrant of attachment, and likewise to allow all proper amendments in that respect and connection. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889); Howland v. Marshall, 127 N.C. 427, 37 S.E. 462 (1900).

Appeal from Clerk's Decision. — From the decision of the clerk in granting a warrant of attachment an appeal lies to the judge. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889); Howland v. Marshall, 127 N.C. 427, 37 S.E. 462 (1900).

§ 1-440.6. Time of issuance with reference to summons or service by publication.—(a) The order of attachment may be issued at the time the summons is issued or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted the words "at the time the summons is issued or at any time thereafter" in subsection (a) for former subdivisions (1) and (2) of such subsection, which pertained to the time of issuance of the order of attachment.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

§ 1-440.7. Time within which service of summons or service by publication must be had.—(a) When an order of attachment is issued before the summons is served.

(1) If personal service within the State is to be had, such personal service must be had within thirty days after the issuance of the order of attachment;

(2) If such personal service within the State is not to be had,

a. Service of the summons outside the State, in the manner provided by Rule 4 (j) (1) a or b of the Rules of Civil Procedure, must be had within thirty days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4 (j) (1) c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of § 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted "Rule 4 (j) (1) a or b of the Rules of Civil Procedure" for "§ 1-104" in subdivision (2) a of subsection (a), and substituted "Rule 4 (j) (1) c of the Rules of Civil Procedure" for "§ 1-99" in subdivision (2) b of such subsection.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

A number of cases in the following note were decided under earlier statutes.

Main Action Commenced by Summons. —The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. Lackett v. Rumbaugh, 45 F. 23 (W.D.N.C. 1891).

When Summons Unnecessary. — Under the former statute it was said that, in proper instances, where civil actions were commenced and service obtained by attachment of the defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action was unnecessary. Jenette v. Hovey & Co., 182 N.C. 30, 108 S.E. 301 (1921). See Grocery Co. v. Bag Co., 142 N.C. 174, 55 S.E. 90 (1906), citing and approving Best v. British & Am. Co., 128 N.C. 351, 38 S.E. 923 (1901), and overruling McClure v. Fellows, 131 N.C. 509, 42 S.E. 951 (1902).

The publication of summons and attachment was not irregular because commenced within thirty days from the time of issuing the summons. Currie v. Golconda Mining & Milling Co., 157 N.C. 209, 72 S.E. 980 (1911).

Failure to Order or Make Service. — Where an affidavit, filed in an action wherein attachment was sought under the former statute against the property of a nonresident within the jurisdiction of the court, was sufficient for the clerk to order service of the summons by publication, but service had not been ordered or made, and the cause had come up on the defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, had obtained an order of publication from the clerk, it was held to be within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. Jenette v. Hovey & Co., 182 N.C. 30, 108 S.E. 301 (1921).

Failure to Commence Service by Publication within Thirty-One Days. — A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within thirty-one days after the issuance of the order of attachment. Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

Extension of Time.—In Finch v. Slater, 152 N.C. 155, 67 S.E. 264 (1910), it is held that where the court had acquired jurisdiction by attachment of property, the time for serving summons by publication, when it had not been properly made, could be extended in the discretion of the court. Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

Proceedings When Notice Not Duly Served.—Under the former statute it was held that if the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it was possible that the defect might be cured by amendments. Branch v. Frank, 81 N.C. 180 (1879); Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

The remedy was not to dismiss the attachment, but by ordering a republication, for, as the defendant was a nonresident, to dismiss the attachment might deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment could be had. Price v. Cox, 83 N.C. 261 (1880); Penniman v. Daniel, 90 N.C. 154 (1884); Penniman v. Daniel, 93 N.C. 332 (1885); Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

The court has a right to extend the time for service by publication. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

Applied in S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949).

Cited in Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

§ 1-440.8. General provisions relative to bonds.—(a) Any bond given pursuant to the provisions of this article shall be executed by the party required to furnish the bond and by

(1) A surety company authorized to do business in this State, as provided by § 109-17, or by

(2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the State and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this article that

(1) The court had no jurisdiction to require or accept bond, or

(2) The order of attachment was improperly granted, or

(3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

§ 1-440.9. Authority of court to fix procedural details.—The court of proper jurisdiction, before which any matter is pending under the provisions of this article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.—Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

(1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars ($200.00);

(2) The condition of the bond shall be that

a. If the order of attachment is dissolved, dismissed or set aside by the court, or

b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

Cross Reference.—See note to § 1-440.12. As to recovery on bond, see note to § 1-440.45.

Mistake in Signing Undertaking.—Under the former attachment statute it was held that where, by mistake, the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, this was a valid and binding undertaking. Boger v. Cedar Cove Lumber Co., 165 N.C. 557, 81 S.E. 784 (1914).

When Bond Sufficient. — Under the former statute, where an attachment was sued out against the owner of a vessel, it was held that a prosecution bond, made payable to the "owner" of the vessel by that description, was sufficient. Bryan v. The Steamer Enterprise, 53 N.C. 260 (1860).

When Defendant May Proceed on Bond.—See note to § 1-440.45.

§ 1-440.11. Affidavit for attachment; amendment.—(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,

b. The nature of such action, and

c. The ground or grounds for attachment (one or more of those stated in § 1-440.3); and

(2) In those cases described below, the additional facts indicated:

a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;

b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

I. In General.
II. Form and Sufficiency of Affidavit.
III. Amendment.

I. IN GENERAL.

Cross Reference.—See note to § 1-440.12.

Editor's Note. — All of the cases in the following note were decided under earlier statutes.

Strict Construction.—The provisions of former § 1-441, relating to the same subject matter as this section, were to be strictly followed. Leak v. Moorman, 61 N.C. 168 (1867); Spiers v. Halstead, Haines & Co., 71 N.C. 209 (1874); Wheeler v. Cobb, 75 N.C. 21 (1876).

II. FORM AND SUFFICIENCY OF AFFIDAVIT.

Affidavit Necessary in Attachment.—In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance. Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

By Whom Made. — An affidavit in attachment may be made generally by the plaintiff, his agent or attorney. Henrietta Mining & Milling Co. v. Gardner, 173 U.S. 123, 19 S. Ct. 327, 43 L. Ed. 637 (1899).

The affidavit to procure an attachment must be specific. Bacon v. Johnson, 110 N.C. 114, 14 S.E. 508 (1892), and must set forth one of the grounds recited in the statute. Mullen v. Norfolk & Carolina Canal Co., 114 N.C. 8, 19 S.E. 106 (1894).

Grounds of Belief Must Be Stated. — Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. Penniman v. Daniel, 90 N.C. 154 (1884).

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. Hughes v. Person, 63 N.C. 548 (1869); Gashine, Emory & Co. v. Baer, 64 N.C. 108 (1870); Clark v. Clark, 64 N.C. 150 (1870); Penniman v. Daniel, 90 N.C. 154 (1884); Judd v. Crawford Gold Mining Co., 120 N.C. 397, 27 S.E. 81 (1897). And if not set out the affidavit is fatally defective. First Nat'l Bank v. Tarboro Cotton Factory, 179 N.C. 203, 102 S.E. 195 (1920).

Need Not Specifically Allege Jurisdiction of Court.—Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. Bacon v. Johnson, 110 N.C. 114, 14 S.E. 508 (1892); Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912); Davis v. Davis, 179 N.C. 185, 102 S.E. 270 (1920); County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Nor That Defendant Has Property in State. — It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this State. Branch v. Frank, 81 N.C. 180 (1879); Parks v. Adams, 113 N.C. 473, 18 S.E. 665 (1893); Foushee v. Owen, 122 N.C. 360, 29 S.E. 770 (1898), overruling Spiers v. Halstead, Haines & Co., 71 N.C. 209 (1874) and Windley v. Bradway, 77 N.C. 333 (1877).

When Made by Agent. — An affidavit made by an agent need not state why it is not made by the principal. Bruff, Faulkner & Co. v. Stern & Bro., 81 N.C. 183 (1879); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892).

Examples of Sufficient Statement.—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

An affidavit for an attachment was sufficient which stated that the defendant was a nonresident and had property in this State, or had removed, or was about to remove some of his property from this State with intent to defraud his creditors. The statute put the modes in the alternative, and the plaintiff would succeed if he established either. Penniman v. Daniel, 90 N.C. 154 (1884).

In proceedings for attachment an affidavit is sufficient which sets out: (1) that the defendant is indebted, etc.; (2) that the defendant has departed from this State with intent, as the affiant is informed and believes, to avoid the service of summons. Hess, Rogers & Co. v. Brower, 76 N.C. 428 (1877).

Examples of Defective Statement. — An affidavit for a warrant of attachment, under former § 1-441, which stated "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," was fatally defective. W.P. Love & Co. v. Young, 69 N.C. 65 (1873).

The affidavit, upon which a warrant of

attachment has been issued, which alleges that the defendant is about to assign, dispose of and secrete money or goods with intent to defraud creditors, without setting forth the grounds upon which this belief is based, is fatally defective. First Nat'l Bank v. Tarboro Cotton Factory, 179 N.C. 203, 102 S.E. 195 (1920).

Remedy When Affidavit Defective. — A plea in abatement was held to be the proper mode of taking advantage of a defect in the affidavit for an attachment. Leak v. Moorman, 61 N.C. 168 (1867).

Collateral Attack. — The validity of the affidavit cannot be collaterally attacked. Wehrman v. Conklin, 155 U.S. 314, 15 S. Ct. 129, 29 L. Ed. 167 (1894).

III. AMENDMENT.

Court Can Allow Amendment. — It is settled that an affidavit can be amended by leave of the court, granted in its discretion, even though the first affidavit was wholly insufficient. Brown, Daniel & Co. v. Hawkins, 65 N.C. 645 (1871); Branch v. Frank, 81 N.C. 180 (1879); Bank of New Hanover v. Blossom, 92 N.C. 695 (1885); Penniman v. Daniel, 93 N.C. 332 (1885); Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892).

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

No Appeal from Court's Order.—From the leave to amend the affidavit no appeal lies. Lippard v. Roseman, 72 N.C. 427 (1875); Henry v. Cannon, 86 N.C. 24 (1882); Wiggins v. McCoy, 87 N.C. 499 (1882); Jarrett v. Gibbs, 107 N.C. 303, 12 S.E. 272 (1890); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892); Cook v. New York Corundum Co., 114 N.C. 617, 19 S. E. 664 (1894).

A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. Palmer v. Bosher, 71 N.C. 291 (1874).

When Clerk Denies Amendment. — Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal, even after appeal to the court in term. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

Findings of Court Having Effect of Amendment.—An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings have the effect of an amendment allowed by him. Thornburg v. Burton, 197 N.C. 193, 148 S.E. 28 (1929).

Amendment Relates Back to Beginning. — An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. Cook v. New York Corundum Co., 114 N.C. 617, 19 S.E. 664 (1894).

§ 1-440.12. Order of attachment; form and contents.—(a) If the matters required by § 1-440.11 (a) are shown by affidavit to the satisfaction of the court and if the bond required by § 1-440.10 is furnished, the court shall issue an order of attachment which shall

(1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;
(2) Run in the name of the State and be directed to the sheriff of a designated county;
(3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;
(4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;
(5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;
(6) Show the date of issuance; and
(7) Be signed by clerk or the judge issuing the order.

(b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by § 1-440.16. (1947, c. 693, s. 1.)

Editor's Note.—Most of the cases in the following note were decided under earlier statutes.

To Whom Warrant Issued. — Former § 1-447 made a distinction between writs issuing from the superior court and the court of a justice of the peace, and in express terms required that writs of attachment from the superior courts should be addressed to the sheriff of the county, while writs issued by a justice of the peace were to be addressed to "the sheriff or any constable." By reason of the rule of strict construction (mentioned in note under § 1-440.1), it was held that a writ of attachment issuing out of the superior court on causes within that jurisdiction must be addressed to the sheriff of the county. Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912). As to order issued by justice under present statute, see § 1-440.49.

An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, would not be dismissed for want of form because directed "to any constable or other lawful officer to execute and return within thirty days (Sundays excepted)," when it appeared that it was executed by the sheriff. Askew v. Stevenson, 61 N.C. 288 (1867).

When Sheriff Is Defendant.—The words of former § 1-447, requiring that the warrant should direct the sheriff to attach "all the property of the defendant" did not, when the sheriff was the defendant, include his tax books showing debts due to him for taxes. Davie v. Blackburn, 117 N.C. 383, 23 S.E. 321 (1895).

A clerk's ex parte order of attachment was properly issued under this section if plaintiff's verified complaint and bond for attachment met the requirements of § 1-440.11 and § 1-440.10 respectively. Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.—(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, at the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

§ 1-440.14. Notice of issuance of order of attachment when no personal service.—(a) When service of process by publication is made subsequent to the original order of attachment, the published and mailed notice of service of process shall include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after publication is begun, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within 30 days after the issuance of the order of attachment. Such notice shall show

(1) The county and the court in which the action is pending,
(2) The names of the parties,
(3) The purpose of the action, and
(4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

(1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or

(2) Shall be posted at the courthouse door in the county for thirty days. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Cross Reference.—As to service by publication, see note under § 1-440.7.

Editor's Note.—The 1967 amendment rewrote subsection (a), substituted "publication is begun" for "the order of publication is made" in the first sentence of subsection (b), and deleted subsection (d).

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Most of the cases in the following note were decided under earlier statutes.

Statement of Amount. — Under former § 1-448, which provided that when the summons in an attachment suit was to be served by publication, the publication should state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims were fatally defective. Flint v. Coffin, 176 F. 872 (4th Cir. 1910).

In attachment the plaintiff cannot recover an amount in excess of that stated in the summons. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Defendant's Bond Considered as Waiver. —Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by former § 1-457 was considered equivalent to a personal appearance in the action and a waiver of the requirement for further service of the summons. It amounted to a voluntary submission of the defendant's cause to the jurisdiction of the court. Mitchell v. Elizabeth City Lumber Co., 169 N.C. 397, 86 S.E. 343 (1915).

Affidavit after Order.—Under the former statute it was held that the affidavit to obtain an order for the publication of a summons might be made after the order, provided the order remained in abeyance until the affidavit was filed. Bank of New Hanover v. Blossom, 92 N.C. 695 (1885).

Omission of Notice in Order of Publication.—Where notice of the attachment was omitted from the order of publication, but in the published notice the defendant was informed that an attachment had been issued against his property, to what court it was returnable, etc., it was held under the former statute that the court had power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. Bank of New Hanover v. Blossom, 92 N.C. 695 (1885).

Publication for Five Weeks.—Where notice of an attachment and the summons were published in one notice for five weeks, it was held a sufficient publication of the notice of the attachment under the former statute, but not of the summons. And the court had power to retain the action and order a sufficient publication. Bank of New Hanover v. Blossom, 92 N.C. 695 (1885).

Late Filing of Newspaper's Affidavit.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Applied in S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.—(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

(1) The levy on real property shall be made as provided by § 1-440.17;

(2) The levy on stock in a corporation shall be made as provided by § 1-440.19;

(3) The levy on goods stored in a warehouse shall be made as provided by § 1-440.20;

(4) The levy on tangible personal property in the possession of the defendant shall, except as provided in § 1-440.19, be made as provided by § 1-440.18;

(5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant,

shall, except as provided by §§ 1-440.19 and 1-440.20, be made as provided by § 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by § 1-440.25. (1947, c. 693, s. 1.)

§ 1-440.16. Sheriff's return. — (a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by §§ 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within ten days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

Late Filing of Return.—After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

§ 1-440.17. Levy on real property.—(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

(1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and

(2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall docket the levy, as provided by § 1-440.33. (1947, c. 693, s. 1.)

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. Voehringer v. Pollock, 224 N.C. 409, 30 S.E.2d 374 (1944).

Sufficiency of Description. — A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. Grier v. Rhyne, 67 N.C. 338 (1872), decided under a former statute.

§ 1-440.18. Levy on tangible personal property in defendant's possession.—The sheriff shall levy on tangible personal property in the possession of the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.—(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

(1) When the certificate is in the possession of the defendant, and

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in § 1-440.26,

(1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

a. Such certificate has been surrendered to the corporation which issued it, or

b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

As to attachment of stock owned by one foreign corporation in another foreign corporation under superseded § 1-459, see Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923).

§ 1-440.20. Levy on goods in warehouses.—(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in § 1-440.26,

(1) If a negotiable warehouse receipt has not been issued with respect thereto, or

(2) If a negotiable warehouse receipt has been issued with respect thereto, and

a. Such receipt is seized, or

b. Such receipt is surrendered to the warehouseman who issued it, or

c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

Applied in Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd, 386 F.2d 199 (4th Cir. 1967).

§ 1-440.21. Nature of garnishment.—(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

(1) Tangible personal property belonging to the defendant but not in his possession, and

(2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by § 1-440.23 is issued. (1947, c. 693, s. 1.)

Editor's Note.—A number of cases in the following note were decided under earlier statutes.

Nature of Garnishment. — The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to defeat his creditors. Chicago, Rock Island & Pac. Ry. v. Sturm, 174 U.S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. Wanzer v. Culy, 58 U.S. (17 How.) 584, 15 L. Ed. 216 (1854).

A garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. Miller v. United States, 78 U.S. (11 Wall.) 268, 20 L. Ed. 135 (1870).

Proceeding in Rem. — In garnishment proceedings, whatever of substance there is must be with the debtor, he holding the res in his hands, giving character to the action as one in the nature of a proceeding in rem. Chicago, Rock Island & Pac. Ry. v. Sturm, 174 U.S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

What Law Governs. — To enable the judgment creditor to arrest the payment of what is due the judgment debtor, which might be paid so as to defeat the rights of the creditor, he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. It is a legal necessity and considerations of situs are somewhat artificial. Chicago, Rock Island & Pac. Ry. v. Sturm, 174 U.S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

Proper Remedy to Reach Intangibles. —Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Jurisdiction Necessary. — The court entertaining a garnishment must have some jurisdiction over the thing garnished. Balk v. Harris, 124 N.C. 467, 32 S.E. 799 (1899).

Prerequisites for Jurisdiction over Debt. —In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, three things should occur: (a) The corporation who is the garnishee must have such a residence and agency within the State as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (c) it must appear that the situs of the debt is in this State. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warrant the court in denying defendants' motion to dismiss for want of jurisdiction. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

The obligation of the garnishee can be enforced by the courts of the foreign state after personal service of process therein, just as well as by courts of the domicil of the debtor. Harris v. Balk, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905).

Former § 1-461 applied alike to residents and nonresidents, persons and corporations, and it would not be declared unconstitutional in an action instituted long subsequent to its enactment. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Warrant Incidental to Original Action. —Want of authority in the justice to issue an original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as provided by the former statute; for issuing the warrant was only incidental to the original action. Baker, Ginsberg & Co. v. Belvin, 122 N.C. 190, 30 S.E. 337 (1898); Mohn v. Cressey, 193 N.C. 568, 137 S.E. 718 (1927).

Not Necessary to Bring Separate Action against Garnishee. — A judgment may be

taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. Baker, Ginsberg & Co. v. Belvin, 122 N.C. 190, 30 S.E. 337 (1898). Carmer v. Evers, 80 N.C. 56 (1879), a case which held the opposite of this, discussed and overruled since it was decided under former law.

Plaintiff Substituted to Rights of Defendant against Garnishee.—A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Bank May Be Garnishee. — A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. Markham-Stephens Co. v. E.L. Richmond Co., 177 N.C. 364, 99 S.E. 17 (1919).

Where Bank a Mere Stakeholder. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

Moneys Not Yet Due.—Under former § 1-461, moneys due by a garnishee, or goods in his hands at the time of appearance and answer, were held applicable to the debt, though not earned and due when he was summoned to answer. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Exemption of Earnings.—Section 1-362 provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Same—Exemption Must Be Claimed. — When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. Pocomoke Guano Co. v. Colwell, 177 N.C. 218, 98 S.E. 535 (1919).

Amounts Due Corporation from Unpaid Stock Subscriptions. — A corporation was held a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. Cooper v. Adel Sec. Co., 122 N.C. 463, 30 S.E. 348 (1898).

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him full consideration, and the husband afterwards absconded before the teeth were furnished, the dentist was not liable as garnishee to a creditor for the value of the teeth. Cherry v. Hooper, 52 N.C. 82 (1859).

Cross Action against Garnishee Not Permitted. — Defendant in an action on contract is not entitled to file a cross action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. Kitchen Equip. Co. v. International Erectors, Inc., 268 N.C. 127, 150 S.E.2d 29 (1966).

§ 1-440.22. **Issuance of summons to garnishee.**—(a) A summons to garnishee may be issued

(1) At the time of the issuance of the original order of attachment, by the court making such order, or

(2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

Personal Service Necessary.—It was held that superseded § 1-461, relating to garnishments, evidently contemplated personal service, as no provision was made for a constructive service of the summons; and the statute had always been strictly construed. Parker v. Scott, 64 N.C. 118 (1870).

Warrant Running beyond Limit of County Where Action Brought. — Under former § 1-461, it was held that, the issuance of a warrant of attachment by a justice of the peace being only incidental to the relief sought in the original action, the warrant in garnishment might run beyond the limit of the county wherein the action was brought. Mohn v. Cressey, 193 N.C. 568, 137 S.E. 718 (1927).

§ 1-440.23. Form of summons to garnishee.—The summons to garnishee shall be substantially in the following form:

State of North Carolina — In the Superior Court
..... County

....., Plaintiff, vs. ....., Defendant, and ....., Garnishee.	Summons to Garnishee

To ....., Garnishee:

You are hereby summoned, as a garnishee of the defendant, ..., and required, within twenty days after the service of this summons upon you, to file a verified answer in the Office of the Clerk of the Superior Court of the above named county, at ....., North Carolina, showing—

(1) Whether, at the time of the service of this summons upon you, or at any time since then until the date of your answer, you were indebted to the defendant or had any property of his in your possession and, if so, the amount and nature thereof; and

(2) Whether, according to your knowledge, information or belief, any other person is indebted to the defendant or has any property of the defendant in his possession and, if so, the name of each such person.

In case of your failure to file such answer a conditional judgment will be rendered against you for the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as will be sufficient to cover the plaintiff's costs.

This the ..... day of ....., 19...

.....
(Here designate Clerk Superior Court or Judge.)

(1947, c. 693, s. 1.)

§ 1-440.24. Form of notice of levy in garnishment proceeding.—The notice of levy to be served on the garnishee shall be substantially in the following form:

State of North Carolina — In the Superior Court
..... County

....., Plaintiff, vs. ....., Defendant, and ....., Garnishee.	Notice of Levy

To ....., Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of ..... County and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the defendant in your possession, and that if you surrender the possession of, or trans-

fer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the ..... day of ....., 19...

.....

Sheriff of ..... County.

(1947, c. 693, s. 1.)

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.—The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by § 1-440.26, a copy of each of the following:

(1) The order of attachment,
(2) The summons to garnishee, and
(3) The notice of levy. (1947, c. 693, s. 1.)

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.—(a) When the garnishee is a domestic corporation, the copies of the process listed in § 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in § 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the State, except that

(1) If the corporation has property within this State, or
(2) If the cause of action arose in this State, or
(3) If the plaintiff resides in this State,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

§ 1-440.27. Failure of garnishee to appear. — (a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than ten days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

§ 1-440.28. Admission by garnishee; setoff; lien. — (a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount which the garnishee admits that he owes the defendant or

has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavit filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) An amount equal to the value of the property in question, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within twenty days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury. If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of setoff which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

§ 1-440.29. Denial of claim by garnishee; issues of fact.—(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

(1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or

(2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within twenty days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defendant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount specified in the jury's verdict, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

Editor's Note. — All of the cases in the following note were decided under earlier statutes.

Jury Trial. — Under former § 1-463, relating to trial of issues in garnishment proceedings, the plaintiff in garnishment proceedings, upon the suggestion that he wished to traverse the return of the garnishee, was entitled, without any formal or verified statement, to have the issue tried by a jury. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Where Principal Defendant Denies Ownership.—The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denied ownership of the attached property, could not be injured by the judgment, and hence, was held not entitled, under the former statute, to have an issue submitted as to the title to the property. Foushee v. Owen, 122 N.C. 360, 29 S.E. 770 (1898).

No Personal Judgment against Nonresident Defendant.—In garnishment proceedings under the former statute against a nonresident defendant, service being had by publication, no jurisdiction was acquired to support a personal judgment against the defendant. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Effect of Judgment against Nonresident Defendant and Garnishee.—Where service of summons was had by publication on a nonresident of the State, and a debt due the defendant was garnished under the former statute, the plaintiff did not lose any lien on the debt by taking a judgment against the defendant and the garnishee. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Order Applying Collections Made to Judgment against Principal Defendant. — Under the former statute, where judgment was given against a garnishee in an action against the debtor, it was held proper to make an order applying the collections made on such judgment to the judgment obtained, or to be obtained, against the debtor. Baker, Ginsberg & Co. v. Belvin, 122 N.C. 190, 30 S.E. 337 (1898).

§ **1-440.30. Time of jury trial.**—All issues arising under § 1-440.28 or § 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ **1-440.31. Payment to defendant by garnishee.**—Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ **1-440.32. Execution against garnishee.**—(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such

execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by § 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

There was no distinction between an execution on an ordinary judgment issued under § 1-305, and an execution on a judgment against a garnishee issued under former § 1-461. They were both judgments and sections to be construed in pari materia. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Execution may be issued against garnishees prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934), decided under former § 1-461.

Without Notice or Hearing. — Where judgment has been regularly entered against certain garnishees in proceedings under former § 1-440, the clerk of the superior court could issue execution on the judgment against the garnishees without notice or a hearing under former § 1-461 and § 1-305. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.—(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the lis pendens docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by § 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

(1) The lien attaches and relates back to the time of the filing of the notice of lis pendens if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the lis pendens docket of the county in which the land lies, as provided by subsection (a) of this section.

(2) The lien attaches only from the time of the docketing of the certificate of levy if no entry of the issuance of the order of attachment has been made prior to the levy on the lis pendens docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by § 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a garnishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which began simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the

attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, § 1.)

Cross Reference. — As to filing of lis pendens when notice required by superseded § 1-449, relating to execution, levy and lien in attachment proceedings, had been given, see note to § 1-116.

Editor's Note.—All of the cases in the following note were decided under earlier statutes.

Lien Enforceable against Subsequent Purchasers. — When the officer had complied with the provisions of former § 1-449, relating to execution, levy and lien of attachments, the plaintiffs had a lien on such property, which was enforceable against all subsequent purchasers from the defendant. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

Debt Owed by City to Principal Defendants.—In attachment proceedings under a former statute an examination of the officials of a city alleged to be indebted to defendants operated as a lien on anything owing by the city to defendants, as of the day when the copy of the warrant of attachment was delivered; and thereby prevented any alterations of the state of accounts between defendants and the city. Carmer v. Evers, 80 N.C. 56 (1879).

Property of Garnishee. — Under former § 1-461, it was held that no lien attached to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

Exemptions.—Under a former statute it was held that property seized under attachment was only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant, he was entitled to the same exemptions in the property attached as he would have been had there been no attachment. State ex rel. Gamble v. Rhyne, 80 N.C. 183 (1879).

Homestead.—The lien of an attachment levied under the former statute upon land of a nonresident debtor was paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. Watkins v. Overby, 83 N.C. 165 (1880).

§ 1-440.34. Effect of defendant's death after levy. — (a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.—The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property. The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment. — (a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

Editor's Note. — Most of the cases in the following note were decided under earlier statutes.

Remedy in This Section Is Not Exclusive. — When the defendant contests the grounds on which the writ issued, this section provides a ready means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948). See § 1-440.41.

The jury having found that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Vacation without Undertaking.—An attachment will be vacated by the judge without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. Bear v. Cohen, 65 N.C. 511 (1871).

Clerk Has Jurisdiction. — The clerk of the superior court has jurisdiction to vacate an attachment. Palmer v. Bosher, 71 N.C. 291 (1874).

Motion out of Term. — It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. Palmer v. Bosher, 71 N.C. 291 (1874).

Motion May Be Made by One of Several Defendants. — Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. Luff v. Levey, 203 N.C. 783, 166 S.E. 922 (1932).

Failure of Defendant to Move to Vacate. — The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

Attachment Vacated When Defendant Bankrupt. — When the defendant was adjudged a bankrupt, that was held to be sufficient ground for vacating an attachment levied upon his property. Mixer, Whitman & Co. v. Excelsior Oil & Guano Co., 65 N.C. 552 (1871); Ward v. Hargett, 151 N.C. 365, 66 S.E. 340 (1909).

Where It Appears from Pleadings That Action Must Fail. — The trial judge may vacate an attachment pending trial where it plainly appears from the pleadings that the action of the plaintiff must fail. Knight v. Hatfield, 129 N.C. 191, 39 S.E. 807 (1901).

Where Funds Attached Held upon Express Trust.—Where in an action against a foreign fraternal insurance society, the funds in the hands of a collector were attached and the society claimed that such funds were held upon an express trust for the benefit of the widows and orphans of the deceased members, and were not subject to attachment, the society was entitled to raise such a question by motion to vacate the attachment. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

When Attachment Not Discharged.—A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved the finding of facts such as he has no interest in. Foushee v. Owen, 122 N.C. 360, 29 S.E. 770 (1898).

Same — Insufficient Affidavit. — It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by

amendment. Branch v. Frank, 81 N.C. 180 (1879); Price v. Cox, 83 N.C. 261 (1880).

Hence, where the application to vacate an attachment is to the clerk before the sitting of the court to which the summons is made returnable, a further order of publication to cure a defective service may be obtained upon an affidavit to the court without discharging the attachment. Penniman v. Daniel, 90 N.C. 154 (1884).

Validity of warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. W.M. Devries & Co. v. Summit, 86 N.C. 126 (1882).

Court May Find Facts.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Pasour v. Lineberger, 90 N.C. 159 (1884).

An appeal lies from the refusal to dismiss an attachment. Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892); Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894); Judd v. Crawford Gold Mining Co., 120 N.C. 397, 27 S.E. 81 (1897).

Appeal Takes Case from Jurisdiction of Court Below. — Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. Pasour v. Lineberger, 90 N.C. 159 (1884).

When Facts Must Be Set Out.—The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

When Findings of Fact Not Reviewable. —On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts found by him, so appearing, are not reviewable. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

The findings of fact of the clerk of the superior court, on a motion to vacate an attachment, supported by the evidence and approved by the judge, are not subject to review. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

Decision Is Res Judicata.—A decision on a motion to vacate an attachment is res judicata until reversed. Roulhac v. Brown, 87 N.C. 1 (1882); Pasour v. Lineberger, 90 N.C. 159 (1884); Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Proceedings upon Vacating Attachment. —In an action under the former statute it was said that when the court vacated the attachment and taxed the plaintiffs with the costs of the attachment proceedings, and then gave judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power were exhausted. Nothing else could be done except, perhaps, to make an order for the return of the property seized under the attachment if the provision in the former statute requiring the return of the property was not self-executing (W.M. Devries & Co. v. Summit, 86 N.C. 126 (1882)), and such an order was necessary. The general practice was to insert such a direction to the sheriff in the order vacating the attachment. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904), citing Jackson, Oglesby & Co. v. Burnett, 119 N.C. 195, 25 S.E. 868 (1896).

Dissolution of Bond.—Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Applied in Armstrong v. Aetna Ins. Co. 249 N.C. 352, 106 S.E.2d 515 (1959).

Cited in Hill v. Dawson, 248 N.C. 95, 102 S.E.2d 396 (1958); Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.37. Modification of the order of attachment.—At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

§ 1-440.38. Stay of order dissolving or modifying an order of attachment.—Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

§ 1-440.39. Discharge of attachment upon giving bond. — (a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

(1) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond.

(2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by §§ 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

Cross Reference.—As to recovery on bond, under former statutes, see note to § 1-440.46.

Editor's Note.—Most of the cases in the following note were decided under earlier statutes.

Property Retained in Custody unless Replevied.—Under the former statute the property attached remained in the custody of the court to await the determination of the action unless replevied. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

By giving the undertaking in the manner provided by former § 1-457, the debtor could procure the release of the attachment. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

Bond in Lieu of Attachment Lien. — Where attachment had been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver was permitted by the court to continue operations, the giving of the bond was in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by former §§ 1-456 and 1-457. Martin v. McBryde, 182 N.C. 175, 108 S.E. 739 (1921).

When Undertaking Unnecessary. — The

undertaking required in former § 1-457 was not necessary when the warrant on its face appeared to have been issued irregularly, or for a cause insufficient in law or false in fact. Bear v. Cohen, 65 N.C. 511 (1871); W. M. Devries & Co. v. Summit, 86 N.C. 126 (1882).

When an attachment on the debtor's property had been vacated by the superior court judge, the defendant was not required to give the undertaking under former § 1-457 to regain possession of the property. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

Effect of Undertaking as Waiver or Estoppel.—Giving the undertaking by defendant under former § 1-457 was equivalent to a general appearance in the action, and waived certain irregularities. It estopped the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment was based. Giving the undertaking did not waive the validity of the statutory ground of attachment. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

The filing of bond by a defendant to release his property from an attachment does not bar defendant from challenging the validity of the attachment. Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Hearing as to Validity of Ground of Attachment.—When defendant gave the undertaking under former § 1-457 the matter of the validity of statutory ground on which attachment was procured might be heard before the trial of the main issue, but, if demand was made, it might be heard before the trial of the merits or it might be tried with the main issue. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

Payment to Defendant of Proceeds of Sale.—The sales of property mentioned in former § 1-456 and 1-468, relating to payment to the defendant of the proceeds of sale, had reference to those made before the attachment was vacated, as, for instance, sales made under the order of the court when the property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Restitution of Property. — Former § 1-456, providing for the restitution of property upon an order dissolving the attachment, did not apply to cases where there had been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment. Jackson, Oglesby & Co. v. Burnett, 119 N.C. 195, 25 S.E. 868 (1896).

Notwithstanding the dissolution of an attachment, the plaintiff, who claimed that the property has been transferred to him by the defendant after the levy of the warrant, was entitled to have submitted to the jury an issue as to the ownership of the property. Jackson, Oglesby & Co. v. Burnett, 119 N.C. 195, 25 S.E. 868 (1896).

Refusal of Sheriff to Deliver Property.—If the sheriff failed or refused to deliver the property after discharge of the attachment as provided in former § 1-456, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Discharge of Surety. — When defendant in attachment entered a general appearance and traversed the allegations of fraudulent concealment of his property upon which the attachment was based, and gave bond to retain possession of the property attached, and upon the trial the issue as to fraud was found in his favor, the surety on the bond was discharged from liability, and it was not necessary that a motion to vacate the attachment should have been previously made. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

When the surety signed a bond under former § 1-457, it was held that he entered into the obligation with reference to the cause as it then stood, so when a new element of liability was introduced by an amendment, the surety was discharged. Rushing v. Ashcraft, 211 N.C. 627, 191 S.E. 332 (1937).

Cited in Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.40. Defendant's objection to bond or surety. — (a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

Cross Reference. — As to appeal from order of clerk denying motion to increase security, see notes to §§ 1-274 and 1-275.

Vacation in Case Increased Bond Not Filed. — The judge of the superior court had the power to order the plaintiff to give further security or an increased bond, under former § 1-469, relating to motions to vacate the attachment or increase the security, but he could not add a condition to the order that the attachment be vacated ipso facto if the increased bond was not filed by a certain time. The plaintiff would be given a reasonable time for filing the bond. Luff v. Levey, 203 N.C. 783, 166 S.E. 922 (1932).

§ 1-440.41. Defendant's remedies not exclusive.—The exercise by the defendant of any one or more rights provided by §§ 1-440.36 through 1-440.40 does not bar the defendant from exercising any other rights provided by those sections. (1947, c. 693, s. 1.)

Stated in Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.—(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order of attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his posssesion by the sheriff shall be subject to all the provisions of this article relating to attached property. (1947, c. 693, s. 1.)

§ 1-440.43. Remedies of third person claiming attached property or interest therein.—Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

(1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

(2) Intervene and secure possession of the property in the same manner and

under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

Cross Reference.—As to interpleader in claim and delivery, see § 1-482 and note.

Editor's Note.—All of the cases in the following note were decided under earlier statutes.

Remedies of Claimant. — Under the former statutes, one whose property had been attached by a sheriff, under a warrant issued in an action to which he was not a party, could intervene or interplead in the action, and demand judgment that he was the owner of the property, and an order directing the sheriff to release the property under former § 1-471. Or he could bring an action against the sheriff and the sureties on his official bond for the property or for damages for its conversion. Stein v. Cozart, 122 N.C. 280, 30 S.E. 340 (1898). Or he could bring an action against the plaintiffs at whose instance the warrant was issued, and the property wrongfully seized, joining the sheriff as a defendant or not as he saw fit; if the sheriff had taken an indemnity bond, he could sue the obligor and the sureties on such bond. Martin v. Buffaloe, 128 N.C. 305, 38 S.E. 902 (1901); Gay v. Mitchell, 146 N.C. 509, 60 S.E. 426 (1908); Tyler v. Mahoney, 168 N.C. 237, 84 S.E. 362 (1915); Tatham v. Dehart, 183 N.C. 657, 112 S.E. 430 (1922); Flowers v. Spears, 190 N.C. 747, 130 S.E. 710 (1925).

Where Defendant Held Property as Agent. — Where the evidence tended to show that a defendant held property levied on as agent for another, such third person should be allowed to be made a party. Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

Separate Trial. — In attachment under the former statute a separate trial for the intervenor was discretionary with the trial judge. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Burden of Proving Title. — In attachment the burden was on the intervenor to establish title to the property. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Objection to Irregularity of Attachment Proceedings.—Under the former statute it was held that parties who intervened in attachment proceedings could not be heard to object to the irregularity of the same, that being a matter between the parties to the main action. Cook v. New York Corundum Co., 114 N.C. 617, 19 S.E. 664 (1894).

An intervenor in an action wherein attachment on the defendant's property had been issued, who claimed a prior lien by reason of a former order of court in another and independent proceeding, became party to the action and could not successfully attack the validity of the proceedings in attachment, and the question of priority was left to be determined in the action. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Under the former statute an intervenor had no right to interfere in the action between the original parties, since he was interested only as to the title to the property. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

§ 1-440.44. When attached property to be sold before judgment.—(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or

(2) If the property is not perishable, but

a. Will materially deteriorate in value pending litigation, or

b. Will likely cost more than one fifth of its value to keep pending a final determination of the action, and

c. Is not discharged from the attachment lien in the manner provided by § 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by § 1-440.39, prior to such sale. The proceeds of such sale shall be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

Sale of Third Party's Goods. — Where an attachment was levied upon the goods of a third party which, being perishable, were sold by the sheriff, and the third

party interpleaded in the action and recovered judgment, the costs and expenses of the attachment, sale, etc., were not properly chargeable against the fund arising from such sale. Haywood v. Hardie, 76 N.C. 384 (1877), decided under a former statute similar to this section.

An intervenor obtaining the possession of property attached by giving a replevy bond could not sell part of the property, such sale not being made as provided by superseded § 1-454, similar to this section, and claim the right to pay for the part sold and return the balance thereof. Bulluck v. Haley, 198 N.C. 355, 151 S.E. 731 (1930).

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.—(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by § 1-440.7,

(1) The defendant shall be entitled to have delivered to him

a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and

b. The proceeds of any sales and all money collected, and

c. All attached property remaining in the officer's hands, and

(2) Any garnishee shall be entitled to have vacated any judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) Upon judgment in his favor in the principal action, the defendant may thereafter, by motion in the cause, recover on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1; 1951, c. 837, s. 8.)

Editor's Note.—Most of the cases in the following note were decided under earlier statutes.

Prior to 1947, there was no provision in this article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Claim on Bond May Not Be Heard at Original Hearing.—Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ or judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Remedy Is by Motion after Judgment or Subsequent Independent Action. — Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

When Limitations Begin to Run on Action on Bond.—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations began to run from the rendition of the judgment and not from the time the property was replevied. The recovery of the judgment in the former action was the condition authorizing the suit, and a vacation of the attachment. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Misjoinder of Principal and Surety.—An action would not be dismissed for a misjoinder of parties where the plaintiff was suing, in the same action, the principal and

surety on an attachment bond given under the former statute. The remedy was by motion to have the causes divided. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Creditor Not Liable on Bond for Sheriff's Failure.—An attaching creditor under the former statute was not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Recovery of Expenses Incurred by Defendant in Procuring Bond.—In an action to recover on an attachment bond given under the former statute for the wrongful levy therein, damages might be awarded for the reasonable expense the plaintiff, who was the defendant in the attachment proceedings, had incurred in procuring the undertaking he had given to obtain the release of the property attached. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Traveling Expenses and Value of Time.—Damages could not be recovered in an action for a wrongful levy in attachment under the former statute for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Delivery of Property and Proceeds of Sales.—The sales of property mentioned in former § 1-468, requiring delivery of property or proceeds of sale to defendant upon his recovery, referred to those before the attachment was vacated, as for instance sales made under the order of the court when property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

When Defendant May Proceed on Bond.—If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment defendant may, without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given. Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954); Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.46. **When plaintiff prevails in principal action.**—(a) If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

(1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.

(2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.

(3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by subdivision (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.

(4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.

(b) In order to secure the sale of the remaining debts and evidences of indebt-

edness as provided in subsection (a) (4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion

(1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and

(2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the purchaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein.

(e) When the judgment and all costs of the proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1; 1951, c. 837, s. 9.)

Editor's Note.—All of the cases in the following note were decided under earlier statutes.

Property Held Until Final Judgment.—The first paragraph of former § 1-466, which was similar to the first paragraph of this section, indicated that the property was held until final judgment and the sheriff could collect from a garnishee against whom judgment was entered. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Property in Possession of Third Party.—Where a person in possession of property was not a party to an attachment suit brought under the former statute, the plaintiff, in addition to a judgment for his debt, was not entitled to a judgment for such property, but must proceed under former § 1-466. Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co., 128 N.C. 199, 38 S.E. 831 (1901).

Judgment against Nonresident. — No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. Johnson v. Whilden, 166 N.C. 104, 81 S.E. 1057 (1914).

Where Nonresident Had No Actual Notice.—A nonresident defendant in attachment proceedings under the former statute, against whom judgment had been rendered under service of summons by publication, and who had not had actual notice of the action until after the judgment had been rendered, could, as a matter of right upon showing that he had a good and meritorious defense, have the judgment vacated by motion within the statutory period, and he could avail himself of any defense he originally had. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

Power and Duty of Sheriff.—The attachment is simply a levy before judgment, and upon execution issuing on a judgment it is the duty of the sheriff to sell the attached property. Gamble v. Rhyne, 80 N.C. 183 (1879); Farmers Mfg. Co. v. Steinmetz, 133 N.C. 192, 45 S.E. 552 (1903); Morgantown Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Former § 1-466 gave an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invested him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co., 128 N.C. 199, 38 S.E. 831 (1901); Chemical Co. v. Sloan, 136 N.C. 122, 48 S.E. 577 (1904); May v. Getty, 140 N.C. 310, 53 S.E. 75 (1905); Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Exemptions after Judgment. — Property seized under attachment is only a legal de-

posit in the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. Gamble v. Rhyne, 80 N.C. 183 (1879).

Sale Passes Only Right of Defendant.—A sale under an execution issuing upon a judgment on an attachment only passed the right of the defendant in attachment. Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co., 128 N.C. 199, 38 S.E. 831 (1901).

Necessity for Separate Action on Undertaking. — Under the former statute it was held that by consent a surety on an undertaking on attachment could come in and the matter of the validity of the grounds of attachment be determined in one action; otherwise a separate action must be brought on the undertaking. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

No summary judgment against the surety on the undertaking under former § 1-457 could be rendered. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928); Hoft v. Coastwise Shipping & Lighterage Co., 215 N.C. 690, 3 S.E.2d 20 (1939).

Surety Concluded from Asserting Insufficiency of Bond.—Where judgment by default final had been rendered against the principal debtor and the surety on an attachment bond given in the action in the form required by former § 1-457 to secure whatever judgment might be rendered, and the property attached had accordingly been retained by the debtor, the surety was concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. Thompson v. Dillingham, 183 N.C. 566, 112 S.E. 321 (1922).

Part 7. Attachments in Justice of the Peace Courts.

§ 1-440.47. Powers of justice of the peace; procedure.—(a) A justice of the peace has the same powers with respect to attachment proceedings in actions of which he has jurisdiction which a clerk or judge of the superior court has with respect to attachment proceedings in actions of which the superior court has jurisdiction.

(b) The procedure with respect to attachment in courts of justices of the peace shall conform as nearly as practicable to the procedure of the superior court, and the statutes relating to attachment in the superior court shall be in effect and shall govern the procedure insofar as it is practicable to apply them except as otherwise provided in §§ 1-440.48 through 1-440.56 of this article. (1947, c. 693, s. 1.)

Wrongful Issue of Attachment by Justice. — An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. Merrell v. McHone, 126 N.C. 528, 36 S.E. 35 (1900), decided under superseded § 1-451, relating to warrant in attachment issued by justice of the peace.

Jurisdiction to Try Interplea to Determine Title to Property.—Attachment proceedings relating to personal property, being only ancillary to the main action, a justice of the peace may entertain and try an interplea to determine the title, although the value of the property exceeds $50. Grambling, Spalding & Co. v. Dickey, 118 N.C. 986, 24 S.E. 671 (1896), decided under superseded § 1-471, relating to intervention in attachment.

§ 1-440.48. Return of order of attachment in justice of the peace courts.—The order of attachment shall not contain a return date but shall be returned to the justice of the peace who issued it. Such return must meet the requirements with respect to the return of orders of attachment issued in the superior court, as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.49. To whom order issued by justice of the peace is directed.—An order of attachment issued by a justice of the peace may be directed to any constable or other lawful officer of a county, who shall have the same powers and duties with respect thereto which the sheriff has with respect to an order of attachment issued by the superior court. (1947, c. 693, s. 1.)

§ 1-440.50. Issuance of order by justice of the peace to another county.—When a justice of the peace issues an order of attachment to a county

other than his own, such order may not be served in such county unless there is endorsed on or attached to the order the certificate of the clerk of the superior court of the justice's county certifying that the justice issuing the order is a justice of the peace and that the signature on the order is in the handwriting of the justice. It is the duty of the clerk of the superior court to issue such certificate upon application and the payment of the fee therefor. (1947, c. 693, s. 1.)

§ 1-440.51. Notice of attachment in justice of the peace courts when no personal service.—When an order of attachment is issued by a justice of the peace and there is no personal service of the summons on the defendant against whom the attachment is issued, notice of the attachment need not be published in a newspaper, but, between the issuance of the order and the trial of the principal action, notice of the attachment must be posted for thirty days at the county courthouse door. Such notice shall state:

(1) The county and the township and the name of the justice of the peace before whom the action is pending,
(2) The names of the parties,
(3) The purpose of the action, and
(4) The fact that on a date specified an order of attachment was issued against the defendant. (1947, c. 693, s. 1.)

Warrant and Summons Distinguished.—Superseded § 1-448, relating to service and content of notice of attachment, provided that in attachment proceedings in a justice's court, advertisement in a newspaper should not be necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks should be sufficient publication, both as to the summons and warrant of attachment. It was said that this permitted the incorporation of the warrant of attachment to be made in the summons, not the summons in the warrant. The summons was an official process, and must be signed and issued by the justice of the peace, whether its service was to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, was not official and might be signed by the plaintiff himself, and if not taken out at the time of issuing the summons, had to be served separately. Ditmore v. Goins, 128 N.C. 325, 39 S.E. 61 (1901).

Section 7-136 Held Inapplicable.—Under the former statute it was held that, in attachment and publication on a nonresident defendant before a justice of the peace, where the defendant's property within the jurisdiction of the court had been levied on, a summons was not required; and therefore the requirements of § 7-136, that the summons must be made returnable not more than thirty days after its issuance, were inapplicable. Best v. British & Am. Co., 128 N.C. 351, 38 S.E. 923 (1901), affirmed in Grocery Co. v. Bag Co., 142 N.C. 174, 55 S.E. 90 (1906), and Currie v. Golconda Mining & Milling Co., 157 N.C. 209, 72 S.E. 980 (1911). Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

§ 1-440.52. Allowance of time for attachment and garnishment procedure in justice of the peace courts.—In order that sufficient time may be allowed in any action before a justice of the peace for the parties to exercise such rights with respect to attachment and garnishment as are hereinbefore provided for, within the same periods of time as are allowed therefor in the superior court, the justice of the peace before whom the principal action has been, or is being, commenced has all such powers with respect to fixing the time for the defendant to appear and answer, granting continuances and fixing the time for the trial, as may be necessary or proper for that purpose, notwithstanding the provisions of §§ 7-136 and 7-149, Rule 15. (1947, c. 693, s. 1.)

§ 1-440.53. Certificates of stock and warehouse receipts; restraint of transfer not authorized in justice of the peace courts.—Nothing in this article is intended to authorize any justice of the peace to restrain or enjoin the transfer of a certificate of stock or a warehouse receipt. (1947, c. 693, s. 1.)

§ 1-440.54. Procedure in justice of the peace courts when land attached.—(a) Upon securing the issuance of an order of attachment by a justice

of the peace, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the lis pendens docket.

(b) A justice of the peace has no authority to issue an execution to sell real property attached in any action commenced in his court. Whenever in any such action real property has been attached, the justice of the peace, upon rendering judgment in the principal action, shall deliver to the clerk of the superior court of his county a copy of the judgment rendered by him together with the original order of attachment.

(c) If judgment was rendered against the defendant whose property was attached, the clerk shall docket the judgment and shall thereupon issue execution directing the sale of the real property attached as shown by the officer's return made pursuant to § 1-440.17, or so much thereof as may be necessary to satisfy the judgment. If judgment was not rendered against the defendant whose property was attached, the clerk shall make an entry on his judgment docket showing the discharge of the attachment.

(d) Notwithstanding the lack of authority of the justice of the peace to issue an execution to sell real property, the levy of the attachment issued by him on real property constitutes a lien on such property, but only under the conditions provided by § 1-440.33. (1947, c. 693, s. 1.)

Attachment issued by a justice creates a lien from its levy, and not merely from docketing of the judgment in the superior court. Morefield v. Harris, 126 N.C. 626, 36 S.E. 125 (1900), decided under earlier provision relating to justice's attachment against land.

§ 1-440.55. Trial of issue of fact in justice of the peace court.—When an issue of fact is raised pursuant to the provisions of § 1-440.28 or § 1-440.29, the justice of the peace may try such issue unless a jury trial is demanded. If a jury trial is demanded, proceedings with respect thereto shall be conducted as in other jury trials before a justice of the peace. (1947, c. 693, s. 1.)

§ 1-440.56. Jurisdiction with respect to recovery on bond in justice of the peace court.—Notwithstanding the provisions of § 1-440.54 (c), the defendant may recover on the plaintiff's bond in the principal action in a court of the justice of the peace only when the amount of the bond does not exceed two hundred dollars ($200.00). (1947, c. 693, s. 1.)

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57. Jurisdiction of inferior courts not affected.—Nothing in this article shall be construed to change in any manner the jurisdiction of any court inferior to the superior court with respect to attachment. (1947, c. 693, s. 1.)

Part 9. Superseded Sections.

§§ 1-441 to 1-471: Superseded by Session Laws 1947, c. 693, codified as §§ 1-440.1 to 1-440.57.

Article 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the

property as provided in this article. (C. C. P., s. 176; Code, s. 321; Rev., s. 790; C. S., s. 830.)

Editor's Note. — For note as to availability of equitable replevin in North Carolina, see 33 N.C.L. Rev. 74-77 (1954).

In General. — Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. Jarman v. Ward, 67 N.C. 32 (1872); Allsbrook v. Shields, 67 N.C. 333 (1872); Hopper v. Miller, 76 N.C. 402 (1877); Wilson v. Hughes, 94 N.C. 182 (1886).

Founded on Right to Possession. — Replevin (and the action of claim and delivery is but a longer name for the same thing) is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. Holmes v. Godwin, 69 N.C. 467 (1873).

A Substitute for Common-Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff; if not, it is a substitute for the action of detinue or trover. Jarman v. Ward, 67 N.C. 32 (1872); Hopper v. Miller, 76 N.C. 402 (1877).

An Ancillery Remedy. — Under N.C. Const., Art. IV, § 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i.e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the party is entitled to them, Wilson v. Hughes, 94 N.C. 182 (1886) and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. Deloatch v. Coman, 90 N.C. 186 (1884); Morris v. O'Briant, 94 N.C. 72 (1886); Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

Adopted from New York Code. — This statutory remedy is adopted from the Code of New York. Manix v. Howard, 82 N.C. 125 (1880).

Statute Must Be Followed. — To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in this section and § 1-473. Hirsh v. J. D. Whitehead & Co., 65 N.C. 516 (1871).

Object Is to Recover Specific Property. —The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property cannot be had. Hendley v. McIntyre, 132 N.C. 276, 43 S.E. 824 (1903).

Who May Bring the Action. — One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrongdoer who is depriving him of possession. Hopper v. Miller, 76 N.C. 402 (1877).

Same—Tenant.—The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, 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).

But one tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners it being required that the claimant show sole ownership. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Same—Landlord.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, 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. Rich v. Hobson, 112 N.C. 79, 16 S.E. 931 (1893). But see State v. Copeland, 86 N.C. 691 (1882); Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889).

Same—Mortgagee. — After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor has the right to redeem, until the property is sold, and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who has the possession of his property. W.C. Kiser & Co. v. Blanton, 123 N.C. 400, 31 S.E. 878 (1898).

Same—Assignee of Chattel Mortgage.— The assignee of a chattel mortgage may

maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid. Johnson v. Bray, 174 N.C. 176, 93 S.E. 728 (1917).

Against Party in Possession.—An action for the possession of property must be brought against the party in possession. Haughton v. Newberry, 69 N.C. 456, (1873); Webb v. Taylor, 80 N.C. 305 (1879); Moore v. Brady, 125 N.C. 35, 34 S.E. 72 (1899); General Motors Acceptance Corp. v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. Webb v. Taylor, 80 N.C. 305 (1879), citing Jones v. Green, 20 N.C. 488 (1839); Charles v. Elliott, 20 N.C. 606 (1839); Slade v. Washburn, 24 N.C. 414 (1842); Foscue v. Eubank, 32 N.C. 424 (1849); Haughton v. Newberry, 69 N.C. 456 (1873).

Recovery of Title Deed.—Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. Pasterfield v. Sawyer, 132 N.C. 258, 43 S.E. 799 (1903).

Where Crops Removed. — The action will lie where the crops are removed from the land leased. Livingston v. Farish, 89 N.C. 140 (1883).

Crops on Wife's Land. — Claim and delivery will not lie for crops produced on wife's land, under a crop lien given by husband without her consent. Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900).

Where Nature of Goods Changed.—If a person bestows his labor upon the property of another, thereby changing it into another species of article (as if corn be made into whiskey, prior to prohibition acts, etc.), the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. Potter v. Mardre, 74 N.C. 36 (1876).

Statute of Limitations Applies. — The three-year statute of limitations in § 1-52 is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note no action of claim and delivery could be maintained. Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

Jurisdiction of Justice.—Where plaintiff, in an action before a justice of the peace to recover $75 due for rent, alleged that defendant wrongfully detained the crop on which the rent was a lien, and incidentally asked for a delivery of the crop which was not alleged to be worth "not more than fifty dollars," the justice of the peace was not deprived of jurisdiction by such allegation and prayer. Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

Trial by Jury. — Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Judgment. — Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. Austin v. Secrest, 91 N.C. 214 (1884).

In claim and delivery the judgment should be for the delivery of the property or its value. Oil Co. v. Grocery Co., 136 N.C. 354, 48 S.E. 781 (1904).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention.—In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Action Will Lie against Officer Taking Property under Execution against Third Person. — An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person. Jones v. Ward, 77 N.C. 337 (1877); Churchill v. Lee, 77 N.C. 341 (1877); Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); C.I.T. Corp. v. Watkins, 208 N.C. 448, 181 S.E. 270 (1935).

§ 1-473. Affidavit and requisites.—Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or someone in his behalf, showing—

(1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.
(2) That the property is wrongfully detained by the defendant.
(3) The alleged cause of the detention, according to his best knowledge, information and belief.
(4) That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,
(5) The actual value of the property. (C. C. P., s. 177; 1881, c. 134; Code, s. 322; Rev., s. 791; C. S., s. 831.)

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the "undertaking." Jones v. Ward, 77 N.C. 337 (1877).

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. The language of the Code is immensely broader in its scope than the language of the Revised Statutes on the subject in hand. Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899).

Rights Conferred. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon, his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899).

When Section Applies. — It is only in cases when the plaintiff seeks to have the property delivered to him instanter, and to have the possession pending the action, as in the old action of replevin, that the affidavit and undertakings are required. Jarman v. Ward, 67 N.C. 32 (1872).

Affidavit Essential. — The affidavit required by the Code is indispensable to maintain claim and delivery. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

Affidavit Must Comply with Section. — In making the affidavit this section must be strictly followed. Hirsh v. J.D. Whitehead & Co., 65 N.C. 516 (1871).

Plaintiff Should State Interest. — It seems that the plaintiff should set forth his special interest in the property. Cooper v. Evans, 174 N.C. 412, 93 S.E. 897 (1917).

Affidavit Made "Per" Another. — In claim and delivery of personal property, an affidavit made by plaintiff "per" another is sufficient. Spencer v. Bell, 109 N.C. 39, 13 S.E. 704 (1891).

Deputy Can Take Affidavit. — The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. Jackson v. Buchanan, 89 N.C. 74 (1883).

Burden of Proof.—In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. Smith v. Cook, 196 N.C. 558, 146 S.E. 229 (1929).

Action Will Lie Where Property Seized under Execution against Third Person.—See note to § 1-472.

Applied in General Motors Acceptance Corp. v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-474. Order of seizure and delivery to plaintiff.—The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section [§ 1-475], by an endorsement in writing upon

the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff. (C. C. P., s. 178; Code, s. 323; Rev., s. 792; C. S., s. 832.)

Summons Necessary. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. Potter v. Mardre, 74 N.C. 36 (1876).

A Ministerial Act. — In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office. Jackson v. Buchanan, 89 N.C. 74 (1883).

Same — Deputy Can Make Order. — It was held in Jackson v. Buchanan, 89 N.C. 74 (1883), that the clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery, only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Plaintiff Must Continue the Action.—In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. Manix v. Howard, 82 N.C. 125 (1880).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-475. **Plaintiff's undertaking.**—The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (C. C. P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C. S., s. 833.)

Cross Reference. — As to the judgment in an action for the recovery of personal property, see § 1-230.

Judgment Should Be in Alternative.—A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. Grubbs v. Stephenson, 117 N.C. 66, 23 S.E. 97 (1895).

Value Ascertained. — For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant, if so adjudged, is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. Barrington v. Skinner, 117 N.C. 47, 23 S.E. (1895).

Measure of Damages Where Property Cannot Be Returned.—Where defendant recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant, from whom an automobile had been taken in claim and delivery by the assignor of a chattel mortgage thereon, would be entitled to recover, if plaintiff's seizure of the property were wrongful, the amount paid on the purchase price of the car less the value of the use obtained from the car by defendant, is held error. C.I.T. Corp. v. Watkins, 208 N.C. 448, 181 S.E. 270 (1935).

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Voluntary Nonsuit by Plaintiff.—Where

the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. Davis Bros. Co. v. Wallace, 190 N.C. 543, 130 S.E. 176 (1925).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952); Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

§ 1-476. Sheriff's duties.—Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (C. C. P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C. S., s. 834.)

Sheriff Acts Officially. — The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Action against Sheriff.—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Quoted in General Motors Acceptance Corp. v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-477. Exceptions to undertaking; liability of sheriff.—The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section [§ 1-478]. (C. C. P., s. 180; Code, s. 325; Rev., s. 794; C. S., s. 835.)

Sheriff Liable as Surety.—In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

Same—Measure of Damages.—In such case the measure of liability is the delivery of the property to the plaintiff (if such delivery be adjudged), with the damages for its deterioration, or (failing delivery) the value of the property; and to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

Same — What Plaintiff Must Prove. — Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and cannot recover, actual damage against such sheriff. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

When Objection Must Be Made. — The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. Spencer v. Bell, 109 N.C. 39, 13 S.E. 704 (1891).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-478. Defendant's undertaking for replevy. — At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C. C. P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C. S., s. 836; 1961, c. 462.)

Cross Reference.—As to judgment in an action for the return of personal property, see § 1-230.

Liability of Surety. — The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. V. Wallace & Sons v. Robinson, 185 N.C. 530, 117 S.E. 508 (1923).

Where, in claim and delivery, the defendant pleads that he became possessed of the property under a contract of sale, upon the facts being so found by the jury (the property having been sold under an order of the court pendente lite), judgment should be rendered against the sureties to the defendant's undertaking for the penalty of the bond, to be discharged upon the payment of the contract price with interest and cost, less the payments by the defendant. Hall v. Tillman, 10 N.C. 220, 14 S.E. 745 (1892).

The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. Federal Fin. & Credit Co. v. Teeter, 196 N.C. 232, 145 S.E. 8 (1928).

Same—Debt Recovered.—The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. Hall v. Tillman, 103 N.C. 276, 9 S.E. 194 (1889).

Liability Where Bond Voluntary. — Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when the bond is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. Wright v. Nash, 205 N.C. 221, 171 S.E. 48 (1933).

The recovery against the surety can in no event exceed the penalty of the bond. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Summary Judgment against Sureties. — Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section, and § 1-230. Hall v. Tillman, 103 N.C. 276, 9 S.E. 194 (1889).

Form of Judgment against Surety. — Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the

surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Sureties' Defenses.—The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. Garner v. Quakenbush, 188 N.C. 180, 124 S.E. 154 (1924).

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. V. Wallace & Sons v. Robinson, 185 N.C. 530, 117 S.E. 508 (1923).

Recovery of Costs. — The language of this section is not so explicit as that of the original section of the Code, but it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. Hall v. Tillman, 110 N.C. 220, 14 S.E. 745 (1892).

Quoted in General Motors Acceptance Corp. v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930); Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952); General Tire & Rubber Co. v. Distributors, Inc., 251 N.C. 406, 111 S.E.2d 614 (1959).

§ 1-479. Qualification and justification of defendant's sureties.—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C. C. P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C. S., s. 837.)

Cross References. — As to qualifications of bail in arrest and bail, see § 1-423. As to justification, see § 1-424.

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-480. Property concealed in buildings.—If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (C. C. P., s. 184; Code, s. 329; Rev., s. 798; C. S., s. 838.)

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-481. Care and delivery of seized property.—When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (C. C. P., s. 185; Code, s. 330; Rev., s. 799; C. S., s. 839.)

Expenses of Seizing Included in Costs. —It is proper to allow in the bill of costs the expense of seizing and caring for the property. Hendricks v. Ireland, 162 N.C. 523, 7 S.E. 1011 (1913).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-482. Property claimed by third person; proceedings.—When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of a justice of the peace he may try such issue unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an intervener shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to intervene: Provided that this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; C. C. P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C. S., s. 840; 1933, c. 131.)

Cross reference.—For requisites of affidavit, see § 1-473.

Editor's Note. — The original section required that the undertaking be in double the value of the property stated in the plaintiff's affidavit, while the 1933 amendment required double the value as stated in the intervener's affidavit. This was probably intended to apply where the intervening claimant does not demand all the property involved or its value has depreciated, and not to allow his statement of the value generally to control as against the security which the plaintiff has been required to give. 11 N.C.L. Rev. 217.

Purpose. — Is it not the purpose of the section to allow one interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring? This seems to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. Claywell v. McGimpsey, 15 N.C. 89 (1833); Churchill v. Lee, 77 N.C. 341 (1877); Hudson v. Wetherington, 79 N.C. 3 (1878); Wallace Bros. v. Robeson, 100 N.C. 206, 2 S.E. 650 (1888).

Right to Intervene Well Settled. — The right of an outside claimant to intervene is well settled by precedent. McKesson v. Mendenhall, 64 N.C. 286 (1870); Toms v. Warson, 66 N.C. 417 (1872); Clemmons v. Hampton, 70 N.C. 534 (1874); Bruff v. Stern, 81 N.C. 183 (1879); Sims v. Goettle Bros., 82 N.C. 268 (1880).

Intervener Restricted to Question of Title.—It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. McLean v. Douglas, 28 N.C. 233 (1846); Dawson v. Thigpen, 137 N.C. 462, 49 S.E. 959 (1905).

In a proceeding under this section the intervener is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener, has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901); Maynard v. Insurance Co., 132 N.C. 711, 44 S.E. 405 (1903); Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921); Hill v. Patillo, 187 N.C. 531, 122 S.E. 306 (1924).

Intervener Must Prove Title. — In proceedings in attachment one who interpleads under this section is an actor upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. Wallace Bros. v. Robeson, 100 N.C. 206, 2 S.E. 650 (1888); Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Appearance Waives Objections. — A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervener, as not having been made in accordance with the requirements of the North Carolina statute, by appearing at the taking of depositions in his behalf and cross-examining his witness. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Voluntary Recognition of Jurisdiction.— Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires, and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Separate Trial.—A separate trial for the intervener is discretionary with the trial judge. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Three Years' Delay by Intervener. — In an action for the possession of personal property, under this section, a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. Clemmons v. Hampton, 70 N.C. 534 (1874).

Surety Cannot Interplead. — Where the defendant in claim and delivery proceedings consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by this section. McDonald v. McBryde, 117 N.C. 125, 23 S.E. 103 (1895).

Nonsuit by Plaintiff. — In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader. Dawson v. Thigpen, 137 N.C. 462, 49 S.E. 959 (1905).

Jurisdiction of Justice of the Peace.—A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds $50. Grambling v. Dickey, 118 N.C. 986, 24 S.E. 671 (1896).

When Garnishee Bank a Mere Stakeholder.—Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

Same—No Bond Required. — The bond required of an intervener by this section, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

Husband and Wife. — Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. Unaka & City Nat'l Bank v. Lewis, 201 N.C. 148, 159 S.E. 312 (1931).

Applied in General Motors Acceptance Corp. v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Francis v. Mortgage Sec. Corp., 198 N.C. 734, 153 S.E. 317 (1930).

§ 1-483. Delivery of property to intervener. — Upon the filing by the claimant of the undertaking set forth in § 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff

may retain the property a reasonable time to demand such indemnity. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; Code, s. 332; Rev., s. 801; C. S., s. 841.)

Purpose of Section.—This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to him. Clemmons v. Hampton, 70 N.C. 534 (1874).

Sheriff Must Take Security.—Under this section the property is not to be delivered to the intervener by the sheriff until the security is given. Bear v. Cohen, 65 N.C. 511 (1871).

§ **1-484. Sheriff to return papers in ten days.**—The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within ten days after taking the property mentioned therein. (C. C. P., s. 187; Code, s. 133; Rev., s. 802; C. S., s. 842.)

ARTICLE 37.

Injunction.

§ **1-485. When preliminary injunction issued.**—A preliminary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

(3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C. C. P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C. S., s. 843; 1967, c. 954, s. 3.)

I. General Consideration.
II. Nature.
III. Grounds of Relief.
  A. Character of Relief in General.
  B. Availability of Other Relief.
  C. Application of Section.

I. GENERAL CONSIDERATION.

Editor's Note. — The 1967 amendment substituted "preliminary" for "temporary" in the first sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Effect upon Prior Law.—This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claims for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N.C. 453, 70 S.E. 752 (1911). Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendency of an action which is receiving or will receive a judicial determination. Armstrong v. Kinsell, 164 N.C. 125, 80 S.E. 235 (1913).

Restraint Sought Must Be Germane to Subject of Action.—This section does not permit injunction to issue when the restraint sought is not germane to the subject of the action. Jackson v. Jernigan, 216 N.C. 401, 5 S.E.2d 143 (1939).

Restraining Order and Injunction Distinguished. — This section in nowise abol-

ishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts. A restraining order can be issued in any cause by any judge of the superior court anywhere in the State, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893). See Kinston v. Wooten, 150 N.C. 285, 63 S.E. 1061 (1909).

An injunction may be granted by a judge outside the county in which the main cause is pending since this is an ancillary proceeding not involving the merits of the cause. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893). This principle was recognized and applied in Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897), a case in which the validity of a judgment obtained in special proceedings was contested on the grounds that it was entered outside of the county in which the main action was litigated.

Mandamus and Mandatory Injunction Distinguished.—In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

Good Faith and Reasonable Diligence Necessary. — Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action, Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890), and such facts exhibited by the plaintiff must constitute a substantial cause of action. Moore v. Silver Valley Mining Co., 104 N.C. 534, 10 S.E. 679 (1889).

Constitutional Provisions.—The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order of a provisional injunction. Heilig v. Stokes, 63 N.C. 612 (1869).

Increasing Bond. — Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Discretion of Court.—It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an ex parte affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

Findings and Proceedings Are Not Binding at Trial on Merits.—The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

Appeal.—On appeal the reviewing court is not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. Even so there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and

show error. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

Cited in Collins v. North Carolina State College, 198 N.C. 337, 151 S.E. 646 (1930); Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); Brown v. Williams, 242 N.C. 648, 89 S.E.2d 260 (1955).

II. NATURE.

The remedy authorized by this section is an ancillary one afforded by the courts of equity for the purpose of preserving the status quo pending the action. It will issue to prevent an injury being committed or seriously threatened. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Purpose Is to Maintain Status Quo.—It is the purpose of a temporary injunction to maintain as nearly as possible the status quo. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

Extraordinary and Provisional Remedy. — Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies. Chambers v. Penland, 78 N.C. 53 (1878); or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. Fink v. Stewart, 94 N.C. 484 (1886).

Equitable Remedy. — Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except insofar as it may come within some plain statutory provision. Person v. Leary, 127 N.C. 114, 37 S.E. 149 (1900).

Remedy Only in Foreign Courts. — Formerly a court of equity would grant an injunction where otherwise the party seeking it would be driven to the courts of another state for the purpose of obtaining it. Hauser v. Mann, 5 N.C. 410 (1810); Richardson v. Williams, 56 N.C. 116 (1856).

Power of Courts. — This section tends greatly to enlarge the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject matter of the action. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885).

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

An injunction can only operate in personam and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the State, should be dismissed. Warlick v. Reynolds, 151 N.C. 606, 66 S.E. 657 (1910); Armstrong v. Kinsell, 164 N.C. 125, 80 S.E. 235 (1913).

The grant of a preliminary mandatory injunction is within the prerogative jurisdiction of courts of equity. Such preliminary injunctions are issued to preserve the status quo until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction May Be Issued for Protection of Easements and Proprietary Rights.—When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits and the defendant compelled to undo what he has done. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction Should Not Be Issued Except in Case of Apparent Necessity.—A preliminary mandatory injunction on ex parte application should not be granted, except in case of apparent necessity for the purpose of restoring the status quo pending the litigation. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injury Must Be Immediate, Pressing, Irreparable, and Clearly Established.—As a rule a mandatory order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injunctive relief is granted only when irreparable injury is real and immediate. This is especially true with reference to

the issuance of a preliminary injunction. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Mandatory Injunction Held Improvidently Granted.—See Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

B. Availability of Other Relief.

In General. — It is well established that when proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. Faison v. McIlwaine, 72 N.C. 312 (1875).

Irreparable Injury.—The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. Bond v. Wool, 107 N.C. 139, 12 S.E. 281 (1890); Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 127 N.C. 130, 37 S.E. 152 (1900). See McKesson v. Hennessee, 66 N.C. 473 (1872). As to allegations of insolvency when injury is irreparable, see note to § 1-486.

Where Execution Improperly or Prematurely Issued. — Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. Bryan v. Hubbs, 69 N.C. 423 (1873).

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. Foard v. Alexander, 64 N.C. 69 (1870).

C. Application of Section.

An injunction pendente lite should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Injunction Subsidiary to Another Action or Special Proceeding.—A court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined. Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective. Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

When Temporary Injunction Granted.—Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

Criminal Law. — The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. Paul v. Washington, 134 N.C. 363, 47 S.E. 793 (1904).

Act Already Committed.—An injunction will not issue to restrain an act which has already been committed. Yount v. Setzer, 155 N.C. 213, 71 S.E. 209 (1911).

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. State ex rel. Attorney Gen. v. Roanoke Navigation Co., 84 N.C. 705 (1881).

Wasteful Destruction by Personal Representative. — A temporary injunction restraining the disposition of assets in this State of an estate administered on in another state, in which the administrator is alleged to have committed a devastavit, was properly continued in their action to

the hearing of the cause. Coleman v. Howell, 131 N.C. 125, 42 S.E. 555 (1902).

Utility Companies and Municipal Corporations. — The section applies equally as well whether the party litigants be public service or municipal corporations or individuals. See Merrick v. Intramontaine R.R., 118 N.C. 1081, 24 S.E. 667 (1896); Griffin v. Goldsboro Water Co., 122 N.C. 206, 30 S.E. 319 (1898); Woodley v. Carolina Tel. & Tel. Co., 163 N.C. 284, 79 S.E. 598 (1913).

As to enjoining continuing trespass, see § 1-486 and note thereto.

§ 1-486. When solvent defendant restrained.—In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (1885, c. 401; Rev., s. 807; C. S., s. 844.)

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Irreparable Injury. — The cases are in accord in holding that if the injury which the plaintiff is sustaining or is about to sustain is an irreparable one so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. Lewis v. John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888); Stewart v. Munger, 174 N.C. 402, 93 S.E. 927 (1917).

Continuing Trespass.—Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should issue to the hearing. Sutton v. Sutton, 161 N.C. 665, 77 S.E. 838 (1913), and, because of this section, it is unnecessary in such case to allege the insolvency of the defendant, Cobb v. Atlantic Coast Line R.R., 172 N.C. 58, 89 S.E. 807 (1916). The same principle is applicable where the plaintiff shows apparent title to the lands and satisfies the court that his claim for injunctive relief is made in good faith. Lodge v. Ijames, 156 N.C. 159, 72 S.E. 204 (1911).

When relief is sought against on continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. Young v. Pittman, 224 N.C. 175, 29 S.E.2d 551 (1944).

Effect upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a bona fide contention as to the title to lands or timber trees thereon. Stewart v. Munger, 174 N.C. 402, 93 S.E. 927 (1917).

Continuance to Hearing.—When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. Norfolk S.R.R. v. Rapid Transit Co., 195 N.C. 305, 141 S.E. 882 (1928).

Destruction of Trees. — Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. McKay v. Chapin, 120 N.C. 159, 26 S.E. 701 (1897).

Weighing Relative Conveniences and Inconveniences to Parties. — The hearing judge may issue an interlocutory injunction upon the application of the plaintiff in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. But the rule that the judge will consider and weigh the relative conveniences and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. Huskins v. Yancey Hosp., Inc., 238 N.C. 357, 78 S.E.2d 116 (1953).

Applied in Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955).

§ 1-487. Timberlands, trial of title to.—In all actions to try title to timberlands, and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or tress may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (1901, c. 666, s. 1; 1903, c. 642; Rev., s. 808; C. S., s. 845.)

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Purpose of Section. — The primary object of this section is to throw a greater safeguard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be adjudicated. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

Constitutional Provisions. — Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. Charles S. Riley & Co. v. Carter, 165 N.C. 334, 81 S.E. 414 (1914).

Plaintiff Must Show a Bona Fide Claim. —The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence constituting a prima facie title. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

Applied in Chandler v. Cameron, 227 N.C. 233, 41 S.E.2d 753 (1947).

Cited in Lawhon v. McArthur, 213 N.C. 260, 195 S.E. 786 (1938).

§ 1-488. When timber may be cut.—In any action specified in § 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (1901, c. 666, ss. 2, 3; Rev., s. 809; C. S., s. 846.)

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Essential Elements.—Under this section the plaintiff must not only show (a) that his claim is made in good faith and (b) that he has a prima facie title thereto, but the court must be able to find as a fact, (c) that the claim of the adverse party is not made in good faith. When relief is sought under this provision all these conditions must be complied with. Johnson v. Duvall, 135 N.C. 642, 47 S.E. 611 (1904). See Chandler v. Cameron, 227 N.C. 233, 41 S.E.2d 753 (1947).

Injunction Granted Where Contention Bona Fide.—This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a bona fide contention, then it should grant an injunction under §§ 1-486, 1-487. Kelly v. Enterprise Lumber Co., 157 N.C. 175, 72 S.E. 957 (1911).

Cited in Lawhon v. McArthur, 213 N.C. 260, 195 S.E. 786 (1938).

§ 1-489: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-490: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to duration of temporary restraining order, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ **1-491**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to notice before issuance of preliminary injunction, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ **1-492**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-493. What judges have jurisdiction.** — The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C. S., s. 851.)

Restraining Orders.—The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the State. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893).

Where a restraining order is made returnable before a judge asssigned to the district at a place outside of the district and after the courts were over, but before the end of the term of the assignment, such judge has jurisdiction to hear the application and to grant injunction until the hearing. City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215 (1944).

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action as proceeding to obtain possession against a tenant of the adverse party. Massengill v. Lee, 228 N.C. 35, 44 S.E.2d 356 (1947).

Perpetual Injunction.—A perpetual injunction must be granted only in the county in which the cause is pending. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893). See also Ledbetter v. Pinner, 120 N.C. 455, 27 S. E. 123 (1897).

Motions for Receiver.—Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district or one holding the courts thereof by exchange, at the option of the mover. Corbin v. McGowan, 83 N.C. 28 (1880).

Appointment of Receiver by County Court.—A general county court is without jurisdiction to appoint a receiver for a judgment debtor having property in another county against whom judgment is rendered in the county court. Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Cited in Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); Baker v. Varsar, 239 N.C. 180, 79 S.E.2d 757 (1954).

§ **1-494. Before what judge returnable.**—All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within twenty (20) days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within ten (10) days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C. S., s. 852; 1963, c. 1143.)

Restraining Order.—A restraining order for a period of twenty days can be made returnable anywhere in the State. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893).

Failure of Judge to Hear Motion. — Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon ten days' notice to the parties. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893).

Judge Holding Special Term.—A judge holding a special term cannot make a restraining order returnable before himself

where the summons is returnable to a term of court beginning after the special term. Royal v. Thornton, 150 N.C. 293, 63 S.E. 1040 (1909).

Perpetual Injunctions.—See § 1-493.

Receivers.—See note to § 1-493.

Cited in Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927); Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934).

§ 1-495. Stipulation as to judge to hear.—By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge. (1883, c. 33; Code, s. 337; Rev., s. 816; C. S., s. 853.)

Stipulation of Parties. — Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Crabtree v. Scheelky, 119 N.C. 56, 25 S.E. 707 (1896).

Same — Duty of Judge Designated. — When the parties have thus stipulated as to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. Cooper v. Cooper, 127 N.C. 490, 37 S.E. 492 (1900).

Applied in Forester v. Town of North Wilkesboro, 206 N.C. 347, 174 S.E. 112 (1934).

§ 1-496: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-497: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-498. Application to extend, modify, or vacate; before whom heard.—Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions may be heard by the judge having jurisdiction if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. (C. C. P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C. S., s. 856; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment rewrote this section.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Applied in City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

§ 1-499: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond. — Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower

court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C. S., s. 858(a); 1969, c. 44, s. 12.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" near the middle and at the end of the section.

Discretion of Court Not Reviewable. — Where an appeal has been taken from a judgment of the superior court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal is within the sound discretion of the trial judge, and not reviewable. Clark v. McQueen, 195 N.C. 714, 143 S.E. 528 (1928).

The dissolution of a restraining order is in the discretion of the trial judge. Such an order is not reviewable by the appellate division except in cases of abuse of discretion. Currin v. Smith, 270 N.C. 108, 153 S.E.2d 821 (1967).

Applied in Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965); High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

Cited in GI Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962); Boyd v. Brooks, 197 N.C. 644, 150 S.E. 178 (1929); City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215 (1944).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C. S., s. 859.)

Cross References.—As to corporate receivers, see §§ 55-147 through 55-157. As to compensation of receivers, see note under § 55-155. As to receiver of ward's estate, see § 33-53. As to what judges have jurisdiction to grant restraining orders and injunctions, see § 1-493. As to receiver in supplemental proceedings, see § 1-363 et seq.

In General. — The provisions of this section and § 1-485, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885).

Purpose. — It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which the reviewing finds them because it was supposed that one or the other of them would at all times be within the district of the action. Galbreath v. Everett, 84 N.C. 546 (1881).

An Inherent Power.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdic-

tion. Skinner v. Maxwell, 66 N.C. 45 (1872).

Discretion of Judge. — The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

Same—Necessary Number. — The court should not apoint more receivers than are necessary. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

Necessity that Judge "Find the Facts". —Upon an application for an injunction and receiver it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. City Nat'l Bank v. Bridgers, 114 N.C. 381, 19 S.E. 642 (1894), citing Jones v. Boyd, 80 N.C. 258 (1879).

Effect on Both Parties Considered. — It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. Venable v. Smith, 98 N.C. 523, 4 S.E. 514 (1887), citing Hanna v. Hanna, 89 N.C. 68 (1883). See also Lewis v. John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888).

Order without Prejudice.—Where it appears from verified pleadings that there is a bona fide controversy between the parties, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. Bennett v. Mortgage Serv. Corp., 206 N.C. 902, 173 S.E. 22 (1934).

What Judge Appoints. — Ordinarily the motion for a receiver must be made before the resident judge of the district, or one assigned to the district or holding the courts thereof by exchange, at the option of the mover. Corbin v. Berry, 83 N.C. 28 (1880); Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before one of such judges. Galbreath v. Everett, 84 N.C. 546 (1881); Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Clerk Cannot Appoint.—The clerk cannot appoint a receiver as that power is reserved to the judge alone. Parks v. Sprinkle, 64 N.C. 637 (1870).

Operation and Effect of Appointment.— The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled but not to change the title, or even the right of possession in the property. Quincy, M. & Pac. R.R. v. Humphreys, 145 U.S. 82, 12 S. Ct. 787, 36 L. Ed. 632 (1892).

An Officer of Court. — A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. Battle v. Davis, 66 N.C. 252 (1872).

Nature of Office.—A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. He is the right arm of the jurisdiction invoked. Union Bank v. Kansas City Bank, 136 U.S. 223, 10 S. Ct. 1013, 34 L. Ed. 341 (1890).

Powers and Duties. — A receiver is an officer of the court and subject to its directions and orders. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Stuart v. Boulware, 133 U.S. 78, 10 S. Ct. 242, 33 L. Ed. 568 (1890).

Title Relates Back. — The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance. Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Place of Hearing.—The hearing as to a receiver may be held outside of the county where the main action is pending. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

The interest of the owner is in nowise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

Necessary Allegations. — Where the appointment of a receiver is sought as an ancillary remedy the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid

of their main relief. Witz, Biedler & Co. v. Gray, 116 N.C. 48, 20 S.E. 1019 (1895).

Security Omitted.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N.C. 535 (1880).

Matter of Record.—The appointment of receivers is matter of record, and should be shown by the record. Person v. Leary, 126 N.C. 504, 36 S.E. 35 (1900).

Conflict of Concurrent Jurisdictions. — The court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its rights to do so because it may not have first obtained physical possession of the property in dispute. Moran v. Sturges, 154 U.S. 256, 14 S. Ct. 1019, 38 L. Ed. 981 (1894).

Priority Where Two Receivers Appointed.—The test of jurisdiction in a case of two receivers being appointed is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, nor which receiver first took possession, but which court is first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it. Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Same — Date Determines. — Priority as between receivers is determined by reference to the date of appointment since the court will not permit both to act. Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Same—Same — Fractions of a Day. — Where proper proceedings for the appointment of a receiver are begun in two different courts and a different receiver is appointed in each case, the court, in determining the priority of appointment as between the receivers, will take notice of fractions of a day. Worth v. Piedmont Bank, 12 1N.C. 343, 28 S.E. 488 (1897).

Complaint Should Be Verified. — The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other persons interested, is not commended. Fisher v. Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

Proof of Appointment of Foreign Receivers. — Persons suing as receivers of a foreign court should, on their appointment being denied, prove the same by a certified copy of the decree dissolving the corporation and appointing them. Person v. Leary, 127 N.C. 114, 37 S.E. 149 (1900).

Quoted in Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936); National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Cited in Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); East Carolina Lumber Co. v. West, 247 N.C. 699, 102 S.E.2d 248 (1958); Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

§ **1-502. In what cases appointed.**—A receiver may be appointed—

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) In cases provided in G.S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

The provisions of G.S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder. (C. C. P., s. 215, 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 847; C. S., s. 860; 1955, c. 1371, s. 3.)

In General. — This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of North Carolina courts upon this subject. Skinner v. Maxwell, 66 N.C. 45 (1872).

This section is expressly made applicable to all receivers. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir. 1944).

Where the plaintiff makes it properly to appear to the court that he is in imminent

danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Kelly v. McLamb, 182 N.C. 158 108 S.E. 435 (1921), pointing out other instances.

Receivership is ordinarily ancillary to some equitable relief. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Before Judgment.—Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. McNair v. Pope, 96 N.C. 502, 2 S.E. 54 (1887), citing Kerchner v. Fairley, 80 N.C. 24 (1879); Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880); Horton v. White, 84 N.C. 297 (1881); Oldham v. First Nat'l Bank, 84 N.C. 304 (1881); John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885).

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. Skinner v. Maxwell, 66 N.C. 45 (1872).

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents are in danger of being lost. Witz v. Gray, 116 N.C. 48, 20 S.E. 1019 (1895); Pearce v. Elwell, 116 N.C. 595, 21 S.E. 305 (1895); and it is generally necessary to show that the party in possession is insolvent, Ellington v. Currie, 193 N.C. 610, 137 S.E. 869 (1927). In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Where an executor's petition to sell lands alleges merely that personalty is insufficient to pay debts, plaintiff executor is not entitled to the appointment of a receiver for the lands on the ground that the action cannot be tried until a subsequent term, and that the devisee had refused to pay taxes, the allegation merely that the personalty is insufficient failing to show plaintiff executor's apparent right to the relief as required for the appointment of a receiver under the provisions of subdivision (1) of this section, especially when the devisee denies the allegation that the personalty is insufficient. Neighbors v. Evans, 210 N.C. 550, 187 S.E. 796 (1936).

County Court Cannot Appoint Receiver after Judgment Docketed in Superior Court.—After the judgment of a general county court is docketed in the superior court of the county the county court has no further jurisdiction of the case and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Discretion of Court. — The appointment of a receiver pendente lite is not a matter of strict right, but rests in the sound discretion of the court. Hanna v. Hanna, 89 N.C. 68 (1883).

A receiver may be appointed pendente lite in the discretion of the court. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

The power to appoint a receiver is inherent in a court of equity. The change to the Code did not abridge, but enlarged, it. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

And Section Does Not Limit Power.—The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section or § 55-147. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

A receiver will not be appointed where there is a full and adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

A receiver of defendant's property will not be appointed at the request of a judgment creditor without more being shown where he has the remedy of execution against the property. Scoggins v. Gooch, 211 N.C. 677, 191 S.E. 750 (1937).

Receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Unless Defense of Adequate Remedy at Law Is Waived.—A simple contract creditor may obtain, in proper cases, equitable relief where answer admits indebtedness and consents to appointment of receiver, waiving the defense of adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Where the debtor and one small creditor agree to have a receiver appointed and to restrain all other creditors from doing anything, a receivership under such circumstances is an agency for the defendant, and the title of such a receiver to the assets of the bankrupt debtor is merely colorable and he may be required to turn over assets

to trustee in bankruptcy. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Danger of Loss.—Under this section apparent danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. Rollins v. Henry, 77 N.C. 467 (1877); Twitty v. Logan, 80 N.C. 69 (1879).

Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss. Rheinstein v. Bixby, 92 N.C. 307 (1885), citing Thompson v. McNair, 62 N.C. 121 (1867).

Same — Examples. — Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due ascertained, the defendant mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same are in danger of being lost. Oldham v. First Nat'l Bank. 84 N.C. 304 (1881).

Plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage; the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent; the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto: Held, that in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. Kerchner v. Fairley, 80 N.C. 24 (1879), approving Broeck v. Orchard, 74 N.C. 409 (1876); Rollins v. Henry, 77 N.C. 467 (1877).

Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executor was doubtful, it was held to be a proper case for the appointment of a receiver. Stith v. Jones, 101 N.C. 360, 8 S.E. 151 (1888).

General Allegations Insufficient.—A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonappointment, without a full statement of the facts. Hanna v. Hanna, 89 N.C. 68 (1883), citing Hughes v. Person, 63 N.C. 548 (1869); Wood v. Harrell, 74 N.C. 338 (1876). See Southern Flour Co. v. McIver, 109 N.C. 120, 13 S.E. 905 (1891).

Insolvency Alone Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

Property Threatened by Fraud and Insolvency. — Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. Peoples Nat'l Bank v. Waggoner, 185 N.C. 297, 117 S.E. 6 (1923).

Same—Question Postponed.—Where an application for a receiver is based on fraud as to creditors in a deed, the question of fraud will not be determined on hearing of the application, but must stand till the final hearing of the case. Rheinstein v. Bixby, 92 N.C. 307 (1885), citing L. Levenson & Co. v. Elson, 88 N.C. 182 (1883).

Fraudulent Confession of Judgment.—A receiver may be appointed under this section, in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, and executions have been levied on the only property of the debtor within the State in favor of nonresident creditors who seek to take the property out of the State. Stern & Co. v. Austern, 120 N.C. 107, 27 S.E. 31 (1897).

Insolvent Foreign Corporation.—An insolvent corporation, with its property or plant located in this State, is subject to the appointment by North Carolina courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state, approving Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905). Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

Infant's Estate. — On the principle of protection, a receiver may be appointed of an infant's estate if it be not vested in a trustee, for he is incompetent to take charge of it himself. Skinner v. Maxwell, 66 N.C. 45 (1872).

To Prevent Suspension of Business. — Where the property and franchise of a city water company were to be sold to satisfy a judgment it was held that in order to pre-

vent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a receiver under subdivision (2) of this section. McNeal Pipe & Foundry Co. v. Howland 111 N.C. 615, 16 S.E. 857 (1892).

Upon Application for Injunction. — Under the broad terms of this section the court has power to appoint a receiver, upon an application for an injunction where it appears that this action will best serve the interests of both parties. Hurwitz v. Carolina Sand & Gravel Co., 189 N.C. 1, 126 S.E. 171 (1925).

Notice to Owner. — Notice to the owner of property should be given before appointment of a receiver therefor. York v. McCall, 160 N.C. 276, 76 S.E. 84 (1912).

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee. — The appointment of a receiver is an equitable remedy and the provisions of this section and § 1-503 enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent North Carolina courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. Woodall v. North Carolina Joint Stock Land Bank, 201 N.C. 428, 160 S.E. 475 (1931).

Apparently Good Title Sufficient. — Where a party, in this case a defendant, in an action involving the title and possession of land, demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted, or not unequivocably denied by his adversary. Lovett v. Slocumb, 109 N.C. 110, 13 S.E. 893 (1891).

Where Receivership Would Cause Loss. — A receiver will not be appointed, in an action to foreclose a mortgage on a newspaper, when the defendant denies owing anything on the mortgage debt, and it is apparent that, owning to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

Domestic Relations. — Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Applied in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Quoted in National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Cited in York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959); Harris v. Hilliard, 221 N.C. 329, 20 S.E.2d 278 (1942).

§ 1-503. Appointment refused on bond being given.—In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (1885, c. 94; Rev., s. 848; C. S., s. 861.)

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, "to refuse the appointment of a receiver." Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. Frank v. Robinson, 96 N.C. 28, 1 S.E. 781 (1887). See Kron v. Smith, 96 N.C. 386, 2 S.E. 463 (1887); Godwin v. Watford, 107 N.C. 168, 11 S.E. 1051 (1890).

Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Lewis v.

John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888); Ousby v. Neal, 99 N.C. 146, 5 S.E. 901 (1888).

Opportunity to File Bond. — The court erred in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom, as the court might subsequently direct. Stith v. Jones, 101 N.C. 360, 8 S.E. 151 (1888).

Effect of Acceptance of Bond by Court. — Plaintiffs who are parties at the time the court accepts bond filed pursuant to this section, and denies application for appointment of a receiver, are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E2d 555 (1947).

Section 1-111 Does Not Apply.—Section 1-111, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N.C. 327 (1884); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Arey v. Williams, 154 N.C. 610, 70 S.E. 931 (1911).

Bankruptcy of Defendant. — Where plaintiff in an action in the superior court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under this section, upon the adjudication of the defendant a bankrupt, the State court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, by execution, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. Gordon v. Calhoun Motors, Inc., 222 N.C. 398, 23 S.E.2d 325 (1942).

Applied in Woodall v. North Carolina Joint Stock Land Bank, 201 N.C. 428, 160 S.E. 475 (1931); Little v. Wachovia Bank & Trust Co., 208 N.C. 726, 182 S.E. 491 (1935).

Cited in York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

§ 1-504. Receiver's bond.—A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Code, s. 383; Rev., s. 849; C. S., s. 862.)

Cross References.—As to giving bond in surety company, see §§ 109-16 and 109-17. As to clerk's bond liable when clerk appointed receiver, see note under § 33-53.

Effect of Failure to Require Adequate Security.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880).

An order appointing a receiver is not void because of an inadequate bond. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir. 1944), citing Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880).

The determination of the amount of the bond is within the discretion of the court. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir. 1944).

And Mortgagee Is Not Liable for Suggesting Inadequate Bond. — The fact that mortgagees suggested an inadequate amount in the bond of a receiver was held not to thereby render them legally liable to the mortgagor. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir. 1944).

Breach. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. Bank of Washington v. Creditors, 86 N.C. 323 (1882).

Same — Must Be Ascertained. — A receiver and his surety cannot be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to render his account. Bank of Washington v. Creditors, 86 N.C. 323 (1882); Atkinson v. Smith, 89 N.C. 72 (1883).

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).

Judgment. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failing to pay the same, for the court to grant leave to sue upon the bond. Atkinson v. Smith, 89 N.C. 72 (1883).

Action against Sureties. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. Black v. Gentery, 119 N.C. 502, 26 S.E. 43 (1896).

Same—Receiver Not a Party. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. Black v. Gentery, 119 N.C. 502, 26 S.E. 43 (1896).

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. The procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1.)

Sale of Property in Hands of Receiver Appointed to Enforce Payment of 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).

A judge of the superior court has the power to order the sale of a defendant husband's non-income-producing real estate for the purpose of investing the proceeds in legal investments as provided in article 6 of chapter 53, so as to produce an income sufficient to enable a 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).

§ 1-506: Repealed by Session Laws 1955, c. 399, s. 2.

§ 1-507. Validation of sales made outside county of action.—All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss. 73, 79; Rev., ss. 1219, 1223; C. S., s. 1208; 1955, c. 1371, s. 2.)

Editor's Note. — For article on corporate receivership in North Carolina, see 32 N.C.L. Rev. 149 (1954).

Broad Powers Conferred.—This part is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for

good cause shown, grants leave to a claimant to bring an independent action against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Section Does Not Limit Power of Court.—The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; and though the practice of appointing the plaintiff's attorney as receiver is not commended, he will not be removed, as a matter of law, on appeal, though, like any other receiver, he may be removed upon application to the proper judge of the superior court. Mitchell v. Aulander Realty Co., 169 N.C. 516, 86 S.E. 358 (1915). See Fisher v. Southern Loan & Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

Effect of Appointment.—The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they cannot interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Improvement Co., 126 N.C. 922, 36 S.E. 185 (1900).

Title of Receiver Relates Back.—The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank of New Hanover, 122 N.C. 397, 29 S.E. 775 (1898); Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903).

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N.C. 125 (1884).

Officers' Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. Young v. Rollings, 90 N.C. 125 (1884).

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Dissolution of De Facto Corporation.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it as a corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N.C. 63 (1878).

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors

are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908).

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Remedy Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy, and such remedy is not available in the federal courts. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2d Cir. 1925).

Adjudication of Bankruptcy during Insolvency Proceedings.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. In re McKinnon Co., 237 F. 869 (E.D.N.C. 1916).

Statutes Applicable to Receiver Appointed under Code of Civil Procedure.—Under § 1-502, the statutes embodied in this Part are "applicable, as near as may be," to a receiver appointed under the Code of Civil Procedure. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Order Made without Specific Findings of Fact or Request Therefor.—Where an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

Cited in Savannah Sugar Ref. Co. v. Royal Crown Bottling Co., 259 N.C. 103, 130 S.E.2d 33 (1963).

§ **1-507.2. Powers and bond.**—The receiver has power and authority to—

(1) Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

(2) Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

(3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

(4) Sell, convey, and assign all of the said estate, rights, and interest.

(5) Appoint agents under him.

(6) Examine persons and papers, and pass on claims as elsewhere provided in this part.

(7) Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C. S., s. 1209; 1955, c. 1371, s. 2.)

Source of Receiver's Authority.—A receiver receives his authority from the applicable statutes, together with the directions and instructions of the court in its order appointing him. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Capacity in Which Property Held and Disposed of.—The receiver holds and disposes of all property coming into his hands

in his official capacity under the direction of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Appointment of Receiver Does Not Suspend Running of Limitations. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, as in the instant case, his appointment will not suspend the running of limitations under § 1-40. Nicholas v. Salisbury Hdwe. & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958).

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation until further order of the court. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2d Cir. 1925).

Power of Receiver to Bring All Actions. —The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

All Rights May Be Adjusted.—In a suit by the receivers of a bank may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904). See Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894); Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Receiver May Plead Usury.—The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N.C. 509, 70 S.E. 997 (1911).

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Receiver Has No Extraterritorial Power. —A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2d Cir. 1925).

Priority between Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditor's bill. Abm. S. See & Depew, Inc. v. Fisheries Prods. Co., 9 F.2d 235 (2d Cir. 1925).

Power after Charter Has Expired.—A receiver, appointed under § 1-507.1 to wind up the affairs of a corporation, can proceed to collect the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Div. Number 15 v. Aston, 92 N.C. 578 (1885).

Effect of Judgment against Corporation. —Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N.C. 492 (1882).

Conveyances.—While subdivision (4) empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943).

Deed Held Sufficient to Pass Title.— Where, under a court order, the receiver of an insolvent bank had conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and § 1-507.3 the deed was sufficient in law to pass title. Wachovia Bank & Trust Co. v. Hudson, 200 N.C. 688, 158 S.E. 244 (1931).

§ 1-507.3. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss. 75, 80; Rev., ss. 1224, 1225; C. S., s. 1210; 1945, c. 635; 1955, c. 1371, s. 2.)

Receiver holds title to property vested in him as an officer of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Prior Liens Not Divested.—In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments, and other liens existing at the time of his appointment. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale under § 1-507.8. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903); Garrison v. Vermont Mills, 154 N.C. 1, 69 S.E. 743 (1910); Witherell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

Effect of Subsequent Judgments.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A judgment rendered in an independent action after the appointment of a receiver does not create a lien on the corporate property as against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Where a creditor held an unsecured claim against an insolvent partnership at the time of the appointment of the receiver, and subsequent to that event reduced such claim to judgment in an independent action against the partners, the creditor did not acquire any lien under the judgment on any of the property owned by the defendants as partners, because under this section such property vested in the receiver prior to the rendition of the judgment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Where Receiver Refuses to Bring Action.—In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

§ 1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265; 1955, c. 1371, s. 2.)

§ 1-507.5. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C. S., s. 1211; 1955, c. 1371, s. 2.)

§ 1-507.6. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss. 1228, 1229; C. S., s. 1212; 1955, c. 1371, s. 2.)

Duty of Court.—The court in control of a receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of priority. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Court May Limit Time for Presentation and Proof of Claims.—This section authorizes the court to limit the time within which creditors may present and prove to the receiver their respective claims against a corporation and may bar all creditors

and claimants failing to do so within the time allotted from participating in the distribution of the assets of the corporation. Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Power of Receiver. — To enable the receiver to decide whether the claims are just, the law confers upon him plenary power to examine the claimants and witnesses touching the claims, and to require the production of relevant books and papers. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Creditors must file and prove their claims, when the court so directs, or be barred. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Proof of claims must be filed with the receiver in writing pursuant to this section and within the time limit directed by the court or such claim may be barred. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

But Court May Extend Time for Filing. —The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hardware Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Assignment Subject to Setoff.—After the appointment of a receiver for a bank a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

§ 1-507.7. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least twenty days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2.)

The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid, or of less dignity than that alleged by him. Moreover, a creditor, who has a valid claim, is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, whose payment will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Partner as "Interested Person".—A partner individually liable for partnership debts, if the partnership assets are insufficient to discharge a claim, is unquestionably an "interested person" who may challenge the validity of an asserted partnership obligation. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

The power to extend time for filing exceptions to receiver's report is expressly given by this section. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Exceptions Not Filed within Time Prescribed.—Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Where objections were filed by a creditor of a corporation in the hands of a receiver

to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was held error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 432, 31 S.E.2d 353 (1944). See Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 153, 29 S.E.2d 348 (1944).

Validity of claim must be determined by court. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Adjudging Claim Preferred without Notice to Other Claimants.—An order of the superior court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Establishment of Claim Where Jury Trial Waived.—See National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Quoted in Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Cited in Webb v. Gaskins, 255 N.C. 281, 121 S.E.2d 564 (1961).

§ 1-507.8. Property sold pending litigation.—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., 1232; C. S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2.)

Section Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. Martin v. Vanlaningham, 189 N.C. 656, 127 S.E. 695 (1925).

§ 1-507.9. Compensation and expenses; counsel fees.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. The court is authorized and empowered to allow counsel fees to an attorney serving as a receiver (in addition to the commissions allowed him as

receiver as herein provided) where such attorney in behalf of the receivership renders professional services, as an attorney, which are beyond the ordinary routine of a receivership and of a type which would reasonably justify the retention of legal counsel by any such receiver not himself licensed to practice law. (1901, c. 2, s. 88; Rev., s. 1226; C. S., s. 1215; 1955, c. 1371, s. 2; 1967, c. 32.)

Editor's Note. — The 1967 amendment added the second sentence.

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909).

Commissions Limited.—A rate not exceeding five percent on receipts and five percent on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

This section does not state that the receiver is entitled to a five percent commission upon receipts and disbursements, but reads in part as follows, "the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements." King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the appellate court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

But Allowance of Costs Is Subject to Review. — That the amount of the allowance of costs by the superior court of attorney's fees is reviewable is well settled. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

It Affects a Substantial Right of Creditors.—The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Commission May Be Divided between Parties.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in case of referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Items Includible in Costs.—Costs of administration of a receivership include, inter alia, such items as the following: (1) Court costs in proceedings relating to the receivership; (2) compensation for the receiver; (3) reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership; (4) costs of conserving property in receivership; (5) costs of sales of property in receivership; (6) premiums for fire insurance on property in receivership; (7) bookkeeping, clerical and accounting expense and postage in connection with the administration of the receivership; (8) payment of all taxes on property real or personal in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894).

Counsel Fees Not Allowed for Collecting Assets of Estate.—A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate since it is the personal duty of the receiver to look after such matters. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Nor for Duties Not Requiring Legal Skill.—The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership require no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself and are not the subject of an allowance of counsel fees. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in

court, including the fees of the receiver and referee, and, except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909); Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

Allowance of Commissions Held Premature.—The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. Delafield v. Mercer Constr. Co., 118 N.C. 105, 24 S.E. 10 (1896).

Appeal.—When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N.C. 273, 60 S.E. 1125 (1908).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the reviewing court will alter the same only when it is clearly inadequate or excessive. Graham v. Carr, 133 N.C. 449, 45 S.E. 847 (1903).

§ 1-507.10. Debts provided for, receiver discharged.—When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C. S., s. 1216; 1955, c. 1371, s. 2.)

Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out of the corpus of the estate in the custody of the court. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership; (2) compensation for the receiver; (3) compensation for the receiver's attorney; (4) bookkeeping and clerical expense; (5) auditing expense; (6) premiums for fire insurance on property in receivership; (7) compensation for watchmen for services in guarding property in receivership; and (8) costs of sale of property in receivership. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cost of Administration and Expenses of Operation Distinguished. — See National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration are preferred in payment to expenses of operation. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Expenses of Operation Subordinate to Claims of Nonconsenting Lienholders. — Indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of nonconsenting lienholders to the corpus of the property. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The court may charge against the interest of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Discharged Receiver Not Proper Party. — Where the receiver of an insolvent railroad company has been discharged, he is

not a proper party to an action against a foreclosure purchaser to recover for personal injuries suffered after the receiver's discharge. Howe v. Harper, 127 N.C. 356, 37 S.E. 505 (1900).

§ 1-507.11. **Reorganization.**—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C. S., s. 1217; 1955, c. 1371, s. 2.)

Power of Superior Court.—This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

Consent of Creditors Unnecessary. — Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

Duty of Fiduciaries. — In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

ARTICLE 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. **Ordered paid into court.**—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (C. C. P., s. 215; Code, s. 380; Rev., s. 850; C. S., s. 863.)

Party Entitled May Retain. — The rule is quite well settled that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. Thompson v. McNair, 62 N.C. 121 (1867); L. Levenson & Co. v. Elson, 88 N.C. 182 (1883).

When Court Will Retain. — When a disputed fund is in possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. Ponton v. McAdoo, 71 N.C. 101 (1874); Morris v. Willard, 84 N.C. 293 (1881); L. Levenson & Co. v. Elson, 88 N.C. 182 (1883).

When Court Will Order Money Delivered to Party. — Where a tenant, upon

the uncontroverted facts, is entitled, as a matter of law, to the proceeds of a crop insurance policy paid into court by insurer, free from the landlord's crop lien for advancements, the court has authority under this section to order that such fund be delivered to the tenant. Peoples v. United States Fire Ins. Co., 248 N.C. 303, 103 S.E.2d 381 (1958).

§ 1-509. Ordered seized by sheriff.—When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (C. C. P., s. 215; Code, s. 381; Rev., s. 851; C. S., s. 864.)

§ 1-510. Defendant ordered to satisfy admitted sum. — When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. (C. C. P., s. 215; Code, s. 382; Rev., s. 852; C. S., s. 865.)

This section may not be invoked where its application would give sanction to piecemeal recoveries which would be essentially inconsistent. Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952).

Claim Not Denied. — Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. Curran v. Kerchner, 117 N.C. 264, 23 S.E. 177 (1895).

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: Held, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note is authorized by this section. Meadows Fertilizer Co. v. Farmers Trading Co., 203 N.C. 261, 165 S.E. 694 (1932).

Cited in Wachovia Bank & Trust Co. v. Wilder, 255 N.C. 114, 120 S.E.2d 404 (1961).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Article 40.

Mandamus.

§§ 1-511 to 1-513: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Article 41.

Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.—The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. To the extent that rules of procedure are not provided for in this article, the Rules of Civil Procedure shall apply. (R. C., c. 26, ss. 5, 25; C. C. P., s. 362; Code, s. 603; Rev., s. 286; C. S., s. 869; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment added the last sentence.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

This article prescribes a specific mode for trying the title to a public office. Such relief is to be sought in a civil action. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

The title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incor-

porated in this article. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Quo Warranto—In General.—Although the proceeding by information in the nature of the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election, or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature seems to have considered paramount to that of the private rights of the persons aggrieved: Hence, the requirement that such actions must be brought by the Attorney General in the name of the people of the State, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney General in the name of the people. Patterson v. Hubbs, 65 N.C. 119 (1871); People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); Brown v. Turner, 70 N.C. 93 (1874); People ex rel. Nichols v. Hilliard, 72 N.C. 169 (1875); Hargrove v. Hunt, 73 N.C. 24 (1875); Saunders v. Gatling, 81 N.C. 298 (1879).

Same — Historical Discussion. — See State ex rel. Giles v. Hardie, 23 N.C. 42 (1840); Ex parte Daughtry, 28 N.C. 155 (1845); Saunders v. Gatling, 81 N.C. 298 (1879); State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

Same—Action Still Called Quo Warranto. — Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and there is in fact only a civil action in which the subject matter is a trial of the title to an office. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Scire Facias — In General. — Writs of scire facias consisted of two classes: The object of the first class was to remedy defects in or to continue an action; that of the second class to commence some proceeding. McDowell v. Asbury, 66 N.C. 444 (1872).

Proceedings in the nature of a sci. fa. of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and form of writs of this class and simplify the process into a notice or summons to show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to affect the substance of the remedy. McDowell v. Asbury, 66 N.C. 444 (1872).

On such motion the judge may allow the defendant to make any defense which he could have availed himself of under the old scire facias proceeding. McDowell v. Asbury, 66 N.C. 444 (1872).

Same — Continuation of Former Suit. — A scire facias on a judgment is not a new action, but is only issued as a continuation of the former suit. Binford v. Alston, 15 N.C. 351 (1833); McDowell v. Asbury, 66 N.C. 444 (1872).

Applied in Stephens v. Dowell, 208 N.C. 555, 181 S.E. 629 (1935); Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746 (1937).

Cited in Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929).

§ 1-515. Action by Attorney General.—An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:

(1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

(2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

(3) When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of § 146-14. (C. C. P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C. S., s. 870.)

Cross References.—As to actions in the nature of quo warranto against corporations by the Attorney General, see § 55-126. As to actions by Attorney General in the name of the State to vacate land grants, see § 146-69.

In General. — This and the subsequent sections provide for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to another process, unless those required to induct, still refuse to do

so, after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

In Dillon on Municipal Corporations, § 680, it is stated that "The adjudged cases in this country agree that quo warranto, or an information or proceeding in the nature of a quo warranto, is the appropriate remedy, when not changed by charter or statute, for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices"; and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a mandamus, but must resort to quo warranto." The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

Who Can Be Complainant.—Actions of this character may be instituted in the name of the State on the relation of the Attorney General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. Saunders v. Gatling, 81 N.C. 298 (1879); State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); State ex rel. Hines v. Vann, 118 N.C. 3, 23 S.E. 932 (1896); State ex rel. Haughtalling v. Taylor, 122 N.C. 141, 29 S.E. 101 (1898); Midgett v. Gray, 158 N.C. 133, 73 S.E. 791 (1912).

A private person cannot institute or maintain an action of this character in his own name or upon his own authority even though he be a claimant of the office. The action must be brought and prosecuted in the name of the State by the Attorney General or in the name of the State upon the relation of a private person, who claims to be entitled to the office, or in the name of the State upon the relation of a private person, who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Relator Need Not Allege Title.—In quo warranto brought by a citizen, qualified voter and taxpayer of a municipal corporation, upon leave of the Attorney General, to try the title of an officer, the chief of police of said corporation, it is not necessary to allege that the relator is entitled to the office or has any interest therein. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

But the action is nonetheless personal as to the parties claiming the office, the issue between them being the right to the same. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910). See Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

Determining Title to Public Office. — One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the superior court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746 (1937), citing Harkrader v. Lawrence, 190 N.C. 441, 130 S.E. 35 (1925). See State ex rel. Giles v. Hardie, 23 N.C. 42 (1840); Ex parte Daughtry, 28 N.C. 155 (1845); Saunders v. Gatling, 81 N.C. 298 (1879).

For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose by the Attorney General in the name of the State, upon his own information or upon the complaint of a private person. In re Wingler, 231 N.C. 560, 58 S.E.2d 372 (1950).

Same—Holding Two Offices.—A citizen and taxpayer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); State ex rel. Hines v. Vann, 118 N.C. 3, 23 S.E. 932 (1896); State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).

Same—Allegation of Illegality.—Usually in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but § 1-521 does not require such averment. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Same — Mandamus and Injunction Improper. — It is not permissible to try the title to an office by injunction, nor by mandamus—a civil action in the nature of quo warranto, is the appropriate remedy, to be tried before a judge and jury. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883); Lyon v. Board, 120 N.C. 237, 26 S.E. 929 (1897); Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. Rogers v. Powell, 174 N.C. 388, 389, 93 S.E. 917 (1917). See State ex rel. Burke v. Commissioners of Bessemer City, 148 N.C. 46, 61 S.E. 609 (1908).

Same—Examples.—Where the board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party: Held, that this could not in anywise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. State ex rel. Roberts v. Calvert, 98 N.C. 580, 4 S.E. 127 (1887).

An action against a judge of probate to vacate his office is properly brought by the Attorney General under this section. Patterson v. Hubbs, 65 N.C. 119 (1871); People ex rel. Attorney Gen. v. Heaton, 77 N.C. 18 (1877).

Contested Seat in General Assembly. — The Constitution of North Carolina withdraws from the consideration of North Carolina courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. State ex rel. Alexander v. Pharr, 179 N.C. 699, 103 S.E. 8 (1920).

What Is a Public Office.—An office such as properly to come within the legitimate scope of a quo warranto information, may be defined, says a recent author, "as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public." High Ex. Leg. Rem., § 620; Eliason v. Coleman, 86 N.C. 236 (1882).

It is manifest, that the statute has reference to such usurping occupants as are exercising public functions or conferred franchises wrongfully, and is confined to an office which, as is said in Nichols v. McKee, 68 N.C. 429 (1873), "is a part of the government and part of the State policy," and to an officer "who takes part in the government." Eliason v. Coleman, 86 N.C. 236 (1882).

The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. Eliason v. Coleman, 86 N.C. 236 (1882).

Same—Examples. — It has often been a matter of controversy what shall be said to be a public office. It has, however, long since been decided that a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works, were officers of such a public character as to come within the rule. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

The office of chief of police is such an office that an action in the nature of a quo warranto may be brought to try the title to it. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

It is held in Eliason v. Coleman, 86 N.C. 236 (1882), that this section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely, the Western North Carolina R.R. Co. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

The business of selling liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. Hargett v. Bell, 134 N.C. 394, 46 S.E. 749 (1904).

Same—Tabulation Prima Facie Correct. —A tabulation of the result of an election by the clerk, in the manner required by law is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898), citing Swain v. McRae, 80 N.C. 111 (1879); Gatling v. Boone, 98 N.C. 573, 3 S.E. 392 (1887).

To Determine Validity of Election. — A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the State by

the Attorney General on the relation of the party aggrieved. Saunders v. Gatling, 81 N.C. 298 (1879); Davis v. Moss, 81 N.C. 303 (1879).

Same — Proper Certificate Ordinarily Conclusive.—The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts. Dillon's Municipal Corporations, Vol. 2, § 892; Lyon v. Board of Comm'rs, 120 N.C. 237, 26 S.E. 929 (1897).

Same—Ballot Boxes Brought into Court.—In Broughton v. Young, 119 N.C. 915, 27 S.E. 277 (1896), it was held that the preservation of the ballots is required that they may be kept as evidence to certify or correct the election returns when impeached, and that on a quo warranto the ballot boxes might be brought into court and the recount made in the presence of the court and jury. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

The facts found by the referee as to the result of an election in proceeding in the nature of a quo warranto, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence. State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922).

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922).

Quo Warranto Is Not Proper Remedy to Test Validity of Tax.—Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

Applied in State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963); State ex rel. Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934).

Cited in Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952); State ex rel. Tillett v. Mustain, 243 N.C. 564, 91 S.E.2d 696 (1956); Starbuck v. Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960); Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929).

§ 1-516. Action by private person with leave.—When application is made to the Attorney General by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the State, upon the relation of such applicant, upon the applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action. (1874-5, c. 76; 1881, c. 330; Code, s. 608; Rev., s. 828; C. S., s. 871.)

Cross Reference.—As to mandatory dissolution of a corporation at the instance of private persons, see § 55-124.

Section Constitutional.—This section allowing the prosecution of an action in the name of the State to assert the right of a citizen to a public office is not, for that reason, unconstitutional. McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904).

Security Must Be Given. — The section clearly provides that, before an action may be instituted or maintained on the relation of a private citizen, satisfactory security must be furnished indemnifying the State against all costs and expenses which may accrue in consequence of bringing the action. Midgett v. Gray, 158 N.C. 133, 73 S.E. 791 (1912).

Interest of Public Is Paramount. — In proceedings under this and § 1-514 to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney General, the filing of the bond, etc., as required by this section, is a prerequisite to the right of the relator to maintain the action. Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310 (1931).

Prerequisites to Prosecution of Action by Private Person. — Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney General for permission to bring the action, tender to the Attorney General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney General to bring the action in the name of the State upon his relation. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Permission Essential.—The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney General. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883). See Midgett v. Gray, 158 N.C. 133, 73 S.E. 791 (1912).

Same—Second Suit after Voluntary Nonsuit.—Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by § 1-514 and the remedy in such matters is under the provisions of this section and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310 (1931).

Same—Effect of § 1-518.—This view that leave is essential is strengthened by § 1-518, which provided that even after leave is given and action commenced, the same may, under certain conditions be withdrawn and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action. Midgett v. Gray, 158 N.C. 133, 73 S.E. 791 (1912).

May Be Given after Commencement of Suit.—The court has held in State ex rel. Sherronhouse v. Withers, 121 N.C. 376, 28 S.E. 522 (1897), that it is not absolutely essential that the leave should be had before the suit is commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney General has been given to prosecute the action. Midgett v. Gray, 158 N.C. 133, 73 S.E. 791 (1912).

Upon Failure to Show Leave Action Dismissed. — It appearing that, by inadvertence, the record in this action of quo warranto to try the title of office did not show that permission of the Attorney General was given according to the requirements of this section, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed. State ex rel. Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912).

Judge Cannot Confer Power to Prosecute Action. — Where a relator had no leave from the Attorney General permitting him to sue as such, he was incapacitated by law to prosecute the action and the trial judge could not confer upon him the legal power denied to him by positive legislative enactment through the simple expedient of designating him a party-plaintiff and treating his answer as a complaint. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Applied in State ex rel. Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934).

Cited in Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929); Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

§ 1-517. Solvent sureties required. — The Attorney General, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the State against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (1901, c. 595, s. 2; Rev., s. 829; C. S., s. 872.)

§ 1-518. Leave withdrawn and action dismissed for insufficient bond.—When the Attorney General has granted leave to a private relator to bring an action in the name of the State to try the title to an office, and it afterwards is shown to the satisfaction of the Attorney General that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the Attorney General may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the Attorney General to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (1891, c. 595; Rev., s. 830; C. S., s. 873.)

§ 1-519. Arrest and bail of defendant usurping office.—When action is brought against a person for usurping an office, the Attorney General, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right

thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (C. C. P., s. 369; 1883, c. 102; Code, s. 609; Rev., s. 831; C. S., s. 874.)

Cross Reference. — As to arrest in civil actions, see §§ 1-409 through 1-439.

§ 1-520. Several claims tried in one action.—Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (C. C. P., s. 374; Code, s. 614; Rev., s. 832; C. S., s. 875.)

§ 1-521. Trials expedited.—All actions to try the title or right to any State, county or municipal office shall stand for trial at the next term of court after the summons and complaint have been served for thirty days, regardless of whether issues were joined more than ten days before the term; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C. S., s. 876; 1947, c. 781.)

Stated in State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 1-522. Time for bringing action.—All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (1901, c. 519; 1903, c. 556; Rev., s. 834; C. S., s. 877.)

When Section Does Not Apply. — This provision requiring a private relator, upon leave of the Attorney General, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Applied in State ex rel. Long v. Smitherman, 251 N.C. 682, 111 S.E.2d 834 (1960).

§ 1-523. Defendant's undertaking before answer. — Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (1895, c. 105; Rev., s. 835; C. S., s. 878.)

§ 1-524. Possession of office not disturbed pending trial. — In any civil action pending in any of the courts of this State in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of

the office pending the litigation, and receive the emoluments thereof. (1899, c. 33; Rev., s. 836; C. S., s. 879.)

Purpose of Section.—An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and the like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. Patterson v. Hubbs, 65 N.C. 119 (1871).

Title Should Be Determined First.—Individuals claiming to comprise the board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. Rogers v. Powell, 174 N.C. 388, 93 S.E. 917 (1917).

Stated in Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.—At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in § 1-523. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (1895, c. 105, s. 2; 1899, c. 49; Rev., s. 837; C. S., s. 880.)

Editor's Note. — For discussion of section, see McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904), cited in State ex rel. Morganton Graded School v. McDowell, 157 N.C. 316, 72 S.E. 1083 (1911).

§ 1-526. Service of summons and complaint.—The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (1899, c. 126; Rev., s. 838; C. S., s. 881.)

Sufficiency of Summons.—If the copy of summons left at defendant's residence be not essentially a true copy of the original, then it would be insufficient under the statute, for only by virtue of this section is substituted service allowable in this way. McLeod v. Pearson, 208 N.C. 539, 181 S.E. 753 (1935).

If the copy of summons left at defendant's residence be a true copy of the original, but was neither signed by the clerk nor under seal, it is fatally defective. McLeod v. Pearson, 208 N.C. 539, 181 S.E. 753 (1935).

§ 1-527. Judgment in such actions.—In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or un-

lawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars. (Const., Art. IX, s. 5; R. C., c. 95; C. C. P., ss. 370, 375; Code, ss. 610, 615; Rev., ss. 839, 840; C. S., s. 882.)

Discretion of Court as to Fine.—Where the defendant went into office under the authority of an unconstitutional appointment by the General Assembly, the court presumed that there was no criminal intent and did not impose the fine. Nichols v. McKee, 68 N.C. 429 (1873).

§ 1-528. Mandamus to aid relator.—In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (1885, c. 406, s. 1; Rev., s. 841; C. S. s. 883.)

§ 1-529. Appeal; bonds of parties.—No appeal by the defendant to the appellate division from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (1885, c. 406, s. 2; Rev., s. 842; C. S., s. 884; 1969, c. 44, s. 13.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" near the beginning of the section.

§ 1-530. Relator inducted into office; duty.—If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (C. C. P., ss. 371, 373; Code, ss. 611, 613; Rev., ss. 843, 844; C. S., s. 885.)

Recovery of Fees and Emoluments.—It was held, under this section, that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. State ex rel. Howerton v. Tate, 70 N.C. 161 (1874); Swain v. McRae, 80 N.C. 111 (1879); State ex rel. Jones v. Jones, 80 N.C. 127 (1879). For further discussion of the recovery of damages in an independent action, see McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904), cited in State ex rel. Morganton Graded School v. McDowell, 157 N.C. 316, 72 S.E. 1083 (1911).

Person Entitled Has Property in Office.—A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. State ex rel. Howerton v. Tate, 70 N.C. 161 (1874); Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Oath and Bond. — Where defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for refusal, that the relator had not filed bond or taken the oath of office, is properly denied, since such further allegations do not constitute a defense, the filing

of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the de jure officer, because in such circumstances such action would be a vain thing which the law does not require, and it being expressly provided by this section, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Court Can Enforce Demand for Documents.—When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Complying with Induction Requirements Not Prerequisite to Action to Try Title.—It is the intention of the lawmaking power that one who is rightfully entitled to an office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Cited in Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952).

§ 1-531. Refusal to surrender official papers misdemeanor. — If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (C. C. P., s. 372; Code, s. 612; Rev., s. 3601; C. S., s. 886.)

§ 1-532. Action to recover property forfeited to State.—When any property, real or personal, is forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (C. C. P., s. 381; Code, s. 621; Rev., s. 845; C. S., s. 887.)

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.—Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (C. C. P., s. 383; Code, s. 624; Rev., s. 853; C. S., s. 888.)

Cross Reference.—See note to § 1-538.

Definition. — Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Clearing of Land. — In England the clearing of land by a life tenant was waste. In Shine v. Wilcox, 21 N.C. 631 (1837) the court says: "While our ancestors brought over to this country the principles of common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste." See King v. Miller, 99 N.C. 583, 6 S.E. 660 (1888); Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Nature of Action.—An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. Rippey v. Miller, 33 N.C. 247 (1850); Butner v. Keelhn, 51 N.C. 60 (1858); Collier v. Arrington, 61 N.C. 356 (1867); Peebles v. North Carolina R.R.,

63 N.C. 238 (1869); Shuler v. Millsaps, 71 N.C. 297 (1874); Shields v. Lawrence, 72 N.C. 43 (1875).

Discretion of Jury.—It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. King v. Miller, 99 N.C. 583, 6 S.E. 660 (1888); Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

To Determine Liability.—In ascertaining whether a given act or omission falls within the rule, and subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

No one shall have an action of waste unless he has the immediate estate of inheritance. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

One entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

An action cannot be maintained by plaintiff a contingent remainderman because, if allowed, the life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

If a person's interest is a contingent remainder, such person has no standing to maintain an action for waste and forfeiture under this section. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

But a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Contingent and Vested Remainder Distinguished.—See Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Section 41-11 Has No Application to Action for Waste.—See note to § 41-11.

Cited in Batten v. Corporation Comm'n, 199 N.C. 460, 154 S.E. 748 (1930).

§ 1-534. For and against whom action lies.—In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C. S., s. 889.)

No Action unless Plaintiff Has Estate.—The writ of waste is founded upon principles, peculiar to itself, and more especially dependent upon a privy between the reversioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privy, the waste being committed in the lifetime of the reversioner. Browne v. Blick, 7 N.C. 511 (1819).

Contingent Remainderman Cannot Sue.—A contingent remainderman cannot sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. Gordon v. Lowther, 75 N.C. 193 (1876); Latham v. Lumber Co., 139 N.C. 9, 51 S.E. 780 (1905); Richardson v. Richardson, 152 N.C. 705, 68 S.E. 217 (1910).

No Application to Judgment Creditor.—The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889).

Right to Restrain Waste.—The right to sue for waste includes the right to restrain its commission. Hinson v. Hinson, 120 N.C. 400, 27 S.E. 80 (1897); Morrison v. Morrison, 122 N.C. 598, 29 S.E. 901 (1898).

Holder of a Vested Estate for Life.—In the case of Gordon v. Lowther, 75 N.C. 193 (1876), the court said, in effect, that while persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent hus-

bandry. That case was cited with approval in the later case of Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889); Farabow v. Green, 108 N.C. 339, 12 S.E. 1003 (1891).

Conflicting Evidence as to Title.—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of the plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed. It was held that the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of this section. It was held further, that while the evidence in this case as to location of the land was meager it was sufficient. Howell v. Shaw, 183 N.C. 460, 112 S.E. 38 (1922).

§ 1-535. Tenant in possession liable.—Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (11 Hen. VI, c. 5; R. C., c. 116, s. 2; Code, s. 626; Rev., s. 855; C. S., s. 890.)

§ 1-536. Action by tenant against cotenant.—Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (13 Edw. I, c. 22; R. C., c. 116, s. 4; Code, s. 627; Rev., s. 856; C. S., s. 891.)

Section Changes Common-Law Rule.—One of the settled rules at common law in England, was that one tenant in common could not sue his cotenant, except for partition, and the legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his cotenant or joint tenant. And the tenant can also restrain his cotenant from the commission of waste. Morrison v. Morrison, 122 N.C. 598, 29 S.E. 901 (1898).

Cutting Trees.—Under this section, one tenant in common may sue his cotenant for waste for cutting down trees to be sold as cross ties and hauled off the land. Hinson v. Hinson, 120 N.C. 400, 27 S.E. 80 (1897).

Applied in Daniel v. Tallassee Power Co., 204 N.C. 274, 168 S.E. 217 (1933).

§ 1-537. Action by heirs.—Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 5; Code, s. 628; Rev., s. 857; C. S., s. 892.)

Heirs Cannot Set Up Damages for Waste as Counterclaim. — In a suit by a widow against the heirs to recover payments allowed to her as dower and made a charge on the land, the heirs cannot set up by way of counterclaim damages for waste committed by the widow but must proceed under the statute. Hybart v. Jones, 130 N.C. 227, 41 S.E. 293 (1902).

Cited in State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937).

§ 1-538. Judgment for treble damages and possession.—In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (6 Edw. I, c. 5; 20 Edw. I, st. 2; R. C., c. 116, s. 3; Code, s. 629; Rev., s. 858; C. S., s. 893.)

In General.—Under this section a tenant in dower, or other life tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Section Changes Former Law. — This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and

can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Prospective Damages Not Allowed. — The jury cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Judgment Must Be in Accord with This Section. — In an action by remaindermen against the life tenant for waste under § 1-533, judgment must be in accord with this section, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid to the life tenant. Parrish v. Parrish, 247 N.C. 584, 101 S.E.2d 480 (1958).

Where Damages Insignificant. — In an action for waste, where the jury find insignificant damages, judgment will be arrested. Sheppard v. Sheppard, 3 N.C. 382 (1806).

Judgment for Damages Only.—It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. Bright v. Wilson, 1 N.C. 251 (1800).

New Action for Subsequent Injury.—If the life tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Appeal. — This section says the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Article 43.

Nuisance and Other Wrongs.

§ 1-538.1. Damages for malicious or wilful destruction of property by minors.—Any person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization, or any nonprofit cemetery corporation, or organization, whether incorporated or unincorporated, shall be entitled to recover damages in an amount not to exceed five hundred dollars ($500.00), in an action in a court of competent jurisdiction, from the parents of any minor under the age of eighteen (18) years, living with its parents, who shall maliciously or wilfully destroy property, real, personal or mixed, belonging to any such person, firm, corporation, the State of North Carolina or any political subdivision thereof, or any religious, educational or charitable organization. (1961, c. 1101.)

Editor's Note. — For comment on this section, see 40 N.C.L. Rev. 619 (1962).

Purpose of Section. — This section and similar statutes appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

The rationale of this section apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

The limitation in this section of liability to malicious or wilful acts of children, as well as the limitation of liability to an amount not to exceed $500.00 for the destruction of property, fails to serve any of the general compensatory objectives of tort law. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

It Is Constitutional.—The enactment of

this section is within the police power of the State and it is not violative of the provisions of Const., Art. I, § 17, or of the provisions of the Fifth Amendment to the federal Constitution. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

And Does Not Violate Parents' Rights. —This section gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

It Imposes Vicarious Liability on Parents.—In an action against the parents under this section the complaint is not fatally defective because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of an injury to plaintiff, for the reason that this section imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilful destruction of property by a child under the age of eighteen living with them. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Under this section a parent is made responsible for damages in an amount not exceeding $500 resulting from the wilful or malicious acts of a child under 18 living with the parent. S & N Freight Line v. Bundy Truck Lines, 3 N.C. App. 1, 164 S.E.2d 89 (1968).

Unlike Common Law.—At common law, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Necessary Elements to Be Shown.—For the plaintiff to recover from the parents he must establish, inter alia, by the greater weight of the evidence, (1) that the minor was under the age of eighteen years living with his parents, and (2) that the child maliciously or wilfully destroyed property, real, personal, or mixed. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Insurer Paying Loss May Sue on Subrogated Claim. — An insurance company, as plaintiff, may bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who pursuant to the provisions of this section, would have been able to bring such an action in its own name. General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Application of Section to Automobile Collision Case. — See Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963).

§ 1-539. Remedy for nuisance.—Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (C. C. P., s. 387; Code, s. 630; Rev., s. 825; C. S., s. 894.)

Cross Reference. — As to injunction against nuisance, see § 1-485 and note thereto.

Editor's Note.—Nuisances consist of two general classes, public and private. A public nuisance exists when a right or privilege, common to all the citizens of the community, is interfered with, even though no actual damage to any individual is caused. In such cases in order to maintain a civil action under this section the plaintiff must show special damages differing both in degree and in kind from that suffered by the general public.

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general as to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. See McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

When the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is nonetheless actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. See Farmer Co-operative Mfg. Co. v. Albemarle & R.R.R.,

117 N.C. 579, 23 S.E. 43 (1895); Pruitt v. Bethell, 174 N.C. 454, 93 S.E. 945 (1917).

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. See Baltimore & P.R.R., v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883).

An Adequate Remedy. — Where a nuisance has been established, working harm to the rights of an individual citizen, the law of North Carolina is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

The ancient writ of nuisance has been superseded under this section by civil action for damages or for a removal of the nuisance, or for both. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Purpose of Damages.—Damages in nuisance should be such as to lead to the abatement of the nuisance. Bradley v. Amis, 3 N.C. 399 (1806).

Appreciable Damage Must Be Suffered. — To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

When Special Damage Necessary.—An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. Pedrick v. Railroad, 143 N.C. 485, 55 S.E. 877 (1906); McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909); Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

But an action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, although others in the community suffered sickness from the same cause. Pruitt v. Bethell, 174 N.C. 454, 93 S.E. 945 (1917).

Diminution of Damage. — In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. Brown v. Virginia-Carolina Chem. Co., 162 N.C. 83, 77 S.E. 1102 (1913).

Injunction Lies.—One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904).

When Injury Irreparable. — Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

In order for an injury to be irreparable it is not required that it be beyond the possibility of repair or compensation in damages, but it is sufficient if it be one to which complainant should not be required to submit or the other party to inflict and is of such continuous and frequent recurrence that reasonable redress cannot be had in a court of law. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

No Permanent Damage. — Permanent damages for the depreciation of property cannot be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. Taylor v. Seaboard Air Line Ry., 145 N.C. 400, 59 S.E. 129 (1907).

Proximate Cause. — In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. McGhee v. Norfolk & S. Ry., 147 N.C. 142, 60 S.E. 912 (1908).

Abatement of a private nuisance is not dependent upon recovery of damages. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. It was held that the complaint alleged a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff was entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

An airport is not a nuisance per se, but may become a nuisance if its location,

structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Obstruction of Fish in Passage Upstream.—The rule that a riparian owner is not entitled to maintain an action for the reason that he had sustained no peculiar injury through the obstruction of fish in their upstream passage to his fishery, has not been rendered obsolete by this section and the prescription of a right to sue in like cases. Hampton v. North Carolina Pulp Co., 49 F. Supp. 625 (E.D.N.C. 1943).

§ 1-539.1. Damages for unlawful cutting or removal of timber; misrepresentation of property lines.—(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594.)

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 533 (1955).

Cited in Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

§ 1-539.2. Dismantling portion of building.—When one person owns a portion of a building and another or other persons own the remainder of said building, neither of said owners shall dismantle his portion of said building without making secure the portions of said building belonging to other persons. Any person violating the provisions of this section shall be responsible in damages to the owners of other portions of such building. (1955, c. 1359.)

ARTICLE 43A.

Adjudication of Small Claims in Superior Court.

§ 1-539.3. Small claims defined; to what actions article applies.—The procedure for adjudicating small claims in the superior courts of this State shall be as herein set forth. A small claim is defined as:

(1) An action in which the relief demanded is a money judgment and the sum prayed for (exclusive of interests and costs of court) by the plaintiff, defendant, or other party does not exceed one thousand dollars ($1,000.00), which may include the ancillary remedy of attachment if the property to be attached does not exceed a value of one thousand dollars ($1,000.00); or,

(2) An action in which the relief demanded is the foreclosure of a lien on real or personal property where the sum prayed for does not exceed one thousand dollars ($1,000.00); or,

(3) An action in which the relief demanded is the recovery of personal property of a value not exceeding one thousand dollars ($1,000.00), which may include the ancillary remedy of claim and delivery if the property claimed does not exceed a value of one thousand dollars ($1,000.00); and in which no jury trial is demanded.

This article shall not apply to actions within the jurisdiction of courts of justice of the peace. (1955, c. 1337, s. 1.)

Applied in Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958); Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 10 (1958); Phillips v. Alston, 257 N.C. 255,

125 S.E.2d 580 (1962); R.B. Stokes Concrete Co. v. Warden, 268 N.C. 466, 150 S.E.2d 849 (1966).

Cited in Better Home Furniture Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236 (1956); Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961).

§ 1-539.4. Small claims docket; caption of complaint; when value of property to be stated; deposit for costs. — Each clerk of the superior court shall maintain a small claims docket. The clerk shall docket in the small claims docket any action in which the relief demanded is a small claim, as defined above. In all such actions the plaintiff shall set forth in the caption of the complaint the words "small claim." If any party demands the foreclosure of a lien on real or personal property, the recovery of personal property, or the ancillary remedy of attachment, such party shall, in his pleading or by affidavit, state that the value of the property does not exceed one thousand dollars ($1,000.00). No prosecution bond shall be demanded of plaintiff when instituting a small claims action, but the clerk shall require such advance deposit for costs as the board of county commissioners shall determine, but not in excess of the advance deposit for costs as in other actions. (1955, c. 1337, s. 2.)

Action Instituted Prior to Passage of Article.—See note to § 1-539.7.

§ 1-539.5. Jury trial.—No trial jury shall be had in small claims actions, unless a party thereto shall demand a jury trial in the first pleading filed by him provided that in the trial of small claims actions where there is no jury trial, the judge shall not be required to comply with the provisions of G.S. 1-185 unless one of the parties so requests, and such request may be made before or after the verdict; and provided further that when any of the parties to the action are entitled to a judgment by default and inquiry against an adverse party thereto under G.S. 1-212 or G.S. 1-213, no jury trial shall be required. (1955, c. 1337, s. 3; 1959, c. 912; 1963, c. 468, s. 3.)

Application of §§ 1-185 through 1-187.—When this article is made applicable to a particular county by appropriate resolution of its board of county commissioners, the right to jury trial in such county may be waived as provided herein. To this extent, this article supplements § 1-184. Construing these statutes in pari materia, it is clear that the provisions of §§ 1-185, 1-186 and 1-187, relating to proceedings upon waiver of jury trial under § 1-184, apply equally when a jury trial is waived under this article. Hajoca Corp. v. Brooks, 249 N.C. 10, 105 S.E.2d 10 (1958), decided before the passage of the 1959 amendment to this section.

Waiver.—Defendant's failure to demand a jury trial, as provided by this section, constituted a waiver of that right. Great Am. Ins. Co. v. Holiday Motors of High Point, Inc., 264 N.C. 444, 142 S.E.2d 13 (1965).

Applied in Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958); Tripp v. Harris, 260 N.C. 200, 132 S.E.2d 322 (1963).

Cited in Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

§ 1-539.6. Transfer of action to regular civil issue docket.—If the defendant in a small claims action files an answer in which a jury trial is demanded or in which affirmative relief is demanded which is not a small claim, as defined above, the action shall be transferred to the regular civil issue docket. (1955, c. 1337, s. 4.)

§ 1-539.7. Civil appeals to superior court placed on small claims docket.—All civil appeals to the superior court from trial courts inferior to the superior court, including civil appeals from courts of justices of the peace, which come within the above definition of a small claim, shall be placed upon the small claims docket, unless at the time the appeal is docketed in the superior court, or within ten days thereafter, a party to the action shall file with the clerk a written demand for a jury trial. (1955, c. 1337, s. 5; 1961, c. 1184.)

§ 1-539.8. Article applicable only in counties which adopt it.—This article shall apply only to those counties in which the board of county commissioners shall by resolution adopt the provisions hereof. (1955, c. 1337, s. 7.)

ARTICLE 43B.

Defense of Charitable Immunity Abolished.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.—The common-law defense of charitable immunity is abolished and shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967. (1967, c. 856.)

Quoted in Habuda v. Trustees of Rex Hosp., 3 N.C. App. 11, 164 S.E.2d 17 (1968); Helms v. Williams, 4 N.C. App. 391, 166 S.E.2d 852 (1969).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge. — In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (1874-5, c. 178; Code, s. 574; Rev., s. 859; C. S., s. 895.)

I. General Consideration.
II. Effect of Compromise or Receipt of Part in Full Payment.
III. Application of Section.
IV. Procedure.

I. GENERAL CONSIDERATION.

Editor's Note.—For a discussion of the law of contracts in relation to this section, see 13 N.C.L. Rev. 45.

Constitutionality of Section. — The section is constitutional. Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889); Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894); Wittkowsky v. Baruch, 127 N.C. 313, 37 S.E. 449 (1900).

The acceptance of a lesser sum in full payment of a larger sum is valid under this section. Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950). See Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895), citing Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889).

Under the construction placed upon our statute the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. And the courts are governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under the statute. Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894).

Rule Prior to Section. — Prior to the passage of the Acts 1874-'75, c. 178 an agreement to receive a part in lieu of the whole of a debt due was held to be a nudum pactum as to all in excess of the sum actually paid. Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895), citing Hayes v. Davidson, 70 N.C. 573 (1874); Mitchell v. Sawyer, 71 N.C. 70 (1874); Love v. Johnston, 72 N.C. 415 (1875); Currie v. Kennedy, 78 N.C. 91 (1878). See Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894).

An agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties. York v. Westall, 143 N.C. 276, 55 S.E. 724 (1906). See generally Williams v. Alexander, 39 N.C. 207 (1845); Barnawell v. Threadgill, 56 N.C. 50 (1856); Mayo v. Gardner, 49 N.C. 359 (1857); Mathis v. Bryson, 49 N.C. 508 (1857); Findly v. Ray, 50 N.C. 125 (1857).

When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts

and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894).

Essentials of Compromise. — As in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. See Horn v. Detroit Dry Dock Co., 150 U.S. 610, 14 S. Ct. 214, 37 L. Ed. 1199 (1893).

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, deliberately and understandingly. Hennessy v. Bacon, 137 U.S. 78, 11 S. Ct. 17, 34 L. Ed. 605 (1890).

A plea of accord and satisfaction is recognized as a method of discharging a contract or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

What Constitutes Accord and Satisfaction.—See Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

When at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt, it was held that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. Jones v. Wilson, 104 N.C. 9, 10 S.E. 79 (1889).

When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. King v. Phillips, 94 N.C. 555 (1886).

Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, the plaintiff agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, when it appears that the settlement had been made in contemplation of the first item alone. Garland v. Linville Improvement Co., 184 N.C. 551, 115 S.E. 164 (1922).

Payment to beneficiary of one half of proceeds of life insurance policy did not constitute accord and satisfaction as a matter of law where beneficiary testified that by virtue of such payment she did not abandon her right to balance of proceeds, and receipt did not expressly state that the sum received was in full settlement. Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

Elements of Accord and Satisfaction.—An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Same—Tort and Contract Actions.—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. Walker v. Burt, 182 N.C. 325, 109 S.E. 43 (1921).

Same—Mistake as to Amount. — Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. Holden v. Warren, 118 N.C. 326, 24 S.E. 770 (1896).

Same—Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, it amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. Cline v. Rudisill, 126 N.C. 523, 36 S.E. 36 (1900).

The accord is the agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

And the satisfaction is the execution or performance of the agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Consideration must in some form or other be present in an accord. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An accord and satisfaction may be based on an undisputed or liquidated claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Accord and Satisfaction Does Not Result from Part Payment of Liquidated and Undisputed Claim.—The fact that a remittance by check purporting to be "in full" is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed, under the generally accepted rule that an accord and satisfaction does not result from the part payment of a liquidated and undisputed claim. The creditor is justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The question of accord and satisfaction may be one of fact and of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Distinction between Liquidated and Unliquidated Claims.—There is a well-recognized distinction between liquidated or undisputed claims and unliquidated or disputed ones. Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt due, was held to be a nudum pactum as to all in excess of the sum actually paid. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Account Deemed Liquidated.— An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

By the words of this section, a compromise and settlement is indicated. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

This section applies as a compromise and settlement when an agreement is made and accepted. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The word "agreement" implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

A compromise and settlement must be based upon a disputed claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Executed Agreement Terminating Controversy Is a Contract.—Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Slight Irregularities Do Not Vitiate. — Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. McAuley v. Sloan, 173 N.C. 80, 91 S.E. 701 (1917).

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. Ramsey v. Browder, 136 N.C. 251, 48 S.E. 651 (1904).

Offer and Acceptance by Telegram. — Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by debtor, constitutes a valid compromise in full satisfaction of the claim. Pruden v. Asheboro & M.R.R., 121 N.C. 509, 28 S.E. 349 (1897).

II. EFFECT OF COMPROMISE OR RECEIPT OF PART IN FULL PAYMENT.

Acts as Complete Discharge. — The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. Tiddy v. Harris,

101 N.C. 589, 8 S.E. 227 (1888); Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889); Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894); Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895); Wittkowsky v. Baruch, 127 N.C. 313, 37 S.E. 449 (1900).

Ordinarily when a creditor calls on his debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge, even though the sum or property received is less than the amount actually owing. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

Precludes Further Action Thereon. — Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. Pruden v. Asheboro & M.R.R., 121 N.C. 509, 28 S.E. 349 (1897).

Checks Accepted as Settlement in Full of Account. — Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. Mercer v. Frank Hitch Lumber Co., 173 N.C. 49, 91 S.E. 588 (1917); Blanchard v. Edenton Peanut Co., 182 N.C. 20, 108 S.E. 332 (1921); De Loache v. De Loache, 189 N.C. 394, 127 S.E. 419 (1925); Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955); Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

Where an employee was discharged and received and cashed a check for $125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." Kerr v. Sanders, 122 N.C. 635, 29 S.E. 943 (1898).

When in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept the benefit of the check so tendered and at the same time retain the right to sue for an additional amount. Moore v. Greene, 237 N.C. 614, 75 S.E.2d 649 (1953).

A check given and received by the creditor, which purports to be payment in full of an account, does not preclude the creditor accepting it from showing that in fact it was not in full unless, under the principle of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Same—Whether Transaction Embraced in Account Question of Law or Fact. — Where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement; but the principle, of course, does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts; but sometimes the evidence may be such as to make it a question for the jury. Aydlett v. Brown, 153 N.C. 334, 69 S.E. 243 (1910); Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

Plaintiff's evidence was to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. It was held that the acceptance of weekly checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raised for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments. Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

Retention of Deed and Collection of Rentals. Where a partnership in real estate held for rentals had title to land purchased with partnership funds and, after demand by one of the two partners for an accounting, one of the pieces of real estate was conveyed to him with the ver-

bal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

III. APPLICATION OF SECTION.

Incorporated in Contract. — Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895), citing Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889).

Must Be Compromise. — The section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. Smith v. Richards, 129 N.C. 267, 40 S.E. 5 (1901).

When Creditor Remitted to Original Rights. — If the debtor, as in Hunt v. Wheeler, 116 N.C. 422, 21 S.E. 915 (1895), repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. Ramsey v. Browder, 136 N.C. 251, 48 S.E. 651 (1904).

Right to Demand Acceptance.—When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment. Boykin v. Buie, 109 N.C. 501, 13 S.E. 879 (1891).

When Payer Is Entitled to Restitution.— Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. Fickey v. Merrimon, 79 N.C. 585 (1878).

Principal Bound by Acts of Agent. — A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. Cashmar-King Supply Co. v. Dowd & King, 146 N.C. 191, 59 S.E. 685 (1907).

Payment of One Account Not Settlement of Another. — While the acceptance of a lesser sum in full payment of a larger sum is valid under this section, the payment of one account is not the settlement of another. And the acceptance of a lesser sum constitutes a settlement only as to those items of liability embraced in the settlement. Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. Moore v. Maryland Cas. Co., 150 N.C. 153, 63 S.E. 675 (1909).

Where two of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former transaction is a part of the consideration for the new one, and is enforceable. Standing Stone Nat'l Bank v. Walser, 162 N.C. 53, 77 S.E. 1006 (1913).

Section Held Controlling. — Where a settlement was arrived at between the parties by the terms of which all claims between them were settled by the payment to plaintiff of $10,000 and for which he executed releases in full on all claims against the defendants or either of them, and payment was made by check of defendant on which was plainly typed: "Settlement of all accounts in full as of today November 8, 1954," and the check was endorsed and cashed by plaintiff, this section is clearly applicable and controlling. Jordan Motor Lines v. McIntyre, 157 F. Supp. 475 (M.D.N.C. 1957).

IV. PROCEDURE.

Discretion of Court. — Where, among other defenses to an action, the defendant pleads accord and satisfaction, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal. McAuley v. Sloan, 173 N.C. 80, 91 S.E. 701 (1917).

Landlord and Cropper. — Where the cropper sues for damages arising from the breach by the landlord of his contract in several particulars, and there is evidence on the trial of full accord and satisfaction between them, the submission of the one issue as to the compromise and settlement

will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights. Walker v. Burt, 182 N.C. 325, 109 S.E. 43 (1921).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice. — The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise. (1961, c. 212.)

Editor's Note.—For comment on effect of release given tort-feasor causing initial injury in later action for malpractice against treating physician, see 40 N.C.L. Rev. 88 (1961). For comment on aggravation of injury by treating physicians, see 2 Wake Forest Intra. L. Rev. 91 (1966).

For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

Section does not violate N.C. Const., Art. I, § 1. Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965).

§ 1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.— In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident. (1967, c. 662, s. 1.)

Editor's Note.—Session Laws 1967, c. 662, s. 3, provides that the act shall become effective July 1, 1967, and shall apply to claims and causes of action arising after said date.

§ 1-541: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68 of the Rules of Civil Procedure (§ 1A-1).

§ 1-542: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 68 of the Rules of Civil Procedure (§ 1A-1).

§ 1-543: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Article 44A.

Tender.

§ 1-543.1. Service of order of tender; return.— In all matters in which it is proper or necessary to make or serve a tender, the clerk of the superior court in the county in which the tender is to be made shall, upon request of the tendering party, direct the sheriff of said county to serve an order of tender, together with the property to be tendered, upon the party or parties upon whom said tender is to be made. In the event said property is incapable of being manually tendered, said order of tender shall so state and service of said order tendering same shall have the same legal effect as if the property had been manually tendered. Within five days after receipt of the order, the sheriff shall make his return thereon, showing upon whom the same was served, the date and hour of service, the property tendered, and whether or not said tender was accepted, or that, after due diligence, the party or parties upon whom service was to be made could not be found within the county. He shall then return said order of tender to the clerk who issued it, and this shall constitute proper tender. Nothing in this section shall be construed to prevent other methods of tender or tender by any party to an action in open court upon any other party to said action. (1965, c. 699.)

Article 45.

Arbitration and Award.

§ 1-544. Agreement for arbitration.—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract. (1927, c. 94, s. 1.)

Editor's Note. — This statute is a verbatim enactment of the Uniform Arbitration Act and North Carolina was among the first states to adopt it.

Provisions of Article Are Cumulative and Concurrent. — The statutory methods of arbitration provided by this article are to be regarded merely as constituting an enlargement on the common-law rule, and the provisions of this article are cumulative and concurrent rather than exclusive. Thomasville Chair Co. v. United Furniture Workers, 233 N.C. 46, 62 S.E.2d 535 (1950).

This article does not exclude the common-law remedy of arbitration, but is cumulative and concurrent thereto, and it does not prevent the parties to a controversy from contracting by parol to submit their differences to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute. Copney v. Parks, 212 N.C. 217, 193 S.E. 31 (1937).

The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

And Parties May Adopt Common-Law Method of Arbitration.—Where the method of arbitration adopted by the parties is in accordance with procedure at common law, and not with that prescribed in this article, plaintiff's motion to strike report of arbitrator must be considered in light of common law. Tarpley v. Arnold, 226 N.C. 679, 40 S.E.2d 33 (1946).

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by this article. Brown v. Moore, 229 N.C. 406, 50 S.E.2d 5 (1948).

Arbitrator Defined.—An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission (and this statute since its passage), and he must be incorrupt and impartial, and not exceed or fall short of his

duty, and if he acts otherwise, his award may be set aside. Crisp v. Love, 65 N.C. 126 (1871).

Applicability to Agreement Respecting Future Controversies. — It seems that this section does not apply to contracts to arbitrate future controversies since it is expressly limited to controversies existing at the time of the agreement, and that the law as to future disputes remains as it was prior to the statute. If this be the proper construction then future contracts to arbitrate which classify as conditions precedent are valid but those classifying as collateral stipulations are invalid. The test applied to the contract is whether it ousts the court of jurisdiction over the contract generally; if it does, it is invalid. See Swaim v. Swaim, 14 N.C. 24 (1831). The cases in the following paragraphs discuss the rule and illustrate its application as to future disputes.

Courts have uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer. Kelly v. Trimont Lodge, No. 249, I.O.O.F., 154 N.C. 97, 69 S.E. 764 (1910), citing Pioneer Mfg. Co. v. Phoenix Assurance Co., 106 N.C. 28, 19 S.E. 1057 (1890). And in Braddy & Gaylord v. New York Bowery Fire Ins. Co., 115 N.C. 354, 20 S.E. 477 (1894), it is said that the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid. Nelson v. Atlantic Coast Line R.R., 157 N.C. 194, 72 S.E. 998 (1911).

It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement. Nelson v. Atlantic Coast Line R.R. 157 N.C. 194, 72 S.E. 998 (1911).

Although an agreement to arbitrate the entire controversy is not enforceable, and prior to the award either party may revoke the agreement, if he fails to do so, and enters upon the arbitration, and an award is made, he is bound. Nelson v. Atlantic Coast Line R.R., 157 N.C. 194, 72 S.E. 998 (1911). See J.T. Williams & Bro. v. Branning Mfg. Co., 154 N.C. 205, 70 S.E. 290 (1911).

This article applies only to agreements to arbitrate controversies existing between the parties at the time of the execution of the agreement to adopt this method of settlement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

When a cause of action has arisen the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Contracts to submit future disputes to arbitration, and thus oust the jurisdiction of the courts, are invalid, and the courts will not specifically, or by indirection, compel performance of such contracts by refusing to entertain a suit until after arbitration. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Arbitration Pending Reference. — Where a cause has been referred, and pending the reference the parties agree to an arbitration and that the referee's conclusions of law should be based on the arbitrators' findings, the arbitration is not one submitted in accordance with this section and its provisions do not apply. Andrews v. Jordan, 205 N.C. 618, 172 S.E. 319 (1934).

Arbitration as Matter of Contract. — It will be observed that this statute makes the right of arbitration a matter of contract; and it is only by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect for it has been held uniformly in this State that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. Sprinkle v. Sprinkle, 159 N.C. 81, 74 S.E. 739 (1912).

The agreement of the parties to arbitrate is a contract. The relation of the parties is contractual. Their rights and liabilities are controlled by the law of contract. A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate. In an action on the contract the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by

refusing to entertain the suit until after arbitration is had under the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

The fact that disputed provisions of a collective labor contract have been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages one of arbitration and award under the Uniform Arbitration Act. Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in § 95-36.1 et seq., preclude maintenance of an action by the employee for such accounting. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

At any time before an arbitration award is rendered under the contract, either party may elect to breach his contract and seek his remedy in the tribunal provided by law. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

It would be contradictory and unwise to hold that a contract to arbitrate future disputes is void and unenforceable as being against public policy, and at the same time hold that a breach of the same contract would give rise to an action for damages. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Controversies involving the right or title to real estate, under the later common law, could be submitted to arbitration provided the submission was in writing. Oral submissions were invalid because they fell within the statute of frauds. This was the law of this State prior to this statute (see Crissman v. Crissman, 27 N.C. 498 (1845); Fort v. Allen, 110 N.C. 183, 14 S.E. 685 (1892)); and it would seem that this statute, since it requires a written submission, would extend to all disputes existing, including those involving title to land.

Sufficiency of Contract. — Since under this statute the submission of a dispute to arbitration is a contract, it is but reasonable to suppose that such contracts must have all the elements necessary to a binding contract. See the general discussion in 5 C.J. [§ 15 et seq.] 23.

The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See Mayo v. Gardner, 49 N.C. 359 (1857).

Who May Make Contract. — This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this section it was held under the common-law practice that the attorneys might make such an agreement and this without the consent of the clients (Millsaps v. Estes, 134 N.C. 486, 46 S.E. 988 (1904)); it would seem that a party could have made the contract by agent in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word in legal terminology and that about the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see § 28-111, and McLeod v. Graham, 132 N.C. 473, 43 S.E. 935 (1903)), trustees, guardians and other representatives may no doubt represent the estates or their wards, cestui que trusts, etc., in this capacity.

It was held prior to this section, following the ordinary rule of contracts, that an agreement made by an infant was voidable. It was also held that a guardian ad litem could not bind the infant by a submission to arbitration, even though the submission was made the rule of the court. Millsaps v. Estes, 137 N.C. 535, 50 S.E. 227 (1905).

Necessity of Controversy Being Litigated.—It is not necessary, it would seem, that the controversy be pending in a court before it can be arbitrated, for any existing controversy might be arbitrated. See Parrish v. Strickland, 52 N.C. 504 (1860). A cause that is pending may be arbitrated (see Islay v. Steward, 20 N.C. 297 (1838)), this was true at common law and under all the statutes, it would seem, unless the contrary is expressly provided for. See 5 C.J., p. 26, §§ 22-24.

Necessity for Writing. — Prior to this article, the necessity of the agreement being in writing depended upon the law of general contracts so that some of such contracts had to be in writing and others did not, depending upon whether they fell within the statute. See Crissman v. Crissman, 27 N.C. 498 (1845); Fort v. Allen, 110 N.C. 183, 14 S.E. 685 (1892).

Power to Revoke.—Since the word "submission" means to agree to refer the matter in dispute (see Words and Phrases, title "Submission" and see 56 C.J. [§ 19] p. 21), this section denies the right to revoke a contract to submit an existing controversy to arbitration after it is once made. It changes the prior rule in this State which permitted a revocation by either party at any time before the rendition of the award [for prior law, see J.T. Williams & Bro. v. Branning Mfg. Co., 153 N.C. 7, 68 S.E. 902 (1910); Long v. Cromer, 181 N.C. 354, 107 S.E. 217 (1921)], or thereafter, even when it has been made a rule of the court, with the consent of the judge

(see Tyson v. Robinson, 25 N.C. 333 (1843), for the prior law).

Effect of Death of Party.—While prior to this article the death of one of the parties before the award automatically revoked the contract to arbitrate (see Whitfield v. Whitfield, 30 N.C. 163 (1847); J.T. Williams & Bro. v. Branning Mfg. Co., 153 N.C. 7, 68 S.E. 902 (1910)) this section changes the rule so that now the effect of such death upon contract is the same as it is upon an ordinary contract.

Notice to Arbitrators of Appointment.—See note under § 1-547.

Cited in In re Estate of Reynolds, 221 N.C. 449, 20 S.E.2d 348 (1942).

§ 1-545. Statement of questions in controversy.—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based. (1927, c. 94, s. 2.)

§ 1-546. "Court" defined.—The term "court" when used in this article means a court having jurisdiction of the parties and of the subject matter. (1927, c. 94, s. 3.)

§ 1-547. Cases where court may appoint arbitrator; number of arbitrators.—Upon the application in writing of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(1) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(2) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(3) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate. (1927, c. 94, s. 4.)

Notice of Appointment to Arbitrators.—There was no necessity that the arbitrators under the former law be informed of their appointment by a formal or written notice. It was sufficient if they were appointed, met and made an award. Allison v. Bryson, 65 N.C. 44 (1871).

§ 1-548. Application in writing; hearing.—Any application made under authority of this article shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions, except as otherwise herein expressly provided. (1927, c. 94, s. 5.)

§ 1-549. Notice of time and place of hearing.—The arbitrators shall appoint a time and place for the hearing, and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award. (1927, c. 94, s. 6.)

Former Law. — It may be stated as a general rule that the parties had a right to a notice of the time and place of hearing if the judgment of the arbitrators may have been influenced or enlightened by evidence. Grimes v. Brown, 113 N.C. 154, 18 S.E. 87 (1893). This probably extended to adjourned meetings, except that no notice of a final meeting to make up and sign the award was ever necessary. Zell v. Johnston, 76 N.C. 302 (1877); 5 C.J. [§ 181], 87.

Right to Notice.—A party to an arbitration agreement has the right, both at common law and by this section, to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the superior court. Grimes v. Homes Ins. Co., 217 N.C. 259, 7 S.E.2d 557 (1940).

§ 1-550. Hearing if party fails to appear.—If any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. (1927, c. 94, s. 7.)

§ 1-551. Award within sixty days.—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing. (1927, c. 94, s. 8.)

Provisions Subject to Waiver. — Where hearings are held before the arbitrators more than sixty days after the submission to arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of this section being subject to waiver, and the award as rendered is binding on the parties. Andrews v. Jordan, 205 N.C. 618, 172 S.E. 319 (1934).

"Making" and "Delivery" of Award Distinguished.—The Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. Poe & Sons v. University of N.C., 248 N.C. 617, 104 S.E.2d 189 (1958).

§ 1-552. Representation before arbitrators.—No one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney at law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration. (1927, c. 94, s. 9.)

§ 1-553. Requirement of attendance of witnesses.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence. The fees for such attendance shall be the same as the fees of witnesses in the superior court.

Subpoenas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this State; if any person so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. (1927, c. 94, s. 10.)

Cross Reference.—See §§ 6-52 and 6-55.

Editor's Note.—At common law the arbitrators could not of themselves compel the attendance of witnesses. And where they heard evidence they were not compelled to administer oaths, though they could do so. McCrae v. Robeson, 6 N.C. 127 (1812). The mode of hearing testimony must have been fair and impartial to the parties. See Pierce v. Perkins, 17 N.C. 250 (1832); Hurdle v. Stallings, 109 N.C. 6, 13 S.E. 720 (1891).

§ 1-554. Depositions.—Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this State. (1927, c. 94, s. 11.)

§ 1-555. Orders for preservation of property. — At any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. (1927, c. 94, s. 12.)

§ 1-556. Questions of law submitted to court; form of award.—The arbitrators may, on their own motion, and shall by request of a party to the arbitration,

(1) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award;

(2) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing. (1927, c. 94, s. 13.)

§ 1-557. Award in writing and signed by arbitrators.—The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay. (1927, c. 94, s. 14.)

Necessity for Writing under Prior Law.—It would seem that under the prior law the award need be in writing only when required by the agreement or come within the general statutes of fraud. See Crissman v. Crissman, 27 N.C. 498 (1845); Gaylord v. Gaylord, 48 N.C. 368 (1856). See also 5 C.J. [§ 262] 114.

Signature of Arbitrators.—In order for an award to have been available, as evidence under the prior law, it was necessary that it be signed by the arbitrators. Morrison v. Russell, 32 N.C. 273 (1849). The signature by persons other than the arbitrators has been held not to vitiate the award when it is properly signed by a majority of the arbitrators. Carter v. Sams, 20 N.C. 321 (1838).

Dealing with All Matters Submitted.—It has always been necessary for arbitrators to pass on all the points particularly referred to them, Osborne v. Calvart, 83 N.C. 365 (1880); otherwise the award was entirely void. But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. Walker v. Walker, 60 N.C. 255 (1864).

The award on its face ought to show that the arbitrators have acted upon all the matters submitted. Crisp v. Love, 65 N.C. 126 (1871).

Matters Not Submitted.—Matters passed on by the arbitrators not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. Robertson v. Marshall, 155 N.C. 167, 71 S.E. 67 (1911). The power of the arbitrators is derived from the submission and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. Cullifer v. Gilliam, 31 N.C. 126 (1848); Cutler v. Cutler, 169 N.C. 482, 86 S.E. 301 (1915).

However, if the decision of submitted questions involved the decision of other questions not submitted, the decision of the latter was not error. Zell v. Johnston, 76 N.C. 302 (1877).

Copy and Delivery of Award. — Under the prior law it was not necessary, in the absence of agreement to that effect, that a copy of the award be given to the parties. All that was necessary was that the parties have notice of the award as by being present when it was agreed upon and signed. With full understanding as to its meaning a demand for a copy should have been made at the time of rendition if the parties wanted it. See Morrison v. Russell, 32 N.C. 273 (1849); Crawford v. Orr, 84 N.C. 246 (1881).

Form of Award.—There has never been any requirement in this State as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. Ball-Thrash Co. v. McCormack, 172 N.C. 677, 90 S.E. 916 (1916).

Award Liberally Construed.—Under the prior law it was held that the court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. Carter v. Sams, 20 N.C. 321 (1838).

"Making" and "Delivery" of Award Distinguished.—See note to § 1-551.

§ 1-558. Time for application for confirmation.—At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is vacated, modified, or corrected, as provided in §§ 1-559 and 1-560. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. (1927, c. 94, s. 15.)

§ 1-559. Order vacating award.—In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. (1927, c. 94, s. 16.)

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack on the ground that he exceeded his authority under a mistake of law and upon other grounds. Calvine Cotton Mills, Inc. v. Textile Workers Union, 238 N.C. 719, 79 S.E.2d 181 (1953).

§ 1-560. Order modifying or correcting award.—In any of the following cases the court shall, after notice and hearing make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(2) Where the arbitrators have awarded upon a matter not submitted to them.

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order must modify and correct the award, so as to effect the intent thereof. (1927, c. 94, s. 17.)

Cited in Calvine Cotton Mills, Inc. v. Textile Workers Union, 238 N.C. 719, 79 S.E.2d 181 (1953).

§ 1-561. Notice of motion to vacate, modify or correct award within three months.—Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (1927, c. 94, s. 18.)

§ 1-562. Judgment or decree entered.—Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. (1927, c. 94, s. 19.)

§ 1-563. Papers to be filed on motion relating to award.—The party moving for an order confirming, modifying, correcting or vacating an award, shall at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(1) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award.

(2) The award.

(3) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such an application.

The judgment or decree shall be entered (or docketed) as if it were rendered in an action. (1927, c. 94, s. 20.)

§ 1-564. Force and effect of judgment or decree.—The judgment or decree so entered (or docketed) shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered. (1927, c. 94, s. 21.)

§ 1-565. Appeal.—An appeal may be taken from the final judgment or decree entered by the court. (1927, c. 94, s. 22.)

Presumption on Appeal.—Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under this article, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. Bryson v. Higdon, 222 N.C. 17, 21 S.E.2d 836 (1942).

§ 1-566. Uniformity of interpretation; interpretation of article. — 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. (1927, c. 94, s. 23.)

§ 1-567. Citation of article.—This article may be cited as the Uniform Arbitration Act. (1927, c. 94, s. 24.)

Article 46.

Examination before Trial.

§ 1-568: Repealed by Session Laws 1951, c. 760, s. 2.

§ 1-568.1: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to depositions and discovery, see Rules 26 to 37 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-568.2 to 1-568.16: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ 1-568.17: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1. 1970.

Cross Reference.—As to written interrogatories, see Rule 33 of the Rules of Civil Procedure (§ 1A-1).

§ 1-568.18: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 37 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.19**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 37 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-568.20 to 1-568.22**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross References.—For provisions similar to those of repealed §§ 1-568.20 and 1-568.21, see Rule 30 of the Rules of Civil Procedure (§ 1A-1). As to motion to suppress deposition, see Rule 32 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.23**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 32 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.24**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to use of depositions, see Rule 26 of the Rules of Civil Procedure (§ 1A-1).

§ **1-568.25**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—For provisions similar to those of the repealed section, see Rule 26 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-568.26, 1-568.27**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§§ **1-569 to 1-576**: Repealed by Session Laws 1951, c. 760, s. 2.

ARTICLE 47.

Motions and Orders.

§ **1-577**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

§ **1-578**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — As to motions generally, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

§§ **1-579 to 1-584**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 48.

Notices.

§ **1-585**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-586**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-587**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-588**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1).

§ **1-589**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference. — For provisions similar to those of the repealed section, see Rule 45 of the Rules of Civil Procedure (§ 1A-1).

§ **1-589.1. Withholding information necessary for service on law-enforcement officer prohibited.** — When service of subpoena, or any other court process, is sought upon any law-enforcement officer of the State or of any political subdivision thereof pursuant to the provisions of G.S. 1-589, or of any other statute, it shall be unlawful for any officer or employee of the agency by whom the officer sought to be served is employed willfully to withhold the address or telephone number of the officer sought to be served with subpoena or other process. (1967, c. 456.)

§§ **1-590, 1-591**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

Cross Reference.—As to service of subpoena, see Rule 45 of the Rules of Civil Procedure (§ 1A-1).

§ **1-592**: Repealed by Session Laws 1967, c. 954, s. 4, effective January 1, 1970.

ARTICLE 49.

Time.

§ **1-593. How computed.**—The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6 (a) of the Rules of Civil Procedure. (C. C. P., s. 348; Code, s. 596; Rev., s. 887; C. S., s. 922; 1957, c. 141; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment substituted "in the manner prescribed by Rule 6 (a) of the Rules of Civil Procedure" for "by excluding the first and including the last day," and deleted the former last sentence which read, "If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

§ **1-594. Computation in publication.**—The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication. (C. C. P., s. 359; Code, s. 602; Rev., s. 888; C. S., s. 923.)

Article 50.

General Provisions as to Legal Advertising.

§ 1-595. Advertisement of public sales. — When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C. S., s. 924.)

Notice of Sale under Mortgage.—Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the superior court for an advertisement for thirty consecutive days was erroneous. Raleigh Sav. Bank & Trust Co. v. Leach, 169 N.C. 706, 86 S.E. 701 (1915).

Burden of Proof. — However, the presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden of showing such failure is on the person setting it up. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

§ 1-596. Charges for legal advertising.—The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C. S., s. 2586; 1945, c. 635; 1949, c. 205, s. 1½.)

Local Modification.—Nash: 1949, c. 205, s. 2.

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc. — Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a news-

paper otherwise meeting the qualifications and having the characteristics prescribed by §§ 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of §§ 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of §§ 1-597 to 1-599. This provision shall be retroactive to May first, one thousand nine hundred and forty, and all publications, advertisements and notices published in accordance with this provision since May first, one thousand nine hundred and forty, are hereby validated.

Notwithstanding the provisions of G.S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice of any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same judicial district; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section. (1939, c. 170, s. 1; 1941, c. 96; 1959, c. 350.)

Notice Ineffective Unless Published as Provided in This Section.—Under this section, the publication of a notice of sale under a power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation within the county where the land to be sold is located to subscribers who have actually paid the subscription price therefor. Jones v. Percy, 237 N.C. 239, 74 S.E.2d 700 (1953).

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

§ 1-598. Sworn statement prima facie evidence of qualification; affidavit of publication.—Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of § 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by § 1-597, such sworn written statement shall be received in all courts in this State as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of § 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named

was at the time stated therein a qualified newspaper within the meaning of § 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of § 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of § 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of § 1-597. (1939, c. 170, s. 1½; 1947, c. 213, ss. 1, 2.)

§ 1-599. Application of two preceding sections.—The provisions of §§ 1-597 to 1-599 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by § 1-597; nor shall the provisions of §§ 1-597 to 1-599 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed by § 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49.)

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.—(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2; 1957, c. 204.)

Chapter 1A.

Rules of Civil Procedure.

Effective Date. — Section 10 of c. 954, Session Laws 1967, as amended by Session Laws 1969, c. 803, makes this chapter effective Jan. 1, 1970.

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§ 1A-1. Rules of Civil Procedure.—The Rules of Civil Procedure are as follows:

Editor's Note.—Chapter 1A of the General Statutes was added by c. 954, Session Laws 1967. Sections 5, 6 and 7 of c. 954 read as follows:

Sec. 5. All those portions of chapter 1 of the General Statutes of North Carolina not repealed by this act, not amended by this act, or not in conflict with this act, are hereby reenacted.

Sec. 6. All provisions of the General Statutes of North Carolina which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

Sec. 7. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, to read as follows: "*Sec. 10.* This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after date."

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1.)

Comment. — This rule gives literal expression to the scope of intended application, but that scope can be appreciated only by a consideration of the rules themselves and the new jurisdiction statute (§ 1-75.1 et seq.), the statutes left undisturbed by Session Laws 1967, c. 954, the statutes amended in s. 3 of c. 954, and those statutes repealed in s. 4 of c. 954. In general it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1.

Rule 2. One form of action.

There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action. (1967, c. 954, s. 1.)

Comment. — This rule, drawn substantially without change from North Carolina Const., Art. IV, § 1, and from former § 1-9, preserves the fundamental reform of 1868, providing for the abolition of the forms of action and for the fusion of law and equity.

Editor's Note.—The cases cited in the following note were decided under former § 1-9.

Effect upon Substantive Law—Torts.—Although there is but one form of action, there are torts and contracts just as there were prior to the Code of Civil Procedure, but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bitting v. Thaxton, 72 N.C. 541 (1875).

Same—Legal and Equitable Principles.—Although one tribunal deals out both law and equity, the principles of law and equity

remain separate and distinct, and it is just as important now as ever before to keep them separate. Jordan v. Lanier, 73 N.C. 90 (1875). See Kiff v. Weaver, 94 N.C. 274 (1886).

Nature of Defense Immaterial.—Any defense, either legal or equitable, may be set up by the defendant in an action by the endorsee upon a nonnegotiable note. Thompson v. Osborne, 152 N.C. 408, 67 S.E. 1029 (1910).

Common-Law Forms Immaterial.—Since the old technical distinctions in the forms of actions were abolished by former § 1-9, it is immaterial whether the plaintiff's remedy under the old practice was trespass or case. Sneeden v. Harris, 109 N.C. 349, 13 S.E. 920 (1891).

An exception to a complaint that it was for money had and received and as such could not be maintained unless the money had been actually received by the defendant was not maintainable under former § 1-9, regardless of the common-law practice. Staton v. Webb, 137 N.C. 35, 49 S.E. 55 (1904).

The plaintiff can file his complaint, alleging a legal cause of action or an equitable cause of action, or can combine them as he may elect. Wilson v. Waldo, 221 F. 505 (W.D.N.C. 1915).

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate. (1967, c. 954, s. 1.)

Comment. — Any system of procedure must provide an easily identifiable moment in time when it is possible definitely to say that an action has been "commenced." Under prior practice, former §§ 1-14 and 1-88 combined to say that in most cases an action was commenced with the issuance of summons. The exceptions related to actions in which service of summons was made by publication or was made outside the State pursuant to former §§ 1-98 and 1-104. In those cases, actions were deemed commenced when the affidavit required by these sections was filed. Under the federal rules, an action is commenced with the filing of a complaint with the court.

As can be seen, the General Statutes Commission preferred for the usual case the federal rule. The Commission did so because it wished to take away the special consideration then accorded out-of-state defendants. But more importantly the Commission wished to remove a potential trap for an unwary plaintiff in a North Carolina federal court. A recent case in the Eastern District is illustrative. A plaintiff filed a complaint in the federal court for wrongful death five days before the statute of limitations had run. Because of a failure to post the required bond, summons was not issued until over a month later. The defendant moved to dismiss, relying on the statute. The plaintiff, of course, was relying on the federal rule as he was plainly in time if that rule applied. But the federal court quite properly held that the federal rule did not apply and that North Carolina practice as to when an action was commenced would govern. Thus the action was dismissed. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962). The court was faithfully following the United States Supreme Court's decision in Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) and its progeny, particularly Ragan v. Merchants Transf. & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949).

The basic notion of the Rios and Ragan cases is that a federal court, irrespective of the federal rules, cannot give to a claim in a diversity action a "longer life . . . than it would have had in the state court . . ." While one may sympathize with the plaintiff in the Rios case in his reliance on the federal rule, still it is clear that his reliance was misplaced. The trap which ensnared him would exist so long as the federal and State practices varied. The Commission believed this variance should be eliminated.

The Commission was not unmindful of the fact that there may be emergencies in which there is no time to prepare a complaint. To take care of these situations, the Commission incorporated in the second paragraph the essence of the first part of former § 1-121, allowing the commencement of an action by the issuance of a summons on application for permission to delay filing of a complaint and an appropriate order by the clerk.

It will be observed that the Commission did not at this point make any provision for discovery prior to filing a complaint. That problem is dealt with in Rule 27 (b) which provides in appropriate cases for discovery without action.

The second sentence of the first paragraph provides the same method formerly provided by § 1-88.1 for making a prima facie case in respect to the date of filing of the complaint. Rule 4 (a) makes that method available also in respect to the date of issuance of a summons.

Editor's Note.—For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For case law survey as to statute of limitations, see 44 N.C.L. Rev. 906 (1966).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1. For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46.

As to meaning of word "issue" in relation to summons as affecting commencement of actions, see Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968), decided under former § 1-88.

Issuance Does Not Confer Jurisdiction.—If there has been no service of summons and no waiver by appearance, the court has no jurisdiction, and any judgment rendered would be void. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

But Personal Service, Acceptance of Service, or Voluntary Appearance Gives Jurisdiction.—When the defendant has been duly served with summons personally within the State, or has accepted service or has voluntarily appeared in court, jurisdiction over the person exists, and the court may proceed to render a personal judgment against the defendant. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

When Summons Sufficient to Confer Jurisdiction.—To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as nonjurisdictional irregularities, subject to amendment. If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

The issuance of a summons is not a judicial act which must be performed by the clerk in person, but rather it is a ministerial act which may be done in his name by a deputy. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

Conflict of Laws.—In an action in a United States district court in North Carolina for wrongful death under the Louisiana wrongful death statute, the procedural law of North Carolina and not the Federal Rules of Civil Procedure determined when the action was commenced. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962), decided under former § 1-14.

Rule 4. Process.

(a) *Summons—issuance; who may serve.*—Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this

State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons—contents.*—The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff.

(c) *Summons—return.*—Personal service or substituted personal service of summons as prescribed by Rule 4 (j) (1) a and b, must be made within 30 days after the date of the issuance of summons, except that in tax and assessment foreclosures under G.S. 105-391 or G.S. 105-414 the time allowed for service is 60 days. But failure to make service within the time allowed shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons—extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 105-391 and G.S. 105-414, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons—discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4 (d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the ac-

tion shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons—date of multiple summonses.*—If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4 (a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4 (d).

(g) *Summons—docketing by clerk.*—The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or nonservice.

(h) *Summons—when proper officer not available.*—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(i) *Summons—amendment.*—At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

(1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(2) Natural Person Under Disability.—Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is

under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State.—Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.

(4) An Agency of the State.—

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney in fact authorized by appointment or by statute to be served or to accept service in its behalf.

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

(6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute.

(7) Partnerships.—Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney in fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf or by leaving copies thereof in the office of such general partner, attorney in fact or agent with the person who is apparently in charge of the office.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers.—Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found Within State.—Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:

a. Personal service outside State.—Personal service may be made on any party outside this State by anyone authorized by section (a) of this rule and in the manner prescribed in this section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G.S. 1-75.10 (1).

b. Registered mail.—Any party subject to service of process under this subsection (9) may be served by mailing a copy of the

summons and complaint, registered mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.

c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a county in the same judicial district, once a week for three successive weeks. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10 (2) and the circumstances warranting the use of service by publication.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading, within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date

when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (vii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA
..... COUNTY
In the ..... Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that A pleading seeking relief against you (has been filed) (is required to be filed not later than ....., 19....) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.)

You are required to make defense to such pleading not later than (....., 19....) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ..... day of ....., 19.....

..... (Attorney) (Party)
..... (Address)

d. Alternative provisions for service in a foreign country.—Where service under this subsection (9) is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (iii) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer or a managing or general agent; or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (v) as directed by order of the court. Service under (iii) or (v) may be made by any person authorized by section (a) of this rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, the order of the court or paragraph b hereof, in which case there shall be included an affidavit or certificate of addressing and mailing by the clerk of the court, or by the law of the foreign country.

e. Attack on judgment by default.—No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence, under some other subsection of this section (j) or under a different paragraph of this subsection (9).

(k) *Process—manner of service to exercise jurisdiction in rem or quasi in rem.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi

in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known.—If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j).

(2) Defendant Unknown.—If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4.)

Comment. — Preliminarily, it should be remarked that this rule is complementary to the jurisdiction statute (§ 1-75.1 et seq.) which the General Statutes Commission proposed for consideration contemporaneously with these rules. Both the statute and this rule are designed to take full advantage of the fairly recent developments in the law of jurisdiction. Generally, the statute prescribes the occasions on which North Carolina courts may exercise jurisdiction or, in other words, the grounds of jurisdiction. This rule, on the other hand, deals with the manner in which jurisdiction is exercised or asserted.

Section (a).—This section contemplates a continuance of the present practice of ordinarily having summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons.

The first two sentences avoid any suggestion that the clerk shall personally deliver the summons to a process officer. North Carolina has operated successfully heretofore under language similar to that in the section and presumably will continue to be able to do so. The words "be issued" are inserted in lieu of the word "issue" for consistency.

Since under section (b) the summons is to be directed to the defendant rather than to a process officer, it is incumbent on the plaintiff to select the appropriate process officer. It will further be observed that no change is made as to who is a process officer in North Carolina.

For service outside the State, it seemed that the Commission might safely rely on the law of the place where service is attempted. Thus, in New York, where private service of process is permissible, a North Carolina plaintiff could employ a private person to serve process.

It should be noticed that no formalities of any kind are necessary to authorize service anywhere, in or out of the State.

Section (b).—The Commission has mentioned already the principal change in the content of the summons; that is, that it shall be directed to the defendant rather than to a process officer. This makes it possible for one version of the summons to suffice wherever it is served, whether in this State or beyond its bounds. Service, however, must still be made by a proper person as defined by section (a).

Other changes are minor. The Commission abandoned the requirement contained in former § 1-89 that summons operative outside the county of issuance bear the seal of the issuing court. The Commission added specific requirements that summons bear the title of the action, the name of the issuing court, and the name and address of the plaintiff's attorney or, if there is no attorney, the name and address of the plaintiff.

Section (c). — The provisions for the return of summons are the same as those now prescribed except that the Commission extended the time in which a summons may be served to thirty (30) days whereas former § 1-89 prescribed a period of only twenty (20) days. The Commission entertained some question of whether or not the period for service might be still further enlarged but in any event it agreed that it would serve the interest of convenience for the summons to retain its full effectiveness for at least thirty (30) days. Thereby, the unnecessary exertion of securing an alias or pluries summons can frequently be avoided.

Section (d).—This section preserves unchanged the essence of former § 1-95. Alternative methods, either endorsement or the issuance of alias or pluries summons, are provided for continuing the life of an action after the time for service of summons has expired. The same time limits for securing the endorsement or alias or pluries summons are prescribed and the special treatment accorded tax suits is retained.

Section (e).—This section is similar to former § 1-96. Accordingly, an action will be discontinued under the new rules just as formerly. It will be observed that while under Rule 3 the commencement of an action is ordinarily tied to the filing of a complaint, the discontinuance of an action is tied to the failure in apt time to secure an endorsement or an alias or pluries summons. Further, it will be observed that in

the special case of an action in which endorsement or the issuance of an alias or pluries summons is secured after the ninety (90) day period, in that case the action will be deemed commenced with the endorsement or the issuance of summons rather than with the filing of a complaint.

Section (f).—Self-explanatory.

Section (g).—Self-explanatory.

Section (h).—This section deals with the problem of the proper person to make service when for stated reasons action by the sheriff in a particular county may not be satisfactory. Formerly, § 1-91 provided for service by the sheriff of an adjoining county when there was not in the county where service was expected to be made a "proper officer" for service or in the case where a sheriff "neglects or refuses" to make service. Section 152-8 empowers the coroner when there is no person "qualified to act as sheriff" to execute all process. While the Commission proposed to leave § 152-8 in effect (§ 1-91 is repealed) it believed that the problem could be taken care of generally by the simple provisions of this section. The procedure outlined by the section does not differ in kind from that prescribed by § 152-8 when the coroner is interested in any action.

Section (i). — This section, in terms, does not provide for any greater liberality of amendment than did former § 1-163, which authorized the court to "amend any . . . process . . . by correcting a mistake in the name of a party, or a mistake in any other respect. . . ." But is does direct attention to what in the Commission's judgment should be the controlling factor: Is there material prejudice to substantial rights?

Section (j).—Some substantial changes were proposed in respect to the manner of service to exercise personal jurisdiction and they cannot be fully understood without considering the jurisdiction statute (§ 1-75.1 et seq.) and the ideas advanced in the commentary thereto. But it perhaps bears emphasis that in the vast majority of cases service is accomplished just as it then was; that is, by a sheriff or his deputy personally delivering a copy of the summons to the defendant and to an officer, director, managing agent or process agent when a partnership or corporation is the defendant.

Subsection (1) a.—This deals with natural persons except those under a disability. As indicated above, the normal procedure, when service is made within this State, will be delivery of summons and complaint to the defendant personally by the sheriff or other proper person as defined in section (a). When service is made outside the State, then service will be accomplished on delivery to the defendant personally of a copy of the summons and complaint by one authorized to serve process under the law of the place of service. Thus, if grounds exist under the jurisdiction statute (§ 1-75.1 et seq.) for the exercise or jurisdiction by a court of this State and if the defendant is in New York, since New York permits service by anyone over 18 years of age, the summons and complaint can be effectively served in New York by such a person. In the familiar case of the nonresident motorist, for example, the plaintiff's lawyer would simply place the summons and complaint in the hands of a New York process server. No special prayer for permission to make service in this manner is required nor is there any requirement that service be made on any functionary in North Carolina.

Subsection (1) b.—Here there is limited authorization for substituted service. While no permission of the court is required for resort to this type of service, it cannot be overemphasized that this type of service is available only when service cannot "with reasonable diligence" be made under paragraph a. A party would thus, if at all possible, prefer to effect service under paragraph a. If he does not, he faces the hazard in those cases where the defendant makes no appearance that a court will later find that service could "with reasonable diligence" have been made under paragraph a and the voiding of any judgment obtained. But although a party is faced with some uncertainty when he resorts to paragraph b, he surely would prefer this uncertainty to not being able to sue at all. Nor, in the absence of the defendant, is it possible altogether to relieve the uncertainty.

Subsection (1) c.—This is a continuation of the basic theme of giving the best notice to a defendant consistent with "reasonable diligence." If service may not be had under either paragraph a or paragraph b, then resort may be had to publication and mailing. Again, it is not necessary to have the court's permission for such service, but there must be filed with the court an affidavit that the defendant cannot be served under paragraphs a or b.

It will be observed that the defendant has until forty days after publication of the notice to answer. This will be the controlling time regulation, irrespective of Rule 12 (a). The action will have com-

menced, of course, with the filing of the complaint.

Subsection (1) d.—Self-explanatory.

Subsection (2). — This subsection attempts to insure that a person under disability and anyone who may have custody of such person shall both be served except in the case of a minor 14 years of age and older. Paragraph b is an attempt to alleviate the situation where there is an unknown guardian. This section requires of the plaintiff what current decisions of the Supreme Court of the United States do. See Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956).

Subsection (3).—Self-explanatory.

Subsection (4).—The Commission here proposed that State agencies be required to appoint process agents. The utility of this requirement is obvious. The definition of the term "agency of the State" gave the Commission some difficulty but the Commission believes the definition arrived at is a workable one.

Subsection (5). — Only paragraph d would seem to require comment. Isolated cases had been reported to the Commission where such a provision would be useful.

Subsection (6). — It should be emphasized that this subsection, along with the rest of this rule, is to be read in conjunction with the jurisdiction statute (§ 1-75.1 et seq.). Here we are dealing only with the manner of asserting jurisdiction. Service of a corporate officer within this State or elsewhere will not suffice to give jurisdiction unless there is a ground for jurisdiction as specified by the jurisdiction statute.

Paragraphs c and d in essence make available all present methods of obtaining service.

Subsection (7).—Self-explanatory.

Subsection (8). — It perhaps should be said here that this subsection does not deal in any way with the problem of capacity to be sued.

Section (k).—Here it will be seen that for in rem jurisdiction, as well as for in personam jurisdiction, the Commission proposed the best notice possible to the defendant consistent with "reasonable diligence." Thus, personal service is required where reasonably possible. If it is not reasonably possible, then substituted service may be resorted to. If substituted service is not possible, then service by publication may be had.

Same—1969 amendment.—These amendments are designed to simplify service of process, especially substituted service upon parties outside this State.

Section (a).—Personal service outside the State is generally made by someone authorized by the law of the place where service is made. This section now also permits service outside the State to be made by anyone not a party and not less than 21 years of age. Sometimes a party (or his attorney) will find it more convenient to make service himself or through an agent rather than to employ a foreign process server. The option is given, since there is no constitutional impediment. It should be exercised with discretion, however, since the word of a disinterested official would probably be given more credence in a dispute as to whether service was validly made.

Section (j).—This section, which governs the specific manner in which service upon a party is to be made, has been substantially amended with respect to substituted service upon parties outside this State. The section is divided into eight subsections, each of which details the manner of service upon a particular type of party. A new ninth subsection governs all service outside this State.

Subsection (1)a.—A process server is no longer required to make a diligent effort to serve a natural person personally. If the party is not at home, copies of the summons and the complaint may be left at his abode with some person of suitable age and discretion then residing therein.

Subsection (1)b.—This subsection now provides that a party or his agent may alternatively be served in any manner specified by any statute.

Subsection (2).—The exception to this subsection for a minor 14 years of age or older has been excised. Thus, all minors are persons under disability for purposes of the subsection.

Subsection (6)b.—This subsection now provides that a corporation or its agent may alternatively be served in a manner specified by any statute.

Subsection (8)b.—See comment to subsection (6)b.

Subsection (9).—This subsection governs all service of process upon parties not inhabitant of or found within this State or which cannot otherwise be diligently served within this State. Such parties may, at the option of the party seeking to make service, be served personally outside this State, as provided in paragraph a, or be served by registered mail as provided in paragraph b. If the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to

serve the party personally or by registered mail, the party may alternatively be served by publication as provided in paragraph c. When service is to be made in a foreign country, the alternative provisions of paragraph d may be employed. Except as provided in paragraph d, permission of the court to make service outside this State is never required.

Subsection (9)a.—Personal service outside this State is to be made in the same way as personal service within this State. Before judgment by default may be had on such service, the party seeking the judgment must file an affadavit with the court containing proof of such service and showing the circumstances warranting its usage.

Subsection (9)b.—This paragraph replaces, in effect, the service provisions of the now repealed nonresident motor vehicles act. It applies, however, to all parties and not just to nonresident motor vehicle tort-feasors. Copies of the summons and the complaint are to be sent registered mail, return receipt requested, directly to the party to be served, and not to any state official or other intermediatery. Service by registered mail is not effected unless the letter is actually delivered to the party. Ordinarily, proof of delivery will be the signed returned receipt itself. Any other evidence of actual delivery is also acceptable. If the mailing is returned stamped "delivery refused," "letter unclaimed," "addressee unknown at the address," or "addressee moved and left no forwarding address," service has not been effected. Before judgment by default may be had on such service, the party seeking the judgment must file with the court an affidavit containing proof of such service and showing the circumstances warranting its usage.

Subsection (9)c.—The mechanics of service by publication have not been substantially changed. The notice is to be published in a newspaper that is qualified for legal advertising in accordance with N.C. G.S. §§ 1-579, 1-598 and is published in the county where the action is pending. If no newspaper in the county qualifies, a qualified newspaper in an adjoining county or the same judicial district may be chosen. If the party's address is known or can with reasonable diligence be ascertained, a copy of the published notice is to be mailed to him. Upon completion of the publication, an affidavit containing proof of such service and showing the circumstances warranting its usage is to be filed with the court.

Subsection (9)d.—This paragraph establishes alternative procedures when service is to be made in a foreign country. It is based upon rule 4(i) of the Federal Rules of Civil Procedure, which is itself drawn from Section 2.01 of the Uniform Interstate and International Procedure Act. Under this paragraph one may enlist the assistance of a foreign government and its laws in making service on a defendant found within its territory, in order to insure the validity of the service and to avoid any objection by the foreign government that efforts to make service there constitute an encroachment on its sovereignty.

Subsection (9)e.—This paragraph prohibits a direct or collateral attack upon a default judgment obtained after service under this subsection (9) on the grounds that the subsection, or any other provision of section (j), required a different method of substituted or personal service. Since the various methods of substituted service provided for are all reasonably calculated to give notice of the pendency of the action, a party is not constitutionally entitled to be served under one rather than another, even though the statute itself so requires. Thus, to challenge an incorrect choice of a method of service under the statute, the party must appear in the action before judgment by default is rendered. Otherwise, the error is waived. Since this paragraph does not seek to bar constitutional objections to the service of process, it should be accorded full faith and credit by other states.

Editor's Note. — The 1969 amendment substituted "made" for "attempted" in the third sentence and rewrote the fourth sentence of section (a) and rewrote subsections (1), (2), (6), (7) and (8) and added subsection (9) of section (j).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

It was held in McGuire v. Montvale Lumber Co., 190 N.C. 806, 131 S.E. 274 (1925), that the word "may" as used in former § 1-95, preserved in section (d) of this rule, means "must." The case further states that "the true office of an alias summons is to continue the action referable to its original date of institution, when the first

'summons issued had not been served," and cites Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907); Powell v. Dail, 172 N.C. 261, 90 S.E. 194 (1916). See Green v. Chrismon, 223 N.C. 723, 28 S.E.2d 215 (1943).

The cases cited in this note were decided under former §§ 1-14, 1-65, 1-88, 1-88.1, 1-89, 1-94, 1-95 and 1-96.

For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46.

Requirements of Due Process. — Due process of law requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Purpose of Service of Summons.—The purpose of service of summons is to give notice to the party against whom the proceedings or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959), citing Jester v. Baltimore Steam Packet Co., 131 N.C. 54, 42 S.E. 447 (1902).

Necessity for Service of Process.—Service of summons, unless waived, is a jurisdictional requirement. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Delivery of Summons to Defendants.—Delivery of copy of summons and the complaint to the male defendant with instructions to him to deliver it to the feme defendant, his wife, is not valid service on the feme. Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957).

Service on Additional Party.—Former § 1-95 related solely to the maintenance of chain of process against an original defendant not properly served, and had no application to the service of process upon an additional party after service had been had on the original defendant. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Return as Evidence of Service.—Where it is sought to condemn the lands of an infant, such infant must defend by general guardian where one has been appointed; and where service of process has been made upon the general guardian, and it appears from the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service to take the case to the jury upon the question involved in the issue. Long v. Town of Rockingham, 187 N.C. 199, 121 S.E. 461 (1924).

Purpose of Keeping up Chain of Summonses.—The real purpose of the provisions of law with respect to keeping up the chain of summonses is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or the time limit of an enabling act. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Summons Never Delivered to Officer to Whom Directed. — Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Effect of Substituting Counties in Original Summons. — Substituting "Mecklenburg" for "Cleveland" County in the original summons and sending such summons to the sheriff of Mecklenburg County works a discontinuance of the action commenced by issuance of summons to Cleveland County. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Signature of Sheriff.—Where process issued to the sheriff of one county is returned and the clerk strikes through the name of the county and inserts the name of a second county, so that the process is directed to the sheriff of the second county, the fact that the sheriff of the second county signs it at the place for the signature of the sheriff of the first county is immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court will take judicial notice of the person who is the sheriff of the county. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Want of Signature of Clerk Does Not Render Summons Fatally Defective.—The want of a signature of the clerk on a summons otherwise complete with seal does not render the summons fatally defective and ineffectual to confer jurisdiction, but merely irregular and subject to amendment; for any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits, may be treated as a matter which can be remedied by amendment. The imprint of the seal furnishes internal evidence of the official origin of the summons. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Summons Signed by Deputy.—Where a summons, otherwise complete and regular, was signed by the deputy clerk and thereupon served, the summons was not void. The failure of the deputy to sign the name of his principal was a nonjurisdictional irregularity. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Summons a Nullity if Not Served within Prescribed Time.—The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Prerequisites to Extension of Time for Service.—In order for a plaintiff to be entitled to the procurement of an extension of time to serve summons, it is contemplated by the statutes and decisions of this State that the summons, as originally issued or extended by order of the clerk, must be served by the sheriff to whom it is addressed for service within the time provided therein, and if not served within that time, such summons must be returned by the officer holding the same for service to the clerk of the county issuing the summons, with notation thereon of its nonservice and the reasons therefor as to any defendant not served. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Summons Never Delivered to Officer Cannot Be Used as Basis for Extension of Time.—Where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service. Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964).

Summons Served Late without Extension Is Nullity.—The service of summons after date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Service by Rural Policeman for Sheriff.—See Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

Sufficiency of Service.—Where an order for service of process on a nonresident motorist was directed to the sheriff of one county and process was served by the sheriff of another county, service was insufficient. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Where, apparently through inadvertence, the order for service of process upon a nonresident motorist was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Service Not Waived by Appearance under Order for Pretrial Examination.—The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Motion to Set Aside Default Judgment for Want of Service.—A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Where process issued to the sheriff of one county is returned without any notation thereon but with an accompanying letter stating that the defendant named is in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process is directed to the sheriff of the second county, amounts to the issuance of new process and institutes a new action as of the date of the later issuance, and service by the sheriff of the second county meets all the requirements of the law. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

An alias summons issues only when the original summons has not been served upon a party defendant named therein. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Alias summons must be sued out within ninety days next after the date of the original summons. Mintz v. Frink, 217 N.C. 101, 6 S.E.2d 804 (1940).

An alias or pluries summons must be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. Green v. Chrismon, 223 N.C. 723, 28 S.E.2d 215 (1943).

Suing Out Alias or Pluries Summons to Prevent Discontinuance.—Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out alias or pluries summons if he desires to prevent a discontinuance. Hodges v. Home Ins. Co., 233 N.C. 289, 63 S.E.2d 819 (1951).

The duty is imposed upon the plaintiff to sue out an alias summons if the original writ failed of its purpose or proved ineffectual; and likewise to sue out a pluries summons when the preceding writs have proved ineffectual, or there will be a discontinuance of the action. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

In a civil action or special proceeding where a defendant has not been served with the original summons, the proper issuance of alias and pluries summons keeps the cause of action alive, and prevents its discontinuance. Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Where the original summons has lost its vitality, to prevent a discontinuance of the action (and thereby toll the statute of limitations), plaintiff must cause alias summons to be issued and served. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

To "sue out" means "to obtain by application; to petition for and take out." McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

A plaintiff may apply orally or in writing to the clerk of the superior court for an alias or pluries summons, and upon such application it is the duty of the clerk of the superior court to issue the writ. No order of court is necessary to authorize the clerk to issue an alias or pluries summons. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

An ordinary summons cannot be effective as an alias or pluries summons by the mere endorsement of the words "alias" or "pluries" thereon. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Return Showing Late Service Sufficient Evidence of Nonservice.—Where the sheriff has served summons more than ten (now thirty) days after its issuance, his return is sufficient evidence of nonservice to enable plaintiff to sue out an alias summons. Atwood v. Atwood, 233 N.C. 208, 63 S.E.2d 103 (1951).

Effect of Proper Issuance of Alias and Pluries Summonses.—Where the original process is kept alive by the proper issuance of alias and pluries summonses, a second action instituted subsequent to the issuance of the original process in the first will not be dismissed notwithstanding that process in the subsequent action is actually served prior to the service of pluries summons in the first. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950). If the alias or pluries summons contains sufficient information in the body thereof to show its relation to the original summons, the legal service of such writ will be effective from the date of the original process. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

When Discontinuance Occurs. — A discontinuance occurs only when the summons has not been served. Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907); Gomer v. Clayton, 214 N.C. 309, 199 S.E. 77 (1938).

In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten (now thirty) days after date of issue; and if not served within that time, the summons must be returned, with proper notation, and alias or pluries summons issued and served, otherwise the original summons loses its vitality and becomes functus officio and void. Green v. Chrismon, 223 N.C. 723, 28 S.E.2d 215 (1943).

The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. Hatch v. Alamance R.R., 183 N.C. 617, 112 S.E. 529 (1922).

Where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance. Neely v. Minus, 196 N.C. 345, 145 S.E. 771 (1928).

The duty is placed upon plaintiff to sue out the alias or pluries summons, if preceding writs have proved ineffectual, in order to avoid a discontinuance of the action. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

Plaintiff May Apply Orally or in Writing to Clerk of Superior Court.—In order for the plaintiff to cause an alias or pluries summons to issue, he may apply orally or in writing to the clerk of superior court, and no order of court is necessary to authorize the clerk to issue such summons. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

Sufficiency of Alias or Pluries Summons.—Where there is nothing upon a

paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service—when required.*—Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service—how made.*—A pleading setting forth a counterclaim or crossclaim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record in the manner provided for service of process in Rule 4. Written return shall be made by the officer making or attempting to make service thereof, but failure to make return shall not invalidate the service. With respect to all other pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(c) *Service—numerous defendants.*—In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.*—All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party shall be filed with the court either before service or within five days thereafter. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e) *Filing with the court defined.*—The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. (1967, c. 954, s. 1.)

Comment.—*Section (a).* This section is based upon the federal rule and incorporates part of the West Virginia rule.

Former § 1-125 required that a copy of the answer be mailed to the plaintiff or his attorney of record by the clerk and

prohibited the clerk from allowing the answer to be filed without a copy for that purpose. Former § 1-140 stated that if no copy of an answer containing a counterclaim was served upon the plaintiff or his attorney, the allegations in the counterclaim should be denied as a matter of law. Other statutes dealing with serving of notice included: Former § 1-578, providing that no motion might be heard and no orders in the cause might be made outside the county where the action was pending unless notice of motion was served on the opposing party in accordance with the provisions of § 1-581; former § 1-568.13, service of order upon person to be examined under adverse party examination statutes; former § 1-568.14, notice to all other parties; former § 8-89, inspection of writings; former § 8-90, production of documents; former §§ 8-71 and 72, depositions; former § 1-153, motion to strike; and § 40-17, notice to parties in eminent domain proceedings.

This section is intended to include all such motions and orders. The phrase "and similar paper" indicates that the enumeration of papers is not exhaustive.

Section (b).—This section is based upon the federal rule but does not track the exact language of the federal rule. The section preserves the requirement of former § 1-140 that a counterclaim or crossclaim be served on the party against whom it is asserted or on his attorney of record.

Former §§ 1-585, 586, and 587 prescribed the form of notices and method of service, which was similar to this section. These provisions permit service upon a party or his attorney unless otherwise provided.

No statutory provision providing heretofore for notice by mail has been found, but such notice by mail was upheld by the court in a case where defendant filed a written motion to strike portions of the complaint and the court found that copies of the motion had been mailed to and received by plaintiff's attorneys. The court said in such circumstances plaintiff was not entitled to have notice of the motion to strike served on her by an officer. Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938).

Section (c). — This section tracks the language of the federal rule. It should be pointed out that the rule is permissive and applies only when the court makes an order under the rule. If such an order is made, a copy of the order must be served upon all parties. If such an order is made, each defendant prepares his answer to the complaint in which he may state his defenses to the complaint, counterclaims against the plaintiff, and cross actions against any or all of the defendants. Each defendant must serve his answer upon the plaintiff within the time prescribed by Rule 12 (a) and file it with the court. The plaintiff is not required to serve and file replies to counterclaims stated in any of the answers of the defendants, and no defendant need serve and file an answer to a crossclaim asserted against him in any of the answers of the defendants. Any counterclaim, crossclaim, or matter constituting an avoidance or affirmative defense contained in any of the answers of the defendants shall be deemed denied. It should be noted that this section dispenses with service of replies to counterclaims and answers to crossclaims only. Other pleadings and all motions must be served as in other cases.

This section also provides that "the filing of any such pleading and service thereof on the plaintiff constitutes due notice of it to the parties." In all cases where an order is entered under the provisions of this section the defendant or his attorney would be required to examine the court file to determine if any crossclaim had been filed against him.

Former § 1-140 provided that if an answer containing a counterclaim was not served on the plaintiff or his attorney, the counterclaim should be deemed denied. The second paragraph of the same statute provided that if a defendant asserted a crossclaim against a codefendant, no judgment by default might be entered against such codefendant unless he had been served with a notice together with a copy of such crossclaim. Thus, the statute did not require that a counterclaim or crossclaim be "served"; it merely denied certain kinds of relief (default judgment) if such was not served.

Default provisions such as Rule 55 would obviously be inoperative if the judge made an order under this section.

Section (d).—Although this section incorporates most of the federal rule, federal Rule 5 (d) was deemed insufficient for North Carolina practice. Consequently, this section is more detailed than the federal rule. The section also incorporates part of the West Virginia rule but does not track the language of that rule. There is no provision in the federal rule with respect to acceptance of service or of a certificate indicating the method of service. It is believed that this section is more in line with North Carolina practice with respect to service or acceptance of service of summons and other process.

This section will not affect the provi-

sions of certain other rules with respect to filing of papers, such as Rule 3, which requires the complaint to be filed before service.

In substance, this section requires the filing with the court of all papers which are required to be served. There are also papers which are not required to be served, which must also be filed, such as motions which may be heard ex parte. Good practice would indicate that all papers relating to the action should be filed with the court whether required by these rules or not.

Section (e). — This section tracks the federal rule. It reflects prior North Carolina practice.

Rule 6. Time.

(a) *Computation.*—In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50 (b), 52, 59 (b), (d), (e), 60 (b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of session.*—The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

(d) *For motions, affidavits.*—A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59 (c), opposing affidavits may unless the court permits them to be served at some other time be served not later than one day before the hearing.

(e) *Additional time after service by mail.*—Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—The basic rule of excluding the first and including the last day is presently embodied in § 1-593 as to the time within which an act is to be done, and in § 1-594 as to publication of notices. Section 1-593 excludes the last day if it is a Sunday or a legal holiday. The federal rule and this section also exclude Saturdays. This section also conforms publication period time requirements to other time computations.

One other significant change is wrought

by adoption of this provision. Formerly, intermediate Saturdays, Sundays, and holidays were included in computing the time, no matter how short the period was. The federal rule makes allowance for the shorter periods of time by providing that if the period is seven days or less, intermediate Saturdays, Sundays or holidays shall not be included.

Section (b).—This section, based upon the federal rule, is more detailed than former statutory provisions. However, there is no basic change in procedure. Former § 1-125 permitted the clerk to extend the time for filing answer or demurrer for a period of time not exceeding 20 days. Former § 1-152 permitted the judge in his discretion to enlarge the time for the doing of any act. Former § 1-220 permitted the clerk or the judge to relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and to supply an omission in any proceeding.

Section (c).—Self-explanatory.

Section (d).—Former § 1-581 provided for 10 days' notice of motion. Thus, adoption of this section results in halving the normal period of notice.

Section (e).—There is no present statutory equivalent to this section. As to service of notice, the statutes do not contemplate service by mail. However, service of notice on plaintiff's attorneys by mail was upheld in Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938). There are other instances in which service by mail is possible.

Editor's Note.—The cases cited in this note were decided under former § 1-152.

Inherent Power to Extend Time.—The superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

A judge of the superior court in this State has inherent power in his discretion and in furtherance of justice to extend the time for filing a complaint, and he is also vested with such authority by statute. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

The right to amend pleadings in a case and allow answers or other pleadings to be filed at any time is an inherent and statutory power of the superior courts which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

This section has been held applicable to complaints. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

Defendants were not entitled to dismissal as a matter of right for plaintiff's failure to file complaint in due time, since this section authorizes the judge, in his discretion, to enlarge time for pleading. Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956).

Enlarging Time for Filing Answer.—The judge of the superior court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. Aldridge v. Greensboro Fire Ins. Co., 194 N.C. 683, 140 S.E. 706 (1927); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

When the complaint states a cause of action, the court, in the exercise of its discretion, may extend defendant's time to plead. Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Section 136-107, limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission, must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Motion to Strike.—When a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

Section 136-107 Prohibits Exercise of Discretion in Condemnation Cases.—Sec-

tion 136-107 expresses a definite, sensible, and mandatory meaning concerning procedure in condemnation proceedings under chapter 136, so as to prohibit the exercise of the statutory or inherent power by the superior court to allow extension of time to answer after time allowed by § 136-107 has expired. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Review of Discretion.—It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. Beck v. Bellamy, 93 N.C. 129 (1885); Best v. British & Am. Mtg. Co., 131 N.C. 70, 42 S.E. 456 (1902); Wilmington v. McDonald, 133 N.C. 548, 45 S.E. 864 (1903); United Am. Free-will Baptist Church, Northeast Conference v. United Am. Free-will Baptist Church, Northwest Conference, 158 N.C. 564, 74 S.E. 14 (1912); Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

If the exercise of a discretionary power of the superior court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subjected to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

This discretion, however, is not an arbitrary but a legal discretion. Hudgins v. White, 65 N.C. 393 (1871).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.*—There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.*—

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) A motion to transfer under G.S. 7A-258 shall comply with the directives therein specified but the relief thereby obtainable may also be sought in a responsive pleading pursuant to Rule 12 (b).

(c) *Demurrers, pleas, etc., abolished.*—Demurrers, pleas, and exceptions for insufficiency shall not be used.

(d) *Pleadings not read to jury.*—Unless otherwise ordered by the judge, pleadings shall not be read to the jury. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section defines the total permissible range of pleadings, following long established code procedure by making the reply the terminal permissible pleading in the traditional exchange between plaintiff and defendant. Furthermore, this section makes specific that which has been evolved without literal sanction under the code, that an answer is to be filed to a crossclaim and that where additional defendants are summoned, third party complaint and answer are to be filed. The only time reply is actually required, aside from when ordered by the court, is to a counterclaim actually so denominated. This is an improvement over code proce-

dure, which requires a reply to any counterclaim at peril of admitting its allegations, thereby putting an unjustifiable burden on the plaintiff to ascertain at his peril whether answers containing affirmative defenses may be construed to involve counterclaims. Whether or not a reply is necessary is presently extremely difficult to determine in other contexts. Compare, e.g. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966), and former § 1-159. Finally, following code practice, authority is given the courts to order replies to non-counterclaiming answers and third party answers, thus rounding out the total list of permissible pleadings under all circumstances.

Section (b) (1). — This section makes more explicit as a matter of literal statement the motion practice actually followed under present code practice. The specification that written motions shall state their grounds and the relief sought is a helpful directive. And the provision for combining the motion with the notice thereof actually gives literal sanction to a procedure of convenience frequently indulged in State court practice without such direct authorization.

Section (c). — This section rounds out the exclusive listing of pleadings and motions allowable under this approach, by making explicit what a long tradition might have resisted, that those other traditional pre-trial stage procedural devices, the demurrer and the special pleas, are abolished from the practice. There are to be only the listed pleadings, and motions shaped functionally to accomplish various specific pre-trial purposes formerly served by motions, demurrers and pleas. The abolition of these devices by name does not, of course, automatically do away with the possibility that the functions served by these shall continue to be served. This section must be read in the light of Rule 12, wherein the new procedure by which these functions are served is spelled out.

Section (d).—The purpose of this section is to end the practice of reading pleadings to the jury. The Commission contemplated that a brief opening statement would generally be substituted.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1. For article on pleadings and motions, see 5 Wake Forest Intra. L. Rev. 70.

Quoted in Jackson v. Jones, 1 N.C. App. 71, 159 S.E.2d 580 (1968).

Rule 8. General rules of pleadings.

(a) *Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; form of denials.*—A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.*—In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or

affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of failure to deny.*—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct; consistency.*—

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficent by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.*—All pleadings shall be so construed as to do substantial justice. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—In prescribing what a complaint is to contain, it will be observed that while the Commission abandoned the code formulation of "a plain and concise statement of the facts constituting a cause of action," it did not adopt without change the federal rules formula, "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement must be "sufficiently particular to give the court and the parties notice of the transactions or occurrences, intended to be proved. . . ."

The Commission's objective may be summarized as follows: 1. By omitting any requirement in terms that a complaint state "facts," the Commission sought to put behind it the sterile dispute as to whether an allegation states evidentiary or ultimate facts or conclusions of law. Of course, in order to show that he is entitled to relief, a pleader will be compelled to be factual, but the new formulation saved him from foundering on the ancient distinctions.

2. By omitting any reference to "cause of action," and directing attention to the notice-giving functions served by the complaint, the Commission sought a new start on the problem of how much specificity is desirable in a complaint. It can fairly be argued, of course, that when the Commission substitued "claim" for "cause of action" that it was merely exchanging one conundrum for another. But changing the formulation does have the advantage of enabling the courts to approach the problem of specificity unembarrassed by prior decisions and with an eye to the functions that pleading can properly serve. Moreover, the new approach can take into account other procedures provided by these rules—the pre-trial conference, the broadened discovery, the summary judgment.

3. By specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. In this connection, the forms provided in Rule 84 should be examined. The Commission's prescription suggests that not only is it permissible under these rules for a pleader to so plead as to obviate the need for a pre-trial conference or resort to the discovery procedures but that it will frequently be his duty to do so.

Section (b). — This section sets forth the basic directive for defensive pleading. It follows the basic code pattern of requiring either denials or admissions of all specific averments of the claimant for affirmative relief, or the pleading of affirmative defenses in avoidance. It is interesting to reflect that here, too, is a plain indication that Rule 8 (a) contemplates factual pleading, else the directive to admit or deny averments is meaningless. Sanction is

given as in existing State practice to obtain the effect of a denial by stating lack of sufficient knowledge or information to form a belief. The traditional prohibition against negative pregnant pleading is stated in terms of fairly meeting the substance of averments denied.

The fairly detailed specification of the different forms that partial denials and admissions may take is a helpful one and does not appear in the code. An innovation from the standpoint of existing State practice is involved in the allowance of a true general denial, or a qualified general denial not directed specifically to each separate paragraph, which is the largest unit that may be generally denied under judicial interpretation of the code.

Section (c) contains a helpful specific listing of numerous traditional defenses which must be specially pleaded. This enumeration is beneficial in avoiding questions as to whether this or that defense is an "affirmative defense" required to be pleaded to allow evidence in its proof. At least one change in existing law is involved in the inclusion of the defense of statute of frauds in this listing. Added to the federal listing are truth in defamation actions, and usury, to reflect existing State practice.

Section (d) states existing State practice.

Section (e) (1) contains a general homily eschewing the old technical forms of pleading and admonishing directness rather than the pomposity which frequently creeps into common law and code pleading.

Section (e) (2) directly sanctions alternative and hypothetical pleadings, which are not literally sanctioned under the code, but generally permitted within limits. More significantly this rule directly authorizes the pleading of inconsistent claims as well as defenses. While inconsistent defenses are now permissible under the code, inconsistent affirmative claims of some types have been held to require election when their underlying legal theories (as opposed to factual theories) were substantively inconsistent.

Section (f) states a homily similarly expressed under the code in former § 1-151.

Editor's Note.—The cases cited in this note were decided under former §§ 1-151 and 1-159.

Common-Law Rule of Construction Modified — Reasonable Construction. — The common-law rule requiring every pleading to be construed against the pleader was materially modified by former § 1-151. Sexton v. Farrington, 185 N.C. 339, 117 S.E. 172 (1923). Hence, a pleading will be upheld if any part presents sufficient facts; or if such facts may be gathered from the whole pleading by a liberal and reasonable construction, the pleading will be sustained. Pridgen v. Pridgen, 190 N.C. 102, 129 S.E. 419 (1925).

In Favor of Pleader.—Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Corbett v. Hilton Lumber Co., 223 N.C. 704, 28 S.E. 250 (1943). See Sandlin v. Yancey, 224 N.C. 519, 31 S.E.2d 532 (1944); Ferrell v. Worthington, 226 N.C. 609, 39 S.E.2d 812 (1946); Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947); McCampbell v. Valdese Bldg. & Loan Ass'n, 231 N.C. 647, 58 S.E.2d 617 (1950). Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

The court is required to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. Setser v. Cepco Dev. Corp., 3 N.C. App. 163, 164 S.E.2d 407 (1968); Joyner v. Woodard, 201 N.C. 315, 160 S.E. 288 (1931); Bailey v. Roberts, 208 N.C. 532, 181 S.E. 754 (1935); Leach v. Page, 211 N.C. 622, 191 S.E. 349 (1937); Anthony v. Knight, 211 N.C. 637, 191 S.E. 323 (1937); Anderson Cotton Mills v. Royal Mfg. Co., 218 N.C. 560, 11 S.E.2d 550 (1940).

Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Corbett v. Hilton Lumber Co., 223 N.C. 704, 28 S.E. 250 (1943). See Sandlin v. Yancey, 224 N.C. 519, 31 S.E.2d 532 (1944); Ferrell v. Worthington, 226 N.C. 609, 39 S.E.2d 812 (1946); Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947); McCambell v. Valdese Bldg. & Loan Ass'n, 231 N.C. 647, 58 S.E.2d 617 (1950).

The allegations of the complaint are to be liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

With View to Substantial Justice between Parties.—This section requires the court to construe liberally a pleading challenged by a demurrer with a view to substantial justice between the parties. Stamey v. Rutherfordton Elec. Member-

ship Corp., 247 N.C. 640, 101 S.E.2d 814 (1958); Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55 (1968).

This section requires that the allegations of a pleading shall be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 520, 156 S.E.2d 691 (1967).

Pleadings challenged by a demurrer are to be construed liberally with a view to substantial justice between the parties. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Construction in View of Merits. — The pleadings must be liberally construed, with a view to present the case upon its real merits. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 420, 156 S.E.2d 691 (1967).

Statement of Cause of Action. — If the facts alleged are sufficient for a cause of action when liberally construed, however inartificially the complaint may have been drawn, it will be sustained. Renn v. Seaboard Air Line R.R., 170 N.C. 128, 86 S.E. 964 (1915); Conrad v. Board of Educ., 190 N.C. 389, 130 S.E. 53 (1925). Same rule applies to an answer. Dixon v. Green, 178 N.C. 205, 100 S.E. 262 (1919); Pridgen v. Pridgen, 190 N.C. 102, 129 S.E. 419 (1925). See also Farrell v. Thomas & Howard Co., 204 N.C. 631, 169 S.E. 224 (1933).

There should be at least a substantial accuracy in the averments of pleadings, and a compliance therein with the essential rules of pleading so that the real issues may be evolved from the controversy. New Bern Banking & Trust Co. v. Duffy, 156 N.C. 83, 72 S.E. 96 (1911).

If the complaint merely alleges conclusions, it is demurrable. On the other hand, if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action the pleading will stand. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intendment therefrom in the plaintiff's favor, however uncertain, defective, and redundant its allegations may be drawn. Elam v. Barnes, 110 N.C. 73, 14 S.E. 621 (1892); Foy v. Stephens, 168 N.C. 438, 84 S.E. 758 (1915); State ex rel. North Carolina Corp. Comm'n v. Harnett County Trust Co., 192 N.C. 246, 134 S.E. 656 (1926); North Carolina Corp. Comm'n v. Citizens Bank & Trust Co., 193 N.C. 513, 137 S.E. 587 (1927); Sewell v. Chas. Cole & Co., 194 N.C. 546, 140 S.E. 85 (1927); Enloe v. Ragle, 195 N.C. 38, 141 S.E. 477 (1928); Presnell v. Beshears, 227 N.C. 279, 41 S.E.2d 835 (1947). See Bryant v. Little River Ice Co., 233 N.C. 266, 63 S.E.2d 547 (1951).

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the court, we are directed to construe such allegations with a view to substantial justice between the parties. Kemp v. Funderburk, 224 N.C. 353, 30 S.E.2d 155 (1944).

The complaint is construed to aver all the facts that can be implied by fair and reasonable intendment from the facts expressly stated. Steel v. Locke Cotton Mills Co., 231 N.C. 636, 58 S.E.2d 620 (1950).

A complaint cannot be overthrown unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. Fairbanks, Morse & Co. v. J.A. Murdock Co., 207 N.C. 348, 177 S.E. 122 (1934); Ramsey v. Nash Furniture Co., 209 N.C. 165, 183 S.E. 536 (1936); Cummings v. Dunning, 210 N.C. 156, 185 S.E. 653 (1936); State ex rel. Avery County v. Braswell, 215 N.C. 270, 1 S.E.2d 864 (1939); Vincent v. Powell, 215 N.C. 336, 1 S.E.2d 826 (1939); Dickensheets v. Taylor, 223 N.C. 570, 27 S.E.2d 618 (1943), citing Anderson Cotton Mills v. Royal Mfg. Co., 218 N.C. 560, 11 S.E.2d 550 (1940).

A complaint must allege a cause of action, and the court will not, under this rule, construe into a pleading that which it does not contain. Jones v. Jones Lewis Furniture Co., 222 N.C. 439, 23 S.E.2d 309 (1942).

Same—Judged from Whole Pleading.— When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under

the rule of liberal construction. Muse v. Ford Motor Co., 175 N.C. 466, 95 S.E. 900 (1918); Dixon v. Green, 178 N.C. 205, 100 S.E. 262 (1919).

Extent of Liberal Construction Rule.— The rule of liberal construction does not mean that a pleading shall be construed to say what it does not say, but that if it can be seen from its general scope that a party has a cause of action or defense, he will not be deprived thereof merely because he has not stated it with technical accuracy. Chesson v. Lynch, 186 N.C. 625, 120 S.E. 198 (1923). Nor does it mean that the court shall supply the necessary allegations; nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. Turner v. McKee, 137 N.C. 251, 49 S.E. 330 (1904). See Fairbanks, Morse & Co. v. J.A. Murdock Co., 207 N.C. 348, 177 S.E. 122 (1934).

While this section requires the appellate court to construe liberally the allegations of a challenged pleading, the appellate court is not permitted to read into it facts which it does not contain. Lane v. Griswold, 273 N.C 1., 159 S.E.2d 338 (1968).

Liberal construction does not mean that the court is to read into the complaint allegations which it does not contain. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

A complaint must be fatally defective before it will be rejected as insufficient. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

A demurrer will not be sustained unless the complaint is fatally and wholly defective. Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55 (1968).

Under the liberal construction rule, an answer must be fatally defective before it will be rejected as insufficient, and every reasonable intendment and presumption must be in favor of the pleader. Commerce Ins. Co. v. McCraw, 215 N.C. 105, 1 S.E.2d 369 (1939).

Errors in Language and Use of Words. —A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal system of pleading, to mean that it did not "accrue" within that time. Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893).

It is proper to strike repetitious allegations from the pleadings. Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969).

New matter in the answer not relating to a counterclaim is deemed denied without a reply. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969).

Conflict of Laws. — The rules of construction of the pleadings are governed by the lex fori, i.e., by the law of the state in which the cause is being litigated. McNinch v. American Trust Co., 183 N.C. 33, 110 S.E. 663 (1922).

Rule 9. Pleading special matters.

(a) *Capacity.*—Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, duress, mistake, condition of the mind.*—In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.*—In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.*—In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.*—In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is

sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) *Time and place.*—For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.*—When items of special damage are claimed each shall be averred.

(h) *Private statutes.*—In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it.

(i) *Libel and slander.*—

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (1967, c. 954, s. 1.)

Comment.—This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed.

Section (a).—This section deals with the problem of putting in issue the legal existence, the capacity or the authority of parties. The rule as presented here requires that parties plaintiff who are not natural persons shall affirmatively aver their legal existence and capacity and that parties plaintiff suing in representative capacities shall affirmatively plead to show capacity and authority. However, the further requirement is laid down that any party actually desiring to put any of these concepts in issue shall negatively aver their nonexistence and support the averment. This section departs from federal Rule 9, which has no requirement that capacity, legal existence or representative authority be affirmatively averred. The code nowhere deals specifically with the question whether capacity, etc., must be affirmatively pleaded. It did, of course, provide for demurrer to a complaint which affirmatively disclosed lack of capacity. Former § 1-127 (2). Monfils v. Hazlewood, 218 N.C. 215, 10 S.E.2d 673 (1940) (complaint in wrongful death action affirmatively showing plaintiff a foreign administratrix). Capacity and existence are customarily pleaded affirmatively in North Carolina practice in any context where they might possibly be in issue, e.g., by parties suing in representative capacities; by corporations. There is no present code requirement that their nonexistence or noncapacity be specifically averred and supported by pleading in order to put this in issue, and the rule does require this. This is an improvement, since it deprives parties of the easy ability, without real basis in fact, to put the opponent to needless proof of these matters.

Section (b).—This section codifies a rule applied without specific code directive in existing State practice. See, e.g., Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881 (1957).

Section (c).—This section is an approximate counterpart to former § 1-155. The rule is, however, more precise on two aspects, and thereby an improvement. First, it is made plain that the license to plead generally extends to "occurrence" as well as to "performance" of conditions precedent. Second, the rule requires that the party desiring to controvert performance or occurrence must specify and particularize rather than merely deny the general allegation.

Section (d).—This section had no counterpart in existing law, but is a helpful sanction to plead generally and in conclusory terms the official character of document issuance and particular acts—"facts" not logically subject to "ultimate fact" pleading.

Section (e).—This section is an approximate counterpart to former § 1-154, but makes precise some things not spelled out in that statute, i.e., that it relates to judg-

ments of foreign as well as domestic courts and to the decisions of quasi-judicial tribunals as well as those of traditional courts of law and judicial officers.

Section (f). — This section varies the usual rule under the code that allegations of time and place are immaterial, but in only one narrow respect, viz., that for purposes of testing the sufficiency of a pleading, i.e., on motion to dismiss or for judgment on the pleadings, such allegations are considered material. The main purpose of this is to allow the early raising of issues as to the bar of the statute of limitations. This section would actually solidify a trend in North Carolina practice toward pre-trial resolutions of the issue, notwithstanding it may not technically be raised by an attack by demurrer on the pleading itself, but must be affirmatively pleaded by the party relying on the defense. Section 1-15. The practice has already evolved, however, of resolving the issue after answer filed, on pre-trial motion or motion for judgment on the pleading. See, e.g., Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961). This section would carry the process one step further and allow the issue to be raised prior to filing of answer by motion to dismiss. For all other purposes, however, allegations of time and place ordinarily remain immaterial, so far as limiting proof is concerned. Of course, any question of materiality is customarily avoided by the "on or about" or "at or near" type allegation.

Section (g). — This section codifies, without attempting elaboration, the rule generally stated and followed under North Carolina code practice. It attempts no specification of what amounts to "special damage" in particular context, so that developed case precedent on this would continue to apply. See, on this point, Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. Rev. 249 (1953).

Section (h).—This section has no counterpart in the federal rules, but is taken from former § 1-157.

Section (i).—This section has no counterpart in the federal rules, but is taken from former § 1-158.

Editor's Note.—The cases cited in the following note were decided under former §§ 1-155, 1-158.

Conditions Precedent—Actions upon Insurance Policy.—In Britt v. Mutual Benefit Life Ins. Co., 105 N.C. 175, 10 S.E. 896 (1890), it was held under former § 1-155 that, in an action upon an insurance policy, the truth of the representations in the application as conditions precedent may be averred generally by stating that the party duly performed all the conditions on his part.

Libel and Slander—Sufficient Averment. —It is material only to aver in the complaint that the slanderous words were spoken of the plaintiff. The facts which point to them and convey to the hearer the sense in which they are used are matters of proof before the jury. Wozelka v. Hettrick, 93 N.C. 10 (1885).

Same—Insufficient Allegation of Publication.—Under this section where the complaint in an action for libel alleges that the defendant sent the plaintiff an open postcard through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient. McKeel v. Latham, 202 N.C. 318, 162 S.E. 747 (1932).

Rule 10. Form of pleadings.

(a) *Caption; names of parties.*—Every pleading shall contain a caption setting forth the division of the court in which the action is filed, the title of the action, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; separate statement.*—All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.*—Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in

any motion in the action. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section dealing with the formal caption and designation of parties in the pleadings generally approximates the corresponding directive found in former § 1-122 (1), although the latter actually dealt literally only with the caption and party designation in the complaint. The rule literally sanctions the practice customarily followed of shortening the listing of multiple parties in all pleadings subsequent to the complaint.

Section (b).—This section deals basically with the requirement that pleadings be drafted in a format designed to promote the clear definition of fact issues—the required separate statement in numbered paragraphs of practically manageable aggregates of factual averments, each generally referable to a separate substantive concept likely to lead to one manageable issue if controverted. This is a key innovation in the code "fact-pleading" reform in reaction to the formulary pleading of common law. Thus, comparable provisions were found in former §§ 1-122 (2) (complaint) and 1-138 (answer). By carrying forward this scheme, it is made abundantly clear that these rules are designed just as are the codes to cause factual issues clearly to emerge in the unsupervised exchange of pleadings where skilled and honest pleaders are aligned in opposition. That this is the design of these rules, particularly as exemplified in Rule 10 (b), see Mr. Justice Jackson's analysis and admonition in O'Donnell v. Elgin, J. & E. Ry., 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187, 16 A.L.R.2d 646 (1949) ("We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking"). It can be stated quite confidently that this rule contemplates a continuation of the issue-defining fact pleading approach of the code.

Section (c). — This section's first sentence involves a change from present practice which is controlled by a rule of the Supreme Court and does not permit adoption of portions of pleadings by reference into other parts of the cause or other pleadings. Of course, this presents a critical policy question of the propriety of adopting statutes in direct conflict with existing court rules. However, the practice sanctioned in this rule is believed an improvement, all things considered. The second sentence, directly sanctioning the incorporation of attached exhibits involves no change in procedure. The phrase "for all purposes" is apt to avoid the type of decision which quibbles over whether mere attachment of an exhibit without express works purporting to incorporate particular aspects as direct allegations does have this effect.

Rule 11. Signing and verification of pleadings.

(a) *Signing by attorney.*—Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by these rules or by statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

(b) *Verification of pleadings by a party.*—In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party, or if there are several parties united in interest and pleading together, by at least one of such parties acquainted with the facts and capable of making the affidavit. Such affidavit may be made by the agent or attorney of a party in the cases and in the manner provided in section (c) of this rule.

(c) *Verification of pleadings by an agent or attorney.*—Such verification may be made by the agent or attorney of a party for whom the pleading is filed, if

the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by such agent or attorney, he shall set forth in the affidavit:

(1) That the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in his possession, or

(2) a. That all the material allegations of the pleadings are true to his personal knowledge and

b. The reasons why the affidavit is not made by the party.

(d) *Verification by corporation or the State.*—When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (1967, c. 954, s. 1.)

Comment.—This rule is in form an amalgamation of federal Rule 11 and basic North Carolina statutes concerned with signing and verification of pleadings. The provision common to both, that every pleading must be signed either by a party or his attorney of record, is retained. The requirement that every pleading subsequent to a verified pleading must be verified is abandoned, and the only time any pleading must be verified is when some statute specifically requires it, as in actions for divorce, (§ 50-8). As an alternative to the verification control on truth, the federal approach of constituting an attorney's signature to any pleading a certificate of good faith in its preparation is adopted. However, the severe explicit federal rule sanction of disciplinary action against an attorney violating this rule is dropped, retaining only the sanction of striking as sham.

Sections (b), (c), and (d) are not found in the corresponding federal rule, but are lifted as substantial counterparts from former §§ 1-145, 1-146, and 1-147.

Cross Reference. — As to requirements of plaintiff's affidavit to be filed with complaint in divorce action, see § 50-8.

Editor's Note. — Section (c) contemplates only two cases where the affidavit may be made by the attorney. The one, when the action is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. The one or the other of these facts is essential to the validity of a verification by an agent or attorney. See Hammerslaugh v. Farrior, 95 N.C. 135 (1886).

The cases cited in this note were decided under former §§ 1-144 through 147.

For case law survey as to verification of pleading, see 44 N.C.L. Rev. 897 (1966).

The object of the verification is that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. Griffin v. Asheville Light Co., 111 N.C. 434, 16 S.E. 423 (1892); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

The requirement as to verification may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading. Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Whether plaintiff verifies his complaint is optional with him unless some statute requires verification as a condition to the maintenance of the action. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Effect of Attempted Verification. — Where plaintiff can maintain his action without verifying the complaint, an attempted verification, which is a nullity, cannot defeat that right. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

A motion is not a pleading. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

Judgment by default may not be entered pending the hearing of a motion to strike, on the ground that the motion was not verified, since a motion is not a pleading. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

Affiant is not required to subscribe the affidavit. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

It is sufficient if the oath is administered by one authorized to administer oaths. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

Instances of Sufficient Verification.—An allegation that plaintiff has "reason to be-

lieve," and therefore "alleges," etc., is sufficient under section (b), requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief." Ware-Kramer Tobacco Co. v. American Tobacco Co., 180 F. 160 (E.D.N.C. 1910).

The verification of the answer in the words following, "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with section (b). McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

A petition in proceedings for contempt which is verified in accordance with the form prescribed by section (b) is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

No Literal Formula Required. — Section (b) provides that the verification must be in "substance" as therein prescribed. Hence, a verbal and literal following of the formula prescribed is not necessary. McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

Same — But Following the Terms of Section Recommended.—With reference to the contents and forms of verification, the court in Cole v. Boyd, 125 N.C. 496, 34 S.E. 557 (1899), said: "We do not wish to be understood as insisting upon a literal compliance. Such a requirement would be contrary to the spirit of our present system. Any form of words that is equivalent thereto will be sufficient. We may even go further and say that we should permit any form of verification that, taken in connection with the form of statement in the pleading, clearly distinguishes between personal knowledge and information so as to render the affiant legally responsible for the truth of every material allegation. But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity of an oath, but that its falsity will fasten upon him the penalties of perjury. This is the object of a verification and the true test of its sufficiency. While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such course in preference to mere experimental practice, which is always dangerous."

The pleadings of a nonresident may be verified by an agent or attorney, if either one of the two requirements of section (c) be present. Griffin v. Asheville Light Co., 111 N.C. 434, 16 S.E. 423 (1892).

Verification by Corporate Officer Need Not State Knowledge, etc.—A verification to a complaint made by an officer of a corporation need not set forth "his knowledge or the grounds of his belief on the subject and the reason why it was not made by the party." A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself. Bank v. Hutchison & Hutchison, 87 N.C. 22 (1882).

Verification by Corporate Defendant Only.—The verification by the vice-president and secretary of the corporate defendant, unchallenged as a proper verification as to the corporate defendant, was not verification by or in behalf of the individual defendants. Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

The managing director of a foreign corporation may verify its pleadings. Best v. British & Am. Mtg. Co., 131 N.C. 70, 42 S.E. 456 (1902).

The city manager of a municipal corporation is its "managing or local agent" and is authorized to verify the municipality's answer in an action instituted against it. Grimes v. Lexington, 216 N.C. 735, 6 S.E.2d 505 (1940).

Instances of Good and Defective Verifications by Agents. — A verification to a complaint, made by an agent or attorney of a nonresident, to the effect that the claim sued on is in writing and in his possession for collection, giving facts in his personal knowledge and sources of other information, meets the substantial requirements of section (c). Johnson, Clark & Co. v. Maxwell, 87 N.C. 18 (1882).

A verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit "that the facts set forth . . . as of his own knowledge are true, and those stated on information and belief he believes to be true . . . ; that the action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of this section," does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification.

Miller v. Curl, 162 N.C. 1, 77 S.E. 952 (1913).

In a proceeding to restore certain records destroyed by fire, an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N.C. 577 (1878).

Where the plaintiff's verification does not meet requirements, defendant is not required to verify his answer. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Rule 12. Defenses and objections — when and how presented — by pleading or motion—motion for judgment on pleading.

(a) (1) When Presented.—A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 20 days after notice of the court's action;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) Cases Removed to United States District Court.—Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified copy of the order of remand to file motions and to answer or other wise plead.

(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not

required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense, numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.*—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.*—The defenses specifically enumerated (1) through (7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.*—If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the judge is not obeyed within 20 days after notice of the order or within such other time as the judge may fix, the judge may strike the pleading to which the motion was directed or make such orders as he deems just.

(f) *Motion to strike.*—Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h) (2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.*—

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7 (a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the

court lacks jurisdiction of the subject matter, the court shall dismiss the action. (1967, c. 954, s. 1.)

Comment.—This rule deals comprehensively with the whole mechanism, including timetables, for raising all the various defenses and objections traditionally available to defensively aligned parties at some pretrial stage, including those based merely on objections to form of pleadings, those traditionally characterized as dilatory defenses, and those based upon defenses on the merits.

Section (a) is a straightforward timetable for the filing of the traditional defensive pleadings, the answer, and the reply. The 30-day period rather than the federal rule 20-day period is adopted. All other considerations of timeliness in raising the various possible objections and defenses by other devices are related to the times for filing these responsive pleadings.

The remaining sections deal in closely interrelated fashion with the whole problem of an orderly staging of the various traditional objections and defenses, worked out to guard against dilatoriness and to encourage economy of effort and early potential raising and determination of defenses likely to be decisive, either as to the abatement of the particular action, or on the merits. The key conceptions, involving some fairly drastic changes from the code practice, are these: (1) Only two kinds of procedural devices—the traditional defensive pleadings and functionally shaped motions—shall be utilized to raise all the objections and defenses made available. This has been presaged in the provisions of Rule 7 (c), abolishing demurrers and pleas, and thus leaving only pleadings and the motion remaining as available devices out of the traditional arsenal. (2) Except for the possible objections to mere forms of pleadings, all the traditional defenses, whether characterized as merely formal, dilatory, or on the merits, may be raised together, and for the first time, in the required responsive pleadings. This departs from the traditional code approach which required certain defenses, both dilatory and on the merits, to be raised, at peril of waiver, by demurrer, when they appear on the face of the pleading (former §§ 1-127, 1-133). Taking a different approach, this rule instead merely gives the option to any defensive pleader to raise seven enumerated objections and defenses by motion prior to filing his responsive pleading [Rule 12 (b)]; and the option to either party to then have such motion-raised defenses heard preliminarily unless the court defers consideration of them to trial time [Rule 12 (d)].

The third sentence in section (b) has as its purpose the clarification of the preceding sentence. Ordinarily, of course, a motion making any of the listed defenses should be made before pleading. But the failure to do so is not preclusive in all circumstances and as to all defenses, as sections (g) and (h) of this rule make clear.

The only ones of the traditional objections to mere form which are retained are the motion to make more definite and certain and the motion to strike. It must be assumed that in the context of the federal pleading approach the motion to make more definite and certain will be utilized with much more restraint, generally only when such ambiguity exists that the responsive pleader cannot reasonably be required to plead to the pleading under attack. See generally 2 *Moore's Federal Practice* Pars. 12.18 and 12.20.

The most direct analogue to the code demurrer for failure to state facts sufficient to constitute a cause of action, which is abolished under this procedure, is the motion to dismiss for failure to state a claim upon which relief can be granted. [Rule 12 (b) (6)]. In a general way it can be said that this motion is typically honored in federal practice under the same circumstances that a demurrer is sustained and action dismissed in State practice because the pleading attacked contains a "statement of a defective cause of action," as opposed merely to a "defective statement of good cause of action." Compare, for example, Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959), illustrating application of the "defective cause" rule under existing State demurrer practice, with DeLoach v. Crawley's Inc., 128 F.2d 378 (5th Cir. 1942), illustrating dismissal rule on motion to dismiss under federal Rule 12 (b) (6). Unlike the State practice demurrer, this motion to dismiss may "speak." [Rule 12 (b), last sentence].

The waiver provisions of Rule 12 (h) provide in effect that the defenses of failure to state a claim, or failure to join a necessary party may be raised at any time before verdict. After verdict however, the defenses of failure to state a claim and failure to join a necessary party cannot then be raised or noted for the first time. Lack of jurisdiction of the subject matter, of course, cannot be waived and is always available as a defense.

In addition to the motion to dismiss, analogous in a limited way to the demurrer as above stated, a motion for judgment on

the pleadings is likewise provided in Rule 12 (c). It too has "speaking" capacities.

A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment or otherwise. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952), decided under former § 1-134.

The objection that a prior action is pending between the same parties for the same cause is waived unless it is raised in the mode appointed by law. McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952), decided under former § 1-134.

The court may strike out irrelevant or redundant matter inserted in a pleading upon motion of any party aggrieved, aptly made. Wall v. England, 243 N.C. 36, 89 S.E.2d 785 (1955); Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969), decided under former § 1-153.

Irrelevant or redundant matter inserted in a pleading is subject to a motion to strike. Johnson v. Petree, 4 N.C. App. 20, 165 S.E.2d 757 (1969), decided under former § 1-153.

A motion to strike, made in apt time, is made as a matter of right. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969), decided under former § 1-153.

A complaint must be fatally defective before it will be rejected as insufficient. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969), decided under former § 1-127.

Rule 13. Counterclaim and crossclaim.

(a) *Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

(b) *Permissive counterclaim.*—A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.*—A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim against the State of North Carolina.*—These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credit against the State of North Carolina or an officer or agency thereof.

(e) *Counterclaim maturing or acquired after pleading.*—A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) *Omitted counterclaim.*—When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) *Crossclaim against coparty.*—A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) *Additional parties may be brought in.*—When the presence of parties other than those to the original action is required for the granting of complete relief in

the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(i) *Separate trial; separate judgment.*—If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or crossclaim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. (1967, c. 954, s. 1.)

Comment. — Sections (a) through (f) deal with counterclaims that must and those that may be asserted in an action, i.e., with compulsory and permissive counterclaims.

Compulsory counterclaims.—There is no current statutory provision which in terms makes any counterclaim compulsory. However, certain counterclaims have traditionally been made compulsory in effect by application of res judicata principles. The judicially evolved rule is that a party will be barred from maintaining an action if in a prior or pending action he could have obtained the same relief by permissive counterclaim and if a judgment for plaintiff in the former or pending action would collaterally estop the plaintiff in the second in respect of determinative issues. Thus, most typically, when a party is sued for damages arising out of negligent operation of an automobile, he must assert any claim for damages he may have arising out of the same occurrence by counterclaim, at peril of being barred from thereafter asserting the claim by separate action. Allen v. Salley, 179 N.C. 147, 101 S.E. 545 (1919). Rule 13 (a) states this substantially, but with more directness, and in a way which avoids some possible question about the application of the North Carolina judicial rule to a second action when plaintiff in the first action lost. Basically, this rule should cause no actual change in the practice in respect to those claims which counsel for defendants will feel under compulsion to assert by counterclaim at peril of being barred to assert them separately.

Three necessary exceptions to the basic rule of compulsion are provided in this section. A counterclaim otherwise compulsory under the rule need not be asserted: (1) If parties necessary to its adjudication cannot be subjected to jurisdiction; or (2) if the pleader has already asserted the claim in another pending action; or (3) if to counterclaim would subject the pleader to personal jurisdiction in respect of a merely quasi in rem claim by the plaintiff, as to which the pleader is not otherwise amenable to personal jurisdiction. Furthermore, possible relief against the consequences of failure to assert a normally compulsory counterclaim is provided in section (f) which gives the court discretion to allow a compulsory counterclaim to be added by amendment.

Permissive counterclaim. — Under former code practice, two types of counterclaim were permissive: (1) Any contract claim existing at the commencement of the plaintiff's action, when the plaintiff's claim is in contract, and (2) any claim arising out of the same contract or transaction which is the basis of plaintiff's action (usually compulsory under the res judicata rule).

The rule in section (b) is much broader. In fact, it is unlimited in its terms — a pleader may at his option assert any claim he may have against an opponent which he is not compelled by section (a) to assert. This approach parallels that of the unlimited joinder of claims philosophy of Rule 18. The idea is that so far as the basic structuring of the litigation at the pleading stage is concerned, there should be unlimited ability to join opposing as well as parallel claims—and that the appropriate protection against trial of an overly complex case resulting from unlimited counterclaim assertion right is by severance for separate trial subsequently under Rule 42 (b).

Section (c).—This section states existing case law in North Carolina. See 1 McIntosh, *North Carolina Practice and Procedure*, § 1238 (2d ed. 1956).

Section (d).—This section is self-explanatory.

Section (e).—This section allows the assertion by supplemental pleading, with leave of court, of counterclaims maturing or acquired after the pleader has already filed his defensive pleading. This is a direct and simple handling of a problem as to which confusion had existed under code practice. Under former § 1-137, a counterclaim might be asserted under the contract section only if it was in existence at the time of commencement of plaintiff's action, but no such limitation was stated with respect to counterclaims under the same transaction section. But, of course, these also may arise out of contract, and some confusion existed in applying the

statute. See 1 McIntosh, *North Carolina Practice and Procedure*, § 1242 (2d ed. 1956). This rule makes no distinction based on types of counterclaim, but simply provides that any subsequently acquired counterclaim may, if the court deems it proper on a whole view of the matter, be injected into litigation after the initial pleading has already been served.

Crossclaims between parties similarly aligned, as coplaintiffs or codefendants. — Rule 13 (g), following the general philosophy of an unlimited option by pleaders to join any claims and assert any counterclaims at the pleading stage, lays down a very liberal policy for asserting crossclaims between coparties. There is, however, a limitation, not found with respect to permissive claim joinder under Rule 18, or permissive counterclaim assertion under Rule 13 (b). The crossclaim must arise out of the same transaction or occurrence on which the basic claims and counterclaims are based, or must relate to property which is the subject matter of the original action. Thus, coparties cannot as a matter of right inject claims between themselves which have not even a general historical relation to the basic claims in litigation between plaintiffs and defendants. But, given the general historical relation expressed in the concept, "arising out of the same transaction or occurrence," there is no further requirement that the crossclaim relate substantively to the basic claim or counterclaim—or that it in some way affect the party asserting these basic claims. Thus, most typically, where A sues B and C for personal injury damages as alleged joint tort-feasors, B and C may crossclaim against each other in respect of independent claims for personal injury or property damage alleged to have resulted from the same occurrence out of which A's claim arose. Certainly the most common bases for crossclaims are those for contribution or indemnification in respect of the crossclaimant's alleged liability, and the last sentence of Rule 13 (g) specifically authorizes these bases.

This represents a substantial departure from former code practice which, without specific statutory directive, had slowly evolved a much more restrictive judicial rule for permissible crossclaims between coparties. Thus, it was held under the code that the only permissible crossclaim was one for indemnification based on a noncontractual right (e.g., primary as opposed to secondary tort liability). Specifically forbidden was any crossclaim by one codefendant against another for: (1) Personal injury or property damage to the claimant, notwithstanding it "arose out of the same occurrence" as plaintiff's primary claim. Jarrett v. Brogdon, 256 N.C. 693, 124 S.E.2d 850 (1962); (2) contribution in respect of the crossclaimant's liability to plaintiff. Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); and (3) indemnification if based on an express or implied contract to indemnify crossclaimant in respect of his liability to plaintiff. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963). See generally, tracing the evolution of the permissible crossclaim rules to their present state, Note, 40 N.C.L. Rev. 633 (1962).

Section (h).—This section states existing North Carolina case law. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961) (when A sues B in negligence and B counterclaims, B may have C brought in to defend against counterclaim on allegations that C is vicariously liable thereon in respect of A's alleged negligence).

Here again, with respect to the liberal attitude toward allowable crossclaims, the notion is that if over-complexity results for the purposes of trial, severance and separate trials under Rule 42 (b) is the appropriate action, rather than preventing the assertion of crossclaims at the pleading stage.

Section (i). — This section incorporates the provisions of Rule 54 (b) to allow the entering of "final judgment" in respect to particular counterclaims or crossclaims, notwithstanding the whole action is not yet ripe for judgment.

Editor's Note. — For comment on the definition and scope of res judicata in North Carolina, see 5 Wake Forest Intra. L. Rev. 315.

Wider Range of Cross Actions between Coparties Authorized.—The new Rules of Civil Procedure authorize a much wider range of cross actions between coparties than heretofore permissible. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Cited in Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969).

Rule 14. Third-party practice.

(a) *When defendant may bring in third party.*—At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may

be liable to him for all or part of the plaintiff's claim against him. Leave to make the service need not be obtained if the third-party complaint is filed not later than five days after the answer to the complaint is served. Otherwise leave must be obtained on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defense to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and crossclaim against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and crossclaims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

Where the normal statute of limitations period in an action arising on a contract is extended as provided in G.S. 1-47 (2) or in any action arising on a contract or promissory note, upon motion of the defendant the court may order to be made parties additional defendants, including any party of whom the plaintiff is a subrogee, assignee, third-party beneficiary, endorsee, agent or transferee, or such other person as has received the benefit of the contract by transfer of interest.

(b) *When plaintiff may bring in third party.*—When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so. (1967, c. 954, s. 1; 1969, c. 810, s. 2.)

Comment. — Certainly one of the most unsatisfactory areas of North Carolina procedural law was that concerned with what has come to be called "third-party practice." By this is meant the basis upon which and the procedure whereby an original defendant (third-party plaintiff) may implead—have brought into the action—an additional party (third-party defendant) to defend against a claim over by the original defendant/third-party plaintiff. An adequate procedural rule dealing with this important and frequently encountered problem must at least: (1) Specify the substantive grounds permitting impleader, and (2) clearly set out the procedure by which it may be accomplished. For a comprehensive coverage, it should additionally prescribe the kinds of claims which, after impleader has been accomplished, may then be asserted by the parties — originally plaintiff, third-party plaintiff, and third-party defendants—inter se. North Carolina statutory law did none of these in adequate, direct terms. Because of the desirability of allowing impleader in some situations at least, the North Carolina court constructed a set of judicial rules for impleading by drawing upon certain statutes which suggested its use peripherally or in a specific situation, but which were completely inadequate if gauged by the standards of adequate coverage above suggested. Thus, former § 1-73, providing in part that the court might cause parties to be brought in when necessary to a complete determination of the controversy; former § 1-222, providing in part that a judgment might be given for or against one or more of several defendants, might determine the rights of the parties on each side, as between themselves, and might grant a defendant any affirmative relief to which entitled; and § 1-240, cryptically providing for the impleading of alleged joint tort-feasors by an original alleged tort-feasor defendant, were drawn upon by the court. As indicated, none of these statutes dealt directly with the basic problems: (a) Of grounds for impleading (except § 1-240, dealing narrowly with contribution between joint tort-feasors); (b) of the procedure by which a third-party plaintiff actually impleads a third-party defendant; or (c) of the kinds of claims that may, after impleader is accomplished, be asserted by the parties inter se.

Working with this completely inadequate statutory pattern, the court has, over the years, evolved rules and sanctioned procedures for impleading which can only be found by resort to the decided cases. These rules as evolved are, aside from the difficulty of locating them, subject to criticism because of their narrowness of approach to the grounds on which impleading is allowed in the first place, and then to the question of what claims may properly be asserted after impleading by the parties inter se. Thus, the basic rule which has evolved to control impleadings permits impleading only when the claim by the third-party plaintiff is for: (1) Contribution against an alleged joint tort-feasor under § 1-240, or (2) indemnification, but only when the indemnification right arises as a matter of law, and not when it arises by express or implied contract. See, for a summary of this rule and the basis of its evolution, 1 McIntosh, *North Carolina Practice and Procedure*, § 722 (2d edition 1956, with 1965 Supplement). The court is not always consistent in this distinction. See Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).

Beyond this, no systematic prescription of the additional claims which may thereafter be asserted between third-party plaintiff and third-party defendant, and between plaintiff and third-party defendant has been worked out in the North Carolina cases. And, as pointed out, this is not provided in the statutes. It is clear only that an impleaded third-party defendant may, but is not compelled to, assert against the third-party plaintiff any claim which would, as to the third-party plaintiff's claim, meet the permissive counterclaim test of former § 1-123. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957) (permissive); Morgan v. Brooks, 241 N.C. 527, 85 S.E.2d 869 (1955) (but not compulsory).

None of the statutes drawn upon prescribed the exact procedure for impleading. Thus, there was no statutory directive as to whether it shall be done by "cross complaint" in the original defendant's answer, or by separate "third-party complaint"; as to whether it requires an order of court based upon motion and notice, or an order entered ex parte; nor as to what mode of service of the third-party complaint or cross complaint shall be utilized. In the absence of any such directive, a practice, generally standardized, but with many variants has been evolved. It has received at least indirect sanction from the court by constant reference to its use without comment. See 1 McIntosh, *North Carolina Practice and Procedure*, § 722.5 (1965 Pocket Supplement). This practice is cumbersome, and, as indicated, not by any means completely standardized.

In contrast to this most unsatisfactory situation, federal Rule 14 provides a directive for third-party practice which is comprehensive in its coverage. The substantive test for impleading is stated directly—a party may be impleaded "who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." This obviously gives the right to implead for contribution and indemnification, where the substantive right to those remedies exists by statute or common law. This is the limit of the impleading right judicially evolved under North Carolina practice. The federal rule is construed to go beyond this and allow impleading for indemnification where the right to be indemnified has arisen out of contract. See, e.g., Watkins v. Baltimore & O. Ry., 29 F. Supp. 700 (W.D. Pa. 1939). This would broaden the North Carolina approach. Note that it still does not allow impleading on as liberal a basis as exists for crossclaims between parties originally joined as defendants. There, under federal Rule 13, the only requirement is relation between the crossclaim and the transaction or occurrence forming the basis of plaintiff's claim.

Beyond the direct and plain statement of the substantive test for impleading, the federal rule prescribes clearly and concisely the procedure for impleading where the right exists. This, as pointed out, is not done in the North Carolina statutes.

Finally, federal Rule 14 concludes with a clear statement, likewise lacking in State statutes, of the various claims which may, after a third-party defendant is impleaded, be asserted by the various parties inter se. Here, as in the joinder statutes, the safeguard against undue complexity which might result under this rule's liberal allowance of permissible cross and counter claims is stated to be severance of claims in advance of trial.

It should be noted that federal Rule 14 is of course entirely procedural—it does not, indeed cannot—affect any substantive rights. Thus, it does not allow impleader unless the substantive right exists under State law. Accordingly, then, adoption of this rule does not affect any of the North Carolina substantive law of contribution or indemnification.

Same—1969 amendment.—(a) G.S. 1-47 (2) was amended to provide that where an action is brought on a sealed instrument, the defendant or defendants in such action may file a counterclaim arising out

of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter period of limitation would otherwise apply to defendant's counterclaim.

The second paragraph of Rule 14 was amended to provide that in such actions, or in any action arising on a contract or promissory note, the defendant may have additional defendants brought into the action. Such additional defendants cannot escape liability by passage of time or by transferring of contract rights.

Editor's Note. — The 1969 amendment added the second paragraph of section (a).

Session Laws 1969, c. 810, s. 2, amending this rule, further provides: "It is the purpose of this section to insure that if a suit may be maintained on a contract against one contracting party, the other contracting party will not be allowed to escape his contractual obligations by the passage of time or the transfer of contract rights."

Session Laws 1969, c. 810, s. 3, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on or after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(d) *Supplemental pleadings.*—Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor. (1967, c. 954, s. 1.)

Comment.—This rule is, except for section (c), substantially a counterpart to federal Rule 15. Section (c) is drawn from the New York Civil Practice Law and Rules, Rule 3025. As such, it deals with a most critical aspect of the whole approach of these rules to the pleading function. This is most obvious in its basic directive for the allowing of amendments to pleading. In this aspect, its approach is generally that of the codes, with the basic theme being to allow amendment as of right up to

the time that the opponent has taken his initial position by responsive pleading, and thereafter to make the privilege to amend more and more difficult to obtain as the litigation progresses and positions may accordingly have become more and more hardened on the basis of the original pleadings. However, a fundamental change of approach from existing practice is taken in (1) the generality with which this basic theme is formulated and (2) this rule's abandonment in terms of the whole variance conception so integral a part of the code amendment scheme.

Section (a). — This section first states the rule for amendment as of right up to responsive pleading time, thus basically making no change in the former law, § 1-161. But then, in dealing with the whole problem of discretionary amendments after this time and up to the time that amendments are sought to conform to proof already adduced, this rule merely lays down the simple directive that leave to amend in this interval shall be freely given "when justice so requires." This is a deliberate abandonment of the typical code approach, as found in former § 1-163, which attempted in tortuous fashion to lay down detailed directives for the exercise of this discretion. The result of this code formulation has been to necessitate equally tortured judicial construction which, instructively, still continues, 100 years after the code's adoption. See e.g., Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951). However, the phrase "as justice requires" has acted as an effective limitation on the amendment privilege in the federal courts. For when, on a whole view of the matter, as is freqently the case, it is determined that justice does not require a particular amendment, or that, to the contrary, positive injustice to the opposing party would result, amendment has been denied. See, e.g., Friedman v. Transamerica Corp., 5 F.R.D. 115 (D. Del. 1946); Portsmouth Baseball Corp. v. Frick, 21 F.R.D. 318 (S.D.N.Y. 1958). This is a much preferable type directive to the detailed code directive which has seemed to necessitate an obviously mechanical jurisprudence in its application. Perkins v. Langdon, supra.

The last sentence of section (a) involves a departure of obvious import from the federal rule timetable.

Section (b). — This section involves the second major change in concept from code practice. Dealing with the problem of trial time amendments necessitated by the failure of proof to conform in some degree with pleadings, it deliberately abandons the laboriously constructed code scheme of immaterial variance, material variance and total failure of proof (former §§ 1-168, 1-169), and lays down a directive based directly upon the truly legitimate policy consideration which should control amendment privilege here, namely, whether, notwithstanding variance of some degree, there has nevertheless been informed consent to try the issues on the evidence presented. Here again, limitation on amendment privilege is sufficiently insured by the phrases, "when the presentation of the merits of the action will be served thereby," and its twin, "and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him." Indeed, it seems quite clear that the code directive was actually designed to get the same result, but that the very detail of its formulation led to a drift into a very mechanical approach which has now largely subverted the "litigation by consent" doctrine in North Carolina. See Note, 41 N.C.L. Rev. 647 (1963). Finally, the last sentence of this section inserts a final safeguard in its reminder of the continuance possibility.

Section (c).—This section deals with the extremely difficult matter of determining when amendments should "relate back" for statute of limitation purposes by posing the broad question of the relation between the new matter and the basic aggregate of historical facts upon which the original claim or defense is based. This deliberately avoids the more abstruse inquiry under the codes as to whether the amendment involves a "wholly different cause of action or defense." It is believed that this approach is a distinct improvement in its express reliance on the truly valid consideration of identity in the historical fact sense. Wachtell's comment on the provision in the New York Civil Practice Law and Rules from which section (c) is drawn is equally pertinent here. The rule, he says, is that "a cause of action in an amended pleading will be deemed to relate back to the commencement of the action if the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences to be proved under the amended pleading. The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved. For example, an amended cause of action for damages for breach of a contract would relate back where the original

pleading alleged an action in equity to rescind the contract for fraud. And an amended cause of action against defendants for breach of an implied warranty of agency in entering into a contract would relate back even though the original pleading had alleged a cause of action upon the contract against the defendants as principals." Wachtell, *N.Y. Practice Under the C.P.L.R.* (1963), p. 141.

Section (d).—This section is in effect a general counterpart to former § 1-167, without some of the specific detail. No practical change in the procedure for filing supplemental pleadings should result under this rule.

Editor's Note.—The cases cited in this note were decided under former §§ 1-161, 1-163, and 167.

For case law survey as to amendment of pleadings, see 45 N.C.L. Rev. 836 (1967).

The judge has broad discretionary powers to permit amendments to any pleading, process or proceeding either before or after judgment. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

The lower court may allow or disallow such amendments as it may think proper in the exercise of sound discretion, bearing in mind, of course, that the nature of the cause of action as previously chartered may not be substantially changed. Goldston Bros. v. Newkirk, 234 N.C. 279, 67 S.E.2d 69 (1951).

Whether the trial court should allow an amendment to the pleadings rests in the court's sound discretion, and the court's ruling thereon is not reviewable on appeal. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

An order allowing plaintiff to file an amended complaint and defendant time thereafter to answer is made in the court's discretion, and as such is not reviewable in the absence of manifest abuse. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The motion to amend is addressed to the discretion of the court and the court's decision thereon is not subject to review, there being no showing or contention that the court abused its discretion. Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

Presiding judge has almost unlimited authority to permit amendments either before or after judgment. Dobias v. White, 240 N.C. 680, 83 S.E.2d 785 (1954); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

And Supplemental Complaint. — It is within the discretionary power of the trial court to allow the filing of a supplemental complaint. Speas v. City of Greensboro, 204 N.C. 239, 167 S.E. 807 (1933).

Power Is Broader as to Amendments Proposed before Trial.—The scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. Modern Elec. Co. v. Dennis, 255 N.C. 64, 120 S.E.2d 533 (1961); George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965); Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Power to Amend Independent of Statute.—The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Cantwell v. Herring, 127 N.C. 81, 37 S.E. 140 (1900); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

The superior court possesses an inherent discretionary power to amend pleadings at any time, and amendments should be liberally allowed. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

The court in its discretion may, before or after judgment, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change substantially the claim, by conforming the pleading or proceeding to the facts. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

Amendment Which Only Adds to Original Cause May Be Allowed.—The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Amendment Permissible When It Introduces No New Cause.—Unless its effect is to add a new cause of action or change the subject matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. Lefler v. Lane & Co., 170 N.C. 181, 86 S.E. 1022 (1915); City of Wilmington v. Board of Educ., 210 N.C. 197, 185 S.E. 767 (1936); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

An amendment to a complaint which makes the pleading conform to the evi-

dence, and does not change the claim of the plaintiff, is permissible. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951).

A trial court may permit a pleading to be amended at any time unless the amendment in effect modifies or changes the cause of action and deprives defendant of a fair opportunity to assemble and present his evidence relative to the matters asserted in the amendment. Thompson v. Seaboard Air Line Co., 248 N.C. 577, 104 S.E.2d 181 (1958).

The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952).

The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

An amendment is permitted, in the discretion of the court, when the amendment does not change substantially the claim or defense. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

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The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

When Amendment Introducing New Cause May Be Allowed.—Where no statute of limitations is involved, it is permissible to allow a plaintiff to introduce a new cause of action by way of amendment for damages for detention of property, possession of which was sought by the action as begun, if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Mica Indus. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Where plaintiff, in amendments to her complaint, for the first time stated facts sufficient to constitute a cause of action, the cause of action then stated embraced relevant facts connected with the transactions forming the subject of her prior pleadings. Hence, absent the bar of an applicable statute of limitations, such new cause of action may be introduced by way of amendment of plaintiff's prior pleadings. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

It is permissible to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Gilliam Furniture, Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Time of Amendment as Matter of Right.—After the time allowed for answering a pleading has expired, such pleading may not be amended as a matter of right, but only in the discretion of the court. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E. 531 (1966).

Extension of Time for Filing Amendment.—Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

Amendment of Defective Summons.—When the summons bears the seal of the clerk and there is evidence it actually emanated from the clerk's office, or the jurat of the clerk and his signature appears below the cost bond, the paper bears internal evidence of its official character and the defect may be cured by amendment. When it does not bear some such evidence, it is void and not subject to amendment. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

If the summons bears internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process and may be amended by permitting the clerk to sign nunc pro tunc. This rule is subject to the limitation that such alteration of the record must not disturb or impair any intervening rights of third parties. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

But if there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all—"no more than one of the usual printed blanks kept by the clerks of the courts." The curative power of amendment may not be invoked when there is nothing upon the face of the paper to give assurance that it re-

ceived the sanction of the clerk before it was delivered to the sheriff to be served. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

Plaintiff Allowed to Amend to Designate Herself as Administratrix.—The court has plenary power to permit plaintiff, who in fact was duly appointed administratrix at the time a complaint was filed, to amend the caption in the complaint in order to designate herself as administratrix in conformity with the allegation in the complaint. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Bringing in Insurance Company Which Has Paid Part of Plaintiff's Loss. — An insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, and may be brought into the action by the court in the exercise of its discretionary power to make new parties at the instance of the insured or the tort-feasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Substituting Another Corporation for Original Plaintiff. — In an action for an injunction by plaintiff corporation arising out of a contract entered into between another corporation and the defendant, the trial court did not have the power to substitute the other corporation as plaintiff in lieu of the original plaintiff. Orkin Exterminating Co. v. O'Hanlon, 243 N.C. 457, 91 S.E.2d 222 (1956).

Amending Complaint under Wrongful Death Statute So as to Bring Action within Federal Employers' Liability Act.—Where the complaint alleges damages for wrongful death under State statute, but the evidence shows that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court plainly has power to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act; and this notwithstanding such amendment was allowed more than three years after the death of decedent. Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

Amendment Alleging Failure of Defendant to Keep Proper Lookout.—Where the facts alleged in a complaint were sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court had the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Moreover, the court had the authority to allow such amendment even if the original complaint did not allege by necessary implication defendant's failure to keep a proper lookout. Simrel v. Meeler, 238 N.C. 668, 78 S.E.2d 766 (1953).

Amendment as to Identity of Driver of Automobile.—In an action involving negligent operation of an automobile resulting in death, it was not error to allow, upon motion made after verdict, an amendment to conform the complaint to the finding of the jury as to the identity of the driver of the automobile, where the crucial fact in respect to defendant's liability was not the identity of the driver, but that defendant, the owner of the automobile, permitted or directed its operation. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Motion Made after Verdict. — Where a motion for leave to amend a complaint to conform to the facts established by the verdict was not made until after the verdict, it was not error to grant it, since the trial below was conducted as if the amendment had been made and the amendment did not change substantially the plaintiff's claim. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Amendment Not Permitted Five Days Before Appeal Is to Be Heard.—Where a proposed amendment sets up a wholly different cause of action or changes substantially the action originally sued upon, this cannot be done five days before an appeal is to be heard in the Supreme Court. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

Review of Ruling Denying Motion.—Where a motion to amend is denied in the discretion of the trial judge, his ruling is not reviewable in the absence of a clear showing of abuse of discretion. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966).

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of manifest abuse of discretion. Crump v. Eckerd's, Inc., 241 N.C. 489, 85 S.E.2d 607 (1955).

Rule 16. Pre-trial procedure; formulating issues.

In any action, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider

(1) The simplification and formulation of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability or necessity of a reference of the case, either in whole or in part;
(6) Matters of which the court is to be asked to take judicial notice;
(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings. (1967, c. 954, s. 1.)

Comment. — While the Rules of Civil Procedure do not envisage a pre-trial conference in every case, they do contemplate a significant role for such conferences. The Commission knows that where former statutes have been used systematically, excellent results have been achieved. 36 N.C.L. Rev. 521 (1958).

Two significant changes are embodied in this rule. First, whether there is to be a pre-trial conference is made an entirely discretionary matter with the judge. It was the Commission's view that pre-trial cannot function effectively unless the judge himself is committed to the desirability of a resort to the procedure. Second, a requirement has been added that if the pre-trial order contains an issue not raised by the pleadings, the court, on motion of any party, shall order an amendment.

Editor's Note.—For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

The purpose of a pre-trial conference is to consider specifics, among them motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

Pre-trial order is interlocutory, from which an appeal does not lie. Green v. Western & S. Life Ins. Co., 250 N.C. 730, 110 S.E.2d 321 (1959); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

Article 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.*—Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party

in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.*—

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem.—In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem. The duty of the State solicitors to prosecute in the cases specified in chapter 33 of the General Statutes, entitled "Guardian and Ward," is not affected by this section.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian.—Notwithstanding the provisions of subsections (b) (1) and (b) (2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons.—In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other

Entities Not in Existence.—In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) When Guardian Ad Litem Not Required in Domestic Relations Actions.—Notwithstanding any other provisions of this rule, an infant who is competent to marry, and who is 18 years of age or older, is competent to prosecute or defend an action or proceeding for his or her absolute divorce, divorce from bed and board, alimony pendente lite, permanent alimony with or without divorce, or an action or proceeding for the custody and support of his or her child, without the appointment of a guardian ad litem.

(7) Miscellaneous Provisions.—The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.*—When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4 (j) (1) a or Rule 4 (j) (1) b is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons,

upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, at any time after the filing of the affidavit required by Rule 4 (j) (1) c and before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.*—When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.*—Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6.)

Comment. — For historical reasons, an apparently necessary component of any procedural code or bloc of rules is a statement of the real party in interest generality, i.e., that action must be prosecuted in the name of the "real party in interest," as opposed to the name of any other person who may have a technical or nominal interest in the claim. This was deemed necessary for the purpose of allowing assignees of choses in action to sue in their own names to recover on the chose, a thing forbidden at common law—and this was probably the only thing had in mind in the original code. But the basic statement in the code was not so limited; hence, it was necessary also to add some obvious qualifications to the basic directive that actions can only be brought in the name of the presently beneficially interested—the "real" —party. Thus, certain fiduciaries should be allowed to sue in their own names on claims in which only their beneficiaries have beneficial—"real"—interests. Furthermore, the third-party contract beneficiary has well established substantive rights which he should be allowed to sue for in his own name, notwithstanding the contract parties alone are "real" parties to the contract and hence, possibly, to the rights arising under it. Finally, some exception was needed to take into account the fact that specific statutes may sometimes give rights to sue in their own names to parties not technically real parties in interest. Through what appears to

be sheer whimsy in codification the original code "real party in interest" draft section, which put both the generality and its exception into one section, was modified in the North Carolina code version to separate the two components. Thus § 1-57 states the generality, while the exceptions were stated in former § 1-63. The federal Rule, 17 (a) dealing with the same matters, returns to the original code pattern and states both the generality and its exception as a connected whole. The rule as presented here tracks the federal rule, and rejects the State code separation of the concepts. No change of central substance is made from the present directive. Consequently, there is no reason to anticipate any change in real party in interest case law arising from this form of statement.

Closely related to the real party in interest generality and its exceptions is the problem of formal representation of persons not sui generis for the purpose of prosecuting and defending actions as to which the parties formally represented have the true beneficial interest—the problem, in short, of the appointment of, the appearance by, and the prosecution and defense of actions through guardians for infants and incompetents. Here, the present State statutory law is substantially retained, with some attempt to clean up and make more comprehensive the whole pattern.

GENERAL COMMENTS ON THE PROBLEMS DEALT WITH IN THE JOINDER RULES, RULES 18 to 21

The fundamental problem sought to be controlled by so-called joinder rules is that of the size which a single law suit shall on the one hand be compelled, and, on the other hand, permitted to assume. Hence, the rules of compulsory (minimum allowable size) and permissive (maximum allowable size) joinder. Since size depends both upon the number of claims (causes of action) and parties potentially involved, the rules of joinder have traditionally been separately framed in terms of parties and claims (causes of action).

PERMISSIVE JOINDER

The underlying policy controlling maximum permissible size is clear and has always been at least tacitly agreed upon under all procedural systems — namely, that the size should be as large as is compatible with orderly handling of issues and fairness to those parties not necessarily interested in all phases of the law suit as finally structured. This in turn is based upon the obvious—that economy of judicial effort is achieved by the resolution in one suit of as many claims, concluding as many parties, as is possible. The rub has come in laying down workable directions which are fairly simple in statement; which nevertheless deal adequately with the potentially two dimensional nature of the joinder problem (both parties and causes); and which, though couched in a form concrete enough for ready application, state what is essentially a quite flexibly conceived goal, i.e., maximum size commensurate with orderly handling of issues and fairness to all parties. One way to solve what is essentially a very difficult drafting problem is to lay down a fairly rigid, hence easily expressed, limitation in the kinds of cause of action which may be joined. If this is done, the problem of too many parties tends to take care of itself, since under traditional conceptions of the structure of a "cause of action," such a single judicial unit rarely has multiple parties aligned on either side of it (typically only when the substantive law contemplates the existence of parties jointly, or jointly or severally, entitled or obligated). Thus, in most cases of attempted joinder of multiple parties there will be a more basic joinder of causes of action which will come under control of the limitation applicable to joinder of causes. This was the common-law approach, which started out allowing only one claim to be made in any action, and finally relaxed only to the point of allowing joinder of causes when they all fell within one of the "forms of action." The code draftsmen, wedded to this approach, essentially codified it, merely using new terminology, e.g., "contract," in place of old "assumpsit," to define the categories within which joinder of claims is permissive. This approach is artificial, and actually loses sight of the basic policy which should control here, but it is simple to put into directive form, and it "works," albeit at the expense of legitimate considerations. When coupled, as it typically is in the codes, with procedural devices provided to attack misjoinder preliminary to trial, it produces a vast amount of skirmishing at this stage before trial is ever reached. This is the history of application of the code joinder rules. Here the emphasis is on artificial restriction of size, with leeway provided for movement in the direction of enlargement only through the power in judges to consolidate causes not technically subject to joinder.

Another approach, which is also simple of statement, is to go in exactly the opposite direction and state a basic directive

for practically unlimited joinder of claims at the pleading stage, limited only by considerations of fairness to any parties not potentially interested in the totality of the law suit as then structured, leaving the burden on the judiciary to move in a restricted direction by exercise of the power of severance closer to trial time. This dispenses with pleading stage skirmishes over the alignment of the suit in terms of parties and claims, and defers ultimate structuring while preserving to the parties at this stage all the benefits of an ongoing uninterrupted law suit. This last is essentially a description of the federal rule approach to the problem of maximum permissible size or permissive joinder.

COMPULSORY JOINDER

Going to the problem of minimum allowable size (compulsory joinder), the Commission found that the underlying policy consideration here has traditionally been to insure that all "necessary" or "indispensable" parties should be involved in a law suit before it proceeds to trial, or certainly before it proceeds to judgment. Necessity and indispensability have always been viewed in this context as involving two aspects: First, necessity from the standpoint of the judicial economy of concluding in one law suit the total potential range of the controversy as defined in the pleadings; second, necessity from the standpoint of avoiding undue practical prejudice to absent parties (notwithstanding they are not legally concluded) by proceeding to trial and judgment without their presence.

There has never been considered to be any corresponding necessity to compel joinder of several causes of action, hence there have not been rules of "compulsory joinder of causes." The res judicata principle of merger by judgment arises at this stage in the form of the rule against "splitting a cause of action." This, in effect, sets the minimum allowable size of a law suit, so far as causes of action is concerned, at one such unit. Beyond this there is no compulsion to "join." Thus, the rules of compulsory joinder have always been rules of compulsory joinder of parties. Here, too, the problem has been to draft concretely to express the essentially flexible consideration of "necessity" above summarized. There has always been general agreement that all parties jointly entitled or obligated were "necessary" in the sense compelling their joinder, and this has been the rule from common-law days, through the codes, and under federal practice. Beyond the "jointly interested" or "united in interest" area, however, the directives have had to rely simply on general formulations of necessity in the sense above discussed. There is remarkably little change in phraseology designed to express this essential notion under the federal rule formulation from that under the codes.

MULTIPLE CAUSES AND PARTIES

A particularly difficult problem in framing permissive joinder directives is occasioned by the necessity for taking into account the possibility of both multiple causes and parties. As indicated, despite the inextricably two-dimensional nature of the joinder problem where multiple causes and parties are involved, the traditional approach has been to frame the joinder rules as if joinder of parties and causes were two separate and independent problems. Of course, where there is but a single claim (cause of action) the joinder rule directed solely at the party joinder limitations is completely adequate to control the matter. But where separately framed directives are used, they must be interrelated in some fashion in order to take into account the possibility of joinder of both claims and parties in a single suit. This poses a logical difficulty which has actually defied any but artificial solutions in any system which has sought to impose separately conceived limitations on joinder of parties and causes, and then to interrelate these limitations. Thus, one code solution has been (as in North Carolina) to resolve this logical dilemma by adding to the basic limitations on joinder of causes the all inclusive limitation that all causes must affect all parties. This is a possible solution, but it achieves relative certainty (only relative) at the expense of truly valid considerations of maximum permissible lawsuit size. Another approach, much more likely to achieve the desired goals, is to allow unlimited joinder of claims as such, and to impose limitations only in respect of parties, which limitations apply whether there is but a single or multiple causes of action (claims) involved. This is the federal rules approach and it has proven in practice not only to be more certain of application in given cases, but also to allow closer approximation to the true goals of permissive joinder, i.e., to allow as much to be concluded in any lawsuit as is commensurate with orderly handling of issues and fairness to parties not interested in the entire scope of the suit. Here again, ultimate protection against confusion of issues and unfairness can be provided by severance power reposed in the judiciary, and so it is under the federal rules approach.

Same—1969 amendment.—(a) The 1969 amendment to Rule 17(a) eliminates another technical ground of possible dismissal. It provides that no action is to be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Correction and substitution of parties was known both to the common law and the code practice. This amendment is merely another step in that direction and avoids needless delay and technical disposition of a meritorious action.

(b) (6) The amendment to Rule 17 designated as (6) merely acknowledges that an infant who is competent to marry, and who is 18 years of age or older, is also competent to prosecute or defend the listed domestic relations action without the appointment of a guardian ad litem.

The amendment also renumbered former subsection (6) of section (b) as (7).

Cross References. — As to service of summons on minor or insane, see ection (j) (2) of Rule 4. As to minor veterans, see § 165-16.

See note under § 41-11.

Editor's Note. — The 1969 amendment added the last sentence to section (a), added present subsection (6) of section (b) and renumbered former subsection (6) of section (b) as (7).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in the following note were decided under former §§ 1-63 through 1-65.

Former §§ 1-65 and 1-97, par. 2, were intended to afford protection to infants, persons non compos mentis, etc., against the able and the cunning who might seek to take advantage of their handicaps. There can be no question but that the requirement as to service of summons on persons falling within the purview of those sections had to be strictly observed.

However, the question inevitably arises as to what is the legal effect of failure to make such summons. In Allen v. Shields, 72 N.C. 504 (1875), it was doubted by the court whether personal service on an infant was not indispensable, with a strong intimation that it was. But it appears that our authorities were fairly uniform on the point, and the doctrine long and almost universally prevailed, that the interests of the minor having been presented, and an answer having been filed by his general guardian or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. Matthews v. Joyce, 85 N.C. 258 (1881); Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905); Rackley v. Roberts, 147 N.C. 201, 60 S.E. 975 (1908); Glisson v. Glisson, 153 N.C. 185, 69 S.E. 55 (1910); Harris v. Bennett, 160 N.C. 339, 76 S.E. 217 (1912); Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921). For present provisions for service on persons under disability, see Rule 4.

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969). For article on parties and joinder, see 5 Wake Forest Intra. L. Rev. 119 (1969).

Section (a) Includes Suits by Agent. — See Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912).

It Excludes Personal Representative of Trustee. — The "trustee of an express trust" does not include the personal representative of such trustee. Alexander v. Wriston, 81 N.C. 191 (1879).

Fiduciaries are not made the real parties in interest, but are empowered to bring an action for the real beneficiaries. Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

When Name of Beneficiary Undisclosed. —When a person contracts in his own name, but really for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. Winders v. Hill, 141 N.C. 694, 54 S.E. 440 (1906).

Where a note was made payable to "J, cashier," and collateral security delivered to him, he being a member and cashier of the firm of "C & J," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in the name of the cashier, he being the holder of the collateral as trustee for the firm. Jenkins v. Wilkinson, 113 N.C. 532, 18 S.E. 696 (1893).

Beneficiary Not a Necessary Party. — Former § 1-63 provided that an executor

or trustee of an express trust may sue without joining with him the party equitably interested. Biggs v. Williams, 66 N.C. 429 (1872); Davidson v. Elms, 67 N.C. 229 (1872). See Jones v. McKinnon, 87 N.C. 294 (1882).

When Beneficiary May Be a Party. — Former § 1-63 did not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee had exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary might be seriously affected. Barbee v. Penny, 172 N.C. 653, 90 S.E. 805 (1916).

Suit upon Administration Bond. — In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, and in such a suit the administrator of the principal in the bond need not be joined. Flack v. Dawson, 69 N.C. 44 (1873).

Assignor of Judgment Assigned for Security May Sue Alone.—Where a judgment creditor has assigned the judgment as security, an action may be brought by the assignor without joining the assignee. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 115 S.E. 329 (1920).

Transferee as Trustee of Express Trust. —Where a plaintiff transferred the claim, upon which his action was subsequently brought, to an attorney at law for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties, the effect of the transfer was to vest ownership of the claim in the attorney as a "trustee of an express trust," and the action should have been brought in his name alone, or in conjunction with those of the cestuis que trustent. Wynne v. Heck, 92 N.C. 414 (1885).

An answer setting forth that B is the real owner of a note sued upon, but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plaintiff. Rankin v. Allison, 64 N.C. 673 (1870).

Court's Duty to Exercise Care in Appointing Guardian ad Litem.—In Morris v. Gentry, 89 N.C. 248 (1883), it was said, "It is the duty of courts to have special regard for infants, their rights and interests, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy."

Appointment Provisions Should Be Strictly Observed.—The provisions in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularties exist. Ward v. Lowndes, 96 N.C. 367, 2 S.E. 591 (1887); White v. Morris, 107 N.C. 93, 12 S.E. 80 (1890); Cox v. Cox, 221 N.C. 19, 18 S.E.2d 713 (1942).

Enforced as Mandatory. — In Moore v. Gidney, 75 N.C. 34 (1876), Bynum, J., speaking for the court, says: "Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside."

Presumption of Proper Appointment. — Where the lands of infants are sold under an order of the superior court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N.C. 112, 9 S.E. 634 (1889).

The object of the appointment of a guardian ad litem is to protect the interest of the infant defendant to which protection he is entitled at every stage of the proceeding. Graham v. Floyd, 214 N.C. 77, 197 S.E. 873 (1938).

Plaintiff Need Not Move for Appointment.—A plaintiff is not bound to move for the appointment of a guardian ad litem for an infant defendant, and his failure to do so is not such laches as will work a discontinuance of the action. Turner v. Douglass, 72 N.C. 127 (1875).

Person with Interest Hostile to Infants Not Appointed.—Any person who has an interest in the action hostile to that of the infants will not be allowed to conduct it on their behalf—whether he be guardian or next friend. George v. High, 85 N.C. 113 (1881).

Nominal Plaintiff Disqualified to Represent Infant.—A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and per-

sistent defense, in every way commendable, and approved by the court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the plaintiff side of the docket. Ellis v. Massenburg, 126 N.C. 129, 35 S.E. 240 (1900).

Mere Colorable Interest Disqualifies. — A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for an infant defendant. Molyneux v. Huey, 81 N.C. 106 (1879); Ellis v. Massenburg, 126 N.C. 129, 35 S.E. 240 (1900).

Appointment Where General Guardian Is Plaintiff.—In a special proceeding by an executor to sell lands, the clerk had the power to appoint a guardian ad litem for an infant defendant, where the executor was the general guardian of such infant. Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905).

Appointment on Day of Trial. — Where a guardian ad litem for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. Simms v. Sampson, 221 N.C. 379, 20 S.E.2d 554 (1942).

Appointment Valid When Infant Not Regularly Served.—The appointment of a guardian ad litem is valid although the infant has not been regularly served with process, but has only accepted service thereof. Cates v. Pickett, 97 N.C. 21, 1 S.E. 763 (1887).

Power of Foreign Guardian to Sue for Wards.—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 next friend (now guardian ad litem). Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

Foreign or Domestic Corporation Cannot Be Appointed.—Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as representative of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed. In re Will of Roediger, 209 N.C. 470, 184 S.E. 74 (1936).

A trustee may sue in his own name, or he may join his cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963), decided under former § 1-63.

The trustee of an express trust may sue without joining the cestui que trust. Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964), decided under former § 1-63.

Where a judgment is assigned to a trustee for the benefit of a judgment debtor, who is entitled to indemnity, the trustee may maintain the action for indemnity without joining the cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963), decided under former § 1-63.

Commissioners to Sell Land and Pay Taxes.—Where a consent judgment directs named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named are trustees of an express trust, notwithstanding that the judgment denominates them as commissioners. Therefore, such persons were authorized to maintain an action for the recovery of taxes unlawfully paid without the joinder of the beneficial owners of the property. Rand v. Wilson County, 243 N.C. 43, 89 S.E.2d 779 (1955), decided under former § 1-63.

Where Property Has Been Distributed and Administrator Is Functus Officio. — Where a widow as executrix distributed in settlement the remaining personalty to herself as life tenant in accordance with the will, and the property then inured to the benefit of the remaindermen, she became functus officio as to such property. An administrator c.t.a., appointed after her death, was likewise functus officio and was not empowered to maintain an action to recover such property from her administrators, since it was no longer part of his testator's estate and not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957), decided under former § 1-63.

Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not, and the Supreme Court will scan with extra care all records affecting the interest of minors. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962), decided under former § 1-65.1.

The power of a next friend (now guardian ad litem) is strictly limited to the performance of the precise duty imposed upon him by the order appointing him; that is, the prosecution of the particular action in which he was appointed. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Duty of Guardian ad Litem.—It is the duty of a next friend (now guardian ad litem) to represent the infant, see that the

witnesses are present at the trial of the infant's case, and to do all things which are required to secure a judgment favorable to the infant. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Where an infant has a general guardian, such guardian is the only one who can defend on behalf of the infant, and defense by a subsequently appointed guardian ad litem is a nullity. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952), decided under former § 1-65.1.

Failure to Plead Infancy of Petitioner as Defense.—Where a minor petitioned for a writ of habeas corpus under § 17-39 in her own name, and not by next friend (now guardian ad litem), and the record on appeal failed to show that the respondent pleaded the infancy of the petitioner as a defense, it was considered as waived. In re Custody of Allen, 238 N.C. 367, 77 S.E.2d 907 (1953), decided under former § 1-64.

When Inquisition of Lunacy Not Essential.—Where allegation of insanity of husband is admitted by demurrer (now motion), suit may be brought by his next friend though no inquisition of lunacy was had; and the wife may bring the action as such next friend, being regularly appointed. Abbott v. Hacock, 123 N.C. 99, 31 S.E. 268 (1898).

The court is under duty to appoint a guardian ad litem for a defendant who is non compos mentis and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959), decided under former § 1-65.1.

Infant Widow May Sue by Representative.—In dissenting from her husband's will and applying for year's allowance, the widow, being a minor without guardian, may be represented by a representative, duly appointed. Hollmon v. Hollmon, 125 N.C. 29, 34 S.E. 99 (1899).

Opposite Party Cannot Object to Appointment.—The defendant cannot object to the representative appointed by the trial judge. Carroll v. Montgomery, 128 N.C. 278, 38 S.E. 874 (1901).

Not Subject to Collateral Attack. — The presence of a guardian ad litem to represent an infant party, and his recognition by the court in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding. Sumner v. Sessoms, 94 N.C. 371 (1886). See Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

Where infant defendants are served with a summons in proceedings for the partition of land and a guardian ad litem is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity. Smith v. Gray, 116 N.C. 311, 21 S.E. 200 (1895).

Defense by One Appointed to Prosecute Right for Infant.—See County of Johnston v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1946).

Jury Trial Waived.—It is competent for the attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. White v. Morris, 107 N.C. 93, 12 S.E. 80 (1890).

Removal of Guardian Ad Litem. — In Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905), it was said: "The superior court has, independently of this section [former § 1-65], the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk who acts as and for the court, may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interest is the special care of the court; the guardian ad litem is the officer of the court, and we can see no good reason or conflict with well-settled principles why it may not for any good reason appoint such guardian."

Infants Are Real Parties Plaintiff.—One who conducts a suit as guardian or next friend for infants is not a party of record, but the infants themselves are the real plaintiffs. George v. High, 85 N.C. 113 (1881); Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851 (1918).

Infant Need Not Know of Suit.—It is not essential that the infant should know that an action has been brought in his favor by a representative, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

When Husband of Infant Need Not Appear.—Where an infant feme covert cestui que trust who has no general guardian appears in a proceeding for the appointment of a trustee by guardian ad litem, the husband need not appear. Roseman v. Roseman, 127 N.C. 494, 37 S.E. 518 (1900).

Validity of Judgment or Order When Infant Appears by Attorney.—A judgment for or against an infant, when he appears by attorney, but has no guardian or next

friend, is not void, but only voidable. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age. Turner v. Douglass, 72 N.C. 127 (1875).

When Infant Reaches Majority Pendente Lite. — Where an infant institutes an action in his own name and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant. Hicks v. Beam, 112 N.C. 642, 17 S.E. 490 (1893).

Where Administrator Represents Minor Heir.—In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian, and the order of sale must be approved by the judge. While it is irregular for the administrator in such cases to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation, or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser. Syme v. Trice, 96 N.C. 243, 1 S.E. 480 (1887); Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1898).

When Infants Bound by Judgment.—Infants without general guardians may appear by their representative, appointed in the manner prescribed, and judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons sui juris. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887); Settle v. Settle, 141 N.C. 553, 54 S.E. 445 (1906).

A decree for the sale of land in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. Moore v. Gidney, 75 N.C. 34 (1876); Gulley v. Macy, 81 N.C. 356 (1879).

In a suit to enforce a tax lien by foreclosure where the affidavit, orders and notices appear sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law, both adult and minors, the minors, if any, not having been represented by a guardian ad litem, would not be bound by the judgment of confirmation rendered in the action. McIver Park v. Briin, 223 N.C. 502, 27 S.E.2d 548 (1943).

Vacation of Irregular Judgment.—Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. Mason v. Miles, 63 N.C. 564 (1869); Larkins v. Bullard, 88 N.C. 35 (1883). See White v. Albertson, 14 N.C. 241 (1831); Pearson v. Nesbitt, 14 N.C. 315 (1832).

When Representative Pays Costs.—While the representative is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891).

Attorney's Fees. — Where it is proper for the attorneys for a ward, employed by his representative, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate. In re Stone, 176 N.C. 336, 97 S.E. 216 (1918).

Order Appealable.—An order appointing a next friend (now guardian ad litem) for plaintiff is an order affecting a substantial right from which plantiff may appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968), decided under former § 1-64.

Whether a new trial will be ordered for failure to appoint a guardian ad litem will depend upon the circumstances of the particular case as to whether the infant or infants have been fully protected in their rights and property, and a new trial will not be granted for mere technical error which could have affected the result, but only for error which is prejudicial or harmful. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962), decided under former § 1-65.1.

Consent to Judgment or Compromise.— In the case of infant parties, the guardian ad litem or guardian cannot consent to a judgment or compromise without the investigation and approval by the court. State ex rel. Hagins v. Phipps, 1 N.C. App. 63, 159 S.E.2d 601 (1968), decided under former § 1-64.

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an

infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant pays the judgment to the clerk of the superior court, who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him, unless the sum is $1,000.00 or less, when he may disburse it himself under the terms of § 2-53. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964), decided under former § 1-64.

Judgment against Infant Held Void.—Where an infant is not served but his guardian ad litem appears and answers but interposes no real defense, and the court enters judgment on the day of the appointment of the guardian ad litem, the judgment against the infant is void for want of jurisdiction. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952), decided under former § 1-65.1.

Rule 18. Joinder of claims and remedies.

(a) *Joinder of claims.*—A party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) *Joinder of remedies; fraudulent conveyances.*—Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. (1967, c. 954, s. 1; 1969, c. 895, s. 7.)

Comment.—This is an exact tracking of the federal rule. This reflects the view that the joinder conceptions expressed in this rule are much preferable to the code approach as previously incorporated essentially in former §§ 1-123, 1-68 and 1-69.

The first sentence of section (a) starts with the simplest possible situation by stating the basic rule for permissive joinder of claims as between just two parties. This rule is simply for potentially unlimited joinder, without regard to number and nature. If this be thought to open the door to vast confusion by encouraging an unfettered joinder of numerous completely unrelated claims, two things should be remembered. First, as a practical matter, human affairs do not often contrive to give many legal claims to any particular individual against another particular individual at times close enough together to raise even the possibility of their joinder in a single action. Furthermore, to the extent multiple claims do arise close enough in point of time to raise the joinder possibility, they are extremely likely to arise out of the same basic historical occurrences or transactions, thus presenting fair ground for inclusion in one lawsuit. Secondly, if, however, too numerous claims are allowed to be joined in the pleadings in a particular case, this does not mean that they must therefore be tried in the same case. Both Rules 20 (b) and 42 (b) contain express mandates to sever claims prior to trial for separate trial where orderliness and fairness require this.

The second sentence posits the more complicated situation of multiple parties and multiple claims, and reiterates the basic rule of unlimited joinder of claims in this situation but with the proviso that the limitations on permissive party joinder (as expressed in Rules 19, 20, and 22) are to be observed. As indicated in the General Comment to this bloc of rules, this is a much more preferable way in logic to handle the difficult problem of interrelating limitations on multiple claim and multiple party joinder than is the code way. The party joinder rules impose quite realistic and sufficient restrictions on unfettered joinder of claims here. For where both multiple claims and multiple parties are involved, two unifying factors in respect of the various parties vis-a-vis the various claims must exist to allow the claims to be joined, i.e., (1) all the claims must arise out of the same aggregation of historical facts (same "transaction or occurrence, etc."), and (2) there must be in respect of all parties some common question of law or fact necessarily to be determined in the action. This is a much more easily understandable and applicable restriction than is the vague "all causes must affect all parties" restriction which underlies all other tests for permissive joinder of claims under the former code approach. It also gets more truly at the valid limiting consideration which should control the maximum size, i.e., the avoidance of too numerous historically unrelated issues in a single action wherein not all the parties are in-

terested in the resolution of all the issues.

The third sentence quite logically makes these rules for permissive joinder of claims and of parties and claims applicable to crossclaims and third-party claims when the integral requirements for prosecuting such claims are met.

By contrast with this logically conceived and well-stated directive for permissive joinder of claims in both the single and multiple party situations, the code approach in former § 1-123 was poorly conceived and has led to logically absurd and unjustifiable results. Thus, for example, in a single party context under this statute, A may sue B in one action for breach of two entirely different contracts, since both causes fall within one of the listed categories of joinable claims, Lyon v. Atlantic C.L.R.R., 165 N.C. 143, 81 S.E. 1 (1914); but A may not in one action sue B, his employer, for (1) negligent injury, and (2) wrongful discharge from employment when A refuses to sign a release as to the negligence claim, because the two causes do not fall within any of the listed categories, not even the "same transaction" category. Pressley v. Great Atl. & Pac. Tea Co., 226 N.C. 518, 39 S.E.2d 382 (1946). In the multiple party context the "joker provision" that notwithstanding claims may be otherwise joinable, they may not be joined if all of them do not affect all parties, has given rise to quite unpredictable results from case to case. For example, in Branch Banking & Trust Co. v. Pierce, 195 N.C. 717, 143 S.E. 524 (1928), against the contention that all causes did not affect all parties, plaintiff was allowed to join several claims against various officers and directors of a corporation, alleging mismanagement notwithstanding the alleged several acts extended over a period of years during all of which it did not appear all the defendants were serving; while in Gattis v. Kilgo, 125 N.C. 133, 34 S.E. 246 (1899), A was not allowed to join a cause of action against B for slander with a cause against B and three others for subsequent publication of the same slander, because all causes did not affect all parties. Legitimate considerations of trial convenience were frequently not served by this code directive. Thus, most typically, while it will prevent A and B from joining in a negligence case against C from injuries received by the same actionable negligence of C, the courts quite frequently consolidate for trial the separate nonjoinable claims of A and B for trial convenience.

Section (b) establishes a rule of permissive joinder, whose obvious import is to avoid the circuity of action necessitated by successive actions if such joinder were not expressly authorized by rule. The effect of this rule is to codify North Carolina case law in respect of the money claim, fraudulent conveyance joinder. Dawson Bank v. Harris, 84 N.C. 206 (1881) (establishing rule consistently followed since).

Same—1969 amendment.—(a) Although Rule 18(a) was rewritten by the 1969 amendment, it appears that together with other rules affecting joinder of claims, especially Rules 13 and 14, a very liberal joinder of claims practice will be permissible. If there are multiple parties, then the parties rules will have to be consulted.

Editor's Note. — The 1969 amendment rewrote section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Suit in Personam and in Rem Combined. —The holder of a note secured by a deed of trust may sue the makers in personam for the debt and may sue in rem to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969), decided under former § 1-123.

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 19. Necessary joinder of parties.

(a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

(b) *Joinder of parties not united in interest.*—The court may determine any

claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

(c) *Joinder of parties not united in interest—names of omitted persons and reasons for nonjoinder to be pleaded.*—In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted. (1967, c. 954, s. 1.)

Cross References. — For statutory provision similar to the proviso in section (a) of this rule, see § 1-72. As to real parties in interest, see rule 17.

Comment. — This rule deals with the problem of the minimum allowable size of a lawsuit, from the standpoint of parties required to be joined in order to proceed to trial. There is no compulsory joinder of causes of action, separately conceived, as noted in the General Comments to this bloc of joinder rules.

As framed, this rule is essentially a recodification of existing and former North Carolina statutes. Specifically, section (a), down to the proviso, is substantially a rewrite of the first sentence of former § 1-70. The introductory phrase, "subject to the provisions of Rule 23," makes the compulsory joinder directive subject to the class-action exception, which is now separately treated in Rule 23. The proviso is substantially a recodification of § 1-72 to carry forward the option to join or not join joint contract obligors plainly stated therein. Section (b) is substantially a tracking of the first sentence of former § 1-73, to express the general notion of "necessary party" based not on substantive jointness of claim but on the more general consideration of fairness and judicial economy of effort developed in the General Comments to this bloc of joinder rules. Adoption of this language involves rejection of the more sophisticated federal rules approach which posits the more refined categories of "indispensable" and "conditionally necessary parties." The code language is retained in the belief that roughly the same functional results are reached under its directive and the case law evolution under it of "proper" and "necessary" parties, and that no sufficiently good purpose would be served by introducing the new and more refined concepts and terminology to justify the risk of confusion from their introduction.

Section (c) is a direct counterpart of federal Rule 19 (c). It is adopted because it forces explanation in the first instance of that which may be otherwise extracted by separate and time consuming later motion to require joinder. As such it should save waste motion and time, if there is an adequate reason, such as unavailability of a party, to explain his nonjoinder in the first place.

Editor's Note.—The cases cited in this note were decided under former §§ 1-70, 1-73 and 1-123.

For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

Persons in Interest.—Persons in interest are necessary parties to a final adjudication. Meadows v. Marsh, 123 N.C. 189, 31 S.E. 476 (1898).

It is necessary as a rule that all defendants have a responsible interest; a judgment that determines points of law adverse to a person, is not sufficient ground for making him defendant. Clark v. Bonsal & Co., 157 N.C. 270, 72 S.E. 954 (1911).

Unconnected Parties with Common Interest.—Several persons, although unconnected with each other, may be made defendants if they have a common interest centering in the point in issue in the cause. Virginia-Carolina Chem. Co. v. Floyd, 158 N.C. 455, 74 S.E. 465 (1912).

Party Unheard of for Years.—Where a person concerned in interest is stated in the bill to have moved away and not since heard of for many years, so that he cannot be served with process, that is a good reason as between third parties for not making him a party; and the court will proceed to a hearing notwithstanding. Ingram v. Lanier, 2 N.C. 221 (1795).

Insolvency of Defendant. — Mere insolvency of a defendant cannot alone determine the right of a plaintiff to join him with others in an action for tort, if he is liable, since the test is in the validity of the cause of action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely affects the prospects of collection. Hough v. Southern Ry., 144 N.C. 692, 57 S.E. 469 (1907).

Tenant in Common May Sue Alone.—One tenant in common may sue without joining his cotenants for the recovery of

the possession of the common property. Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887). See Wilson v. Arentz, 70 N.C. 670 (1874).

Common Grantor of Plaintiff and Defendant Made Party Defendant after Mutual Mistake. — Where there is allegation of mutual mistake of the common grantor of the plaintiff and defendant, and of the plaintiff and defendant as grantees in the deeds simultaneously executed and delivered to them by said grantor, it was held proper for the court to make the grantor a party defendant. Smith v. Johnson, 209 N.C. 729, 184 S.E. 486 (1936).

Person Refusing to Join as Plaintiff May Be Made Defendant.—See Hardy v. Miles, 91 N.C. 131 (1884); Wilson v. Pearson, 102 N.C. 290, 9 S.E. 707 (1889); Elliott v. Brady, 172 N.C. 828, 90 S.E. 951 (1916).

But Must Be Served with Summons.—See Plemmons v. Southern Improvement Co., 108 N.C. 614, 13 S.E. 188 (1891).

Persons Held Necessary or Unnecessary Parties.—See Browning v. Pratt, 17 N.C. 44 (1831); Harris v. Bryant, 83 N.C. 568 (1880); Dawkins v. Dawkins, 93 N.C. 283 (1885); Peacock v. Harris, 85 N.C. 147 (1881).

Scope of Section (b).—Section (b) contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. Moore v. Massengill, 227 N.C. 244, 41 S.E.2d 655 (1947), citing McDonald v. Morris, 89 N.C. 99 (1883).

Section (b) does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action. Moore v. Massengill, 227 N.C. 244, 41 S.E.2d 655 (1947).

Section (b) is mandatory. Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Section (b) of this rule makes it mandatory when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. They are necessary parties. Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Section (b) makes it mandatory "when a complete determination of the controversy cannot be made without the presence of other parties" for these others to be made parties to the action. They are necessary parties. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

It Contemplates Only Making of Necessary Parties.—See Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Necessary Parties. — When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. W.F. Kornegay & Co. v. Farmers & Merchants' Steamboat Co., 107 N.C. 115, 12 S.E. 123 (1890); Maxwell v. Barringer, 110 N.C. 76, 14 S.E. 516 (1892); Parton v. Allison, 111 N.C. 429, 16 S.E. 415 (1892); Burnett v. Lyman, 141 N.C. 500, 54 S.E. 412 (1906); McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913); Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926); Fry v. Pomona Mills, 206 N.C. 768, 175 S.E. 156 (1934).

Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952); Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in because such party is a necessary party and has an absolute right to intervene in a pending action. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy. State ex rel.

Jones v. Griggs, 219 N.C. 700, 14 S.E.2d 836 (1941).

Proper Parties. — The term "proper party" to an action or proceeding means a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Defect of Parties.—A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. When such a defect appears from the complaint itself, it is a ground for demurrer and a fatal defect unless the necessary party is brought in under this section. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Requisite Interest of New Party. — To entitle one to the benefits of this section allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. Griffin & Vose, Inc. v. Non-Metallic Minerals Corp., 225 N.C. 434, 35 S.E.2d 247 (1945).

Discretion of Court. — As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. Service Fire Ins. Co. v. Horton Motor Lines, 225 N.C. 588, 35 S.E.2d 879 (1945).

The fact that plaintiff alone, without joinder of the owner, could not maintain the action does not limit the discretionary power of the judge. Service Fire Ins. Co. v. Horton Motor Lines, 225 N.C. 588, 35 S.E.2d 879 (1945).

Review of Decision. — See Merrill v. Merrill, 92 N.C. 657 (1885).

Necessity Must Clearly Appear. — An order to bring additional parties into an action will not be granted until the necessity for making them parties clearly appears. Lee v. Eure, 92 N.C. 283 (1885).

Consent of the Parties.—Unless by consent of the parties, only such new parties can regularly be admitted, by amendment, to the action as are necessary to its proper determination; but, where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. Richards v. Smith, 98 N.C. 509, 4 S.E. 625 (1887).

Continuance for Bringing in Necessary Parties.—If other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

In action by purchaser against real estate brokers to recover earnest money paid, wherein the seller was a necessary party to a complete determination of the controversy, denial of motion for his joinder as additional party defendant was held reversible error. Lampros v. Chipley, 228 N.C. 236, 45 S.E.2d 126 (1947).

Real Owners as Parties in Action between Lessor and Lessee.—Where lessors sued lessees for rent, and the latter showed, as a counterclaim, that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease, the persons claiming as real owners should be made parties to the action. McKesson v. Mendenhall, 64 N.C. 286 (1870).

Action to Set Aside Deed to Purchaser of Tax Sale Certificate.—In an action to set aside a deed to a purchaser at a foreclosure of a tax sale certificate, the purchaser at the sale, the owners of the property and all persons having any interest in the property should be made parties for a complete determination of the controversy. County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934).

When Trustee Is Necessary Party. — Where the plaintiff claims under a voluntary conveyance made by cestui que trust, he cannot, in any form of action, obtain the legal title and possession until the trustee is made a party. Matthews v. McPherson, 65 N.C. 191 (1871).

Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action. Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Action by Owner against Contractor.—Where an owner sued his contractor for breach of contract and the contractor sought to have his subcontractor joined as a party defendant, it was held that this section was inapplicable. Gaither Corp. v. Skinner, 238 N.C. 254, 77 S.E.2d 659 (1953).

Claims for Wages.—The claim for unpaid wages due an employee can be joined

in one action with similar claims assigned to that plaintiff employee, and if the claims are assigned to joint assignees, all assignees must be parties and recover in their joint right. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

Counterclaim.—If, prior to the institution of plaintiff's action, the defendant could have sued either the plaintiff, the other party, or both, there is no reason why the defendant is required to join the other party as a codefendant to its cause of action on a counterclaim against plaintiff. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961).

Ejectment.—Where in an action of ejectment the controversy involved is whether the plaintiff owns the land in fee simple absolute, or whether the defendant owns the land in fee simple, subject to a charge payable in equal shares to the plaintiff and the personal representatives of six decedents, it is manifest that the personal representatives of these six decedents are so vitally interested in this controversy that a valid judgment cannot be rendered in this action completely and finally determining the controversy without their presence as parties. This being true, they are necessary parties to the action. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Foreclosure.—In an action for foreclosure, the trustee in the deed of trust is a necessary and indispensable party. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969).

Where a note secured by a deed of trust is payable to joint payees, they must join as parties in an action to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Joint Holders of Bill or Note.—Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.*—All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and of any question of law or fact common to all parties will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trial.*—The court shall make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and shall order separate trials or make other orders to prevent delay or prejudice. (1967, c. 954, s. 1.)

Comment.—This is an exact counterpart of federal Rule 20, and was proposed because it was felt, as developed in the General Comment to this bloc of rules, that the federal approach to permissive joinder is a much more serviceable one than was the code approach.

As pointed out in that Comment, the only limitations in respect of joinder in the federal approach are those related literally to party joinder. These limitations contemplate both single claim actions and multiple claim actions. In the multiple party-multiple claim action they are related by reference as limitations on claim joinder, as indicated in the Comment to Rule 18.

The rule is designed generally to express the notion that the limiting factors which control maximum lawsuit size in either single claim or multiple claim (by referring party joinder limitations to the claim joinder rule) litigation are (1) that the right to relief asserted by or against each party joined in the action should arise generally out of the same general aggregation of historical facts, and (2) furthermore, that in respect of all parties joined there must be involved for necessary determination in the lawsuit as structured a common question of law or fact. Beyond these limitations designed to keep the issues within bounds of fairness to parties

and orderliness of handling, there is no requirement that every party must be affected by, or interested in, all the relief sought in the total action. And it is made plain, in furtherance of this notion, that the judgment entered in law suits involving multiple similarly aligned parties may be conformed to the possibility that not all parties are interested in all the relief to be given.

Section (b) provides the final safeguard against dangerous oversize and complexity through joinder by laying down a specific mandate for severance or such other orders as will protect parties in multiple party cases from unfairness resulting from their lack of interest or involvement in every facet of the case as permitted to be structured by the joinder rules.

Editor's Note.—The cases cited in this note were decided under former §§ 1-68, 1-69, 1-70 and 1-73.

For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956). For note on alternative joinder of defendants, see 42 N.C.L. Rev. 242 (1963).

For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

Basic Concept.—The code of civil procedure was bottomed on the basic concept that a court ought to bring before it as parties in a particular action all persons who might have interests either by way of rights or by way of liabilities in the subject matter of the action so that a single judgment might be rendered effectually determining all such rights and liabilities for the protection of all concerned. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952).

There May Be Several Plaintiffs Whose Interests Are Not Identical. — The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. Wilson v. Horton Motor Lines, 207 N.C. 263, 176 S.E. 750 (1934); Peed v. Burleson's Inc., 242 N.C. 628, 89 S.E.2d 256 (1955).

But Their Interests Must Be Consistent. —While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary that the interests of parties plaintiff be consistent. Burton v. Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

The object of former § 1-68 was to permit all persons, who came within its terms, to unite as parties plaintiff, so that a single judgment might be rendered completely determining the controversy for the protection of all concerned. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956); Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Proper parties are those whose interest might be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

Two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

One Cause of Action.—This section permits the joinder of defendants in the alternative where there is but one cause of action. For instance, if A wishes to sue B, the driver of a motor vehicle, and his employer for B's negligence but is uncertain whether C or D was the principal, he may join them both as defendants in the alternative. Conger v. Travelers Ins. Co., 260 N.C. 112, 131 S.E.2d 889 (1963).

Where defendant is liable to one of two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, he is entitled to join both as plaintiffs. American Air Filter Co. v. Robb, 267 N.C. 583, 148 S.E.2d 580 (1966).

Where the wrongful acts of two or more persons concur in producing a single injury and with or without concert between them, they may be treated as joint tortfeasors and, as a rule, sued separately or together at the election of plaintiffs. Chumley v. Great Atl. & Pac. Tea Co., 191 F. Supp. 254 (M.D.N.C. 1961), citing Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918).

In an action by a partner for the dissolution of the partnership and for the proper application of the partnership assets, plaintiff partner may join as a defendant the transferee of the defendant partner upon allegation that the transfer was wrongful, in order to have the entire controversy settled in one action and plaintiff is not compelled first to bring an action to establish the fact of the existence of the partnership and then another action for an accounting. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Holder of Note Not Named in Deed of Trust.—Where the note which a deed of trust purports to secure is payable to

bearer, the plaintiff alleges it is "a false and fictitious paper writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Joinder of Insured in Insurer's Action to Enforce Subrogation. — See Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Insurance Company That Has Paid Part of Plaintiff's Loss. — An insurance company which pays an insured for a part of the loss is a proper party to an action brought by the insured against a tortfeasor to recover the total amount of the loss, and may be brought into the action at the instance of the insured or the tortfeasor either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953). See Jackson v. Baggett, 237 N.C. 554, 75 S.E.2d 532 (1953).

Husband and Wife as Plaintiffs.— Where plaintiffs, husband and wife, alleged that they own their home in which they live and that defendant's nearby mining operations have resulted in damage to it, the allegation that they own their home is sufficient to show that both have an interest in the property, and therefore both are properly joined as plaintiffs. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956).

Husbands Sued on Trade Acceptances and Their Wives as Guarantors. — There was no misjoinder of parties and causes of action where the plaintiff in the same proceeding sued husbands on trade acceptances, and sued their wives on guaranties executed to secure such trade acceptances. Arcady Farms Co. v. Wallace, 242 N.C. 686, 89 S.E.2d 413 (1955).

Joinder of Husband and Wife in Action for Negligent Use of Property Held as Tenants by Entirety.—A husband and wife, holding property as tenants by the entirety, may properly be named defendants and held jointly liable for injuries resulting from the negligent use of the property, unless there is evidence shown at the trial that the husband exercised such exclusive control of the property as to exonerate the wife from liability. Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 21. Procedure upon misjoinder and nonjoinder.

Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately. (1967, c. 954, s. 1.)

Comment.—This is an exact counterpart to federal Rule 21, with the addition of the phrase "nor misjoinder of parties and claims" appearing in the first sentence. The general purpose of the rule is clearly to solidify the basic notion under the federal approach that faulty structuring of a case in terms of joinder of improper parties should not give rise to any drastic interruption of its normal progress to trial. Rather, the safeguard of restructuring without interruption, through severance or dropping of parties, without dismissal, is provided as an adequate protection against the evils of proceeding to trial in an overly-complex structure. The phrase referring to misjoinder of parties and causes, while probably not strictly necessary from the logical standpoint, is inserted because of the developed North Carolina case law rule for dismissal rather than severance where there is "misjoinder of both parties and causes." See Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. Rev. 1, pp. 49-53 (1946).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

Rule 22. Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims expose or may expose the plaintiff to double or multiple liability. It is not ground for objection to the joinder that

the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. (1967, c. 954, s. 1.)

Comment.—This rule makes clear that a liberalized use of interpleader is to be permitted. In particular, Pomeroy's four limitations on the use of interpleader are specifically repudiated. While the North Carolina court has not yet turned its back on these limitations, it has indicated some impatience with them. See Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Rule 23. Class actions.

(a) *Representation.*—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) *Secondary action by shareholders.*—In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) *Dismissal or compromise.*—A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — In respect to class actions, the Commission adheres rather closely to the statutory provisions in North Carolina. See former § 1-70. It will be seen that three requirements are present. First, there must be a "class." Second, there must be such numerosity as to make impracticable the joinder of all members of the class. Third, there must be an assurance of adequacy of representation. This last requirement, while not contained in the statute, is surely necessary if the class action is to have any binding effect on absentees. See Hansberry v. Lee, 311 U.S. 32, 61 Sup. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

Section (b).—The Commission has not followed the federal rule in this section in its requirements that a shareholder must allege that he was a shareholder at the time of the transaction of which he complains. It was the Commission's thought that such a requirement may well deprive shareholders of any remedy when the corporation has suffered grievous injury. The Commission has also chosen not to follow the federal rule in its requirement of allegations in respect to the shareholder's efforts to persuade the managing directors to take remedial action. The Commission does not, however, take the positive approach of saying such allegations are unnecessary. Rule 8 governing what a complaint must contain is a sufficient guide in this matter.

Section (c). — This section seems obviously desirable in the protection that it affords absentees.

Editor's Note.—The cases cited in this note were decided under former § 1-70.

For note on capacity of unincorporated associations to sue and be sued, see 30 N.C.L. Rev. 465 (1952).

For discussion of class actions, see 26 N.C.L. Rev. 223.

Federal Counterpart. — Former § 1-70 had its counterpart in Rule 23a of the Federal Civil Rules of Procedure. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Provisions merely provide a ready means for dispatch of business. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Rule in Section (a) Prevailed in Former Equity Practice. — The exception to the general rule that all persons interested in and to be affected by the determination of the suit must be made parties on one or the other side obtains when they "may be very numerous and it may be impractical to bring them all before the court," a rule prevailing in the former equity practice. Glenn v. Farmers' Bank, 72 N.C. 626 (1875); Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881); Foster v.

Hackett, 112 N.C. 546, 17 S.E. 426 (1893). See Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887); McMillan v. Reeves, 102 N.C. 550, 9 S.E. 449 (1889).

Community of Interest. — Plaintiff is authorized to bring an action in behalf of himself and other owners of lots in a cemetery who by reason of similar representations were induced to buy lots. Such lot owners have a community of interest. Mills v. Carolina Cemetery Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

Representation of Community by Members. — Where property was conveyed to trustees for use as a community house or playground for the benefit of the residents of the community, and an action was instituted involving title to the property in which representative members of the community were made parties, the judgment in the action is binding upon the minors and all members of the community not made parties under provision of this section for class representative. Carswell v. Creswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Plaintiff Must Show Authority to Join Causes of Action in Favor of Other Parties Similarly Situated.—A party plaintiff may not join with his own cause of action against a defendant causes of action against the same defendant in favor of other parties similarly situated, in the absence of a showing of authority to bring such actions in their behalf. Nodine v. Goodyear Mtg. Corp., 260 N.C. 302, 132 S.E.2d 631 (1963).

Potential Beneficiaries of Trust.—Where the potential beneficiaries of a trust were so numerous that it was practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class could be made a party and represent the class. The court's jurisdiction over the trust was not dependent on acquiring personal jurisdiction over every potential beneficiary. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Rule 24. Intervention.

(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.*—Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.*—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure. (1967, c. 954, s. 1.)

Comment. — *Section (a).* — This section, providing for intervention as of right, while closely following the federal rule, spells out a practice much like that already achieved in North Carolina. Intervention now is of right in claim and delivery and in attachment by virtue of § 1-440.43 and § 1-482. In respect to subsection (2), it will be

noted that the harm to the intervenor's interest is to be considered from a "practical" standpoint, rather than technically. In other words, the intervenor need not be threatened with being bound in a strict res judicata sense. Further, it should be noted that adequate representation for the proposed intervenor is not limited to purely formal representation. But a present party may, in appropriate circumstances, be relied on to protect the intervenor's interest even though there is no formal relationship. See Annot., 84 ALR2d 1412 (1962).

It will be observed that in any case, the application to intervene must be "timely." What will be "timely" will depend on the circumstances of the case.

Section (b). — This section perhaps establishes a broader base for permissive intervention than North Carolina now has but the Commission believes that the flexibility it makes possible to be highly desirable and the Commission is confident that the stated guide to the court as to what it shall consider in deciding whether or not to permit intervention will insure adequate protection for the original parties.

Section (c).—This section with its simple statement of the required procedure should be useful.

Editor's Note.—The cases cited in this note were decided under former §§ 1-70 and 1-73.

Persons Entitled to Intervene.—Before a third party will be permitted to become a party defendant in a pending action, he must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

A person who is a necessary party has an absolute right to intervene in a pending action, and the court commits error when it refuses to permit him to exercise such right. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Refusal to permit a necessary party to intervene is error. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Discretion of Court. — Ordinarily it is within the discretion of the court to permit proper parties to intervene. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Where No Controversy between Parties. — Where in an action to establish and enforce a lien for labor on defendants' land, the defendants filed no answer, persons who claimed to hold a mortgage on the land were not entitled to intervene, since there was no controversy between plaintiff and defendant. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956).

Intervening Plaintiffs Whose Interests Are Adverse to Original Plaintiffs. — In an action filed by taxpayers to enjoin city from destroying low cost rental units belonging to city, intervenors were not entitled to come into case as parties plaintiff where their pleadings expressly denied all material allegations of the complaint and attempted to assert claims wholly antagonistic to those alleged by the plaintiffs. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

(a) *Death.*—No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may order the substitution of said party's personal representative or successor in interest and allow the action to be continued by or against the substituted party.

(b) *Insanity or incompetency.*—No action abates by reason of the incompetency or insanity of a party. If such incompetency or insanity is adjudicated, the court, on motion at any time within one year after such adjudication, or afterwards on a supplemental complaint, may order that said party be represented by his general guardian or trustee or a guardian ad litem, and, allow the action to be continued. If there is no adjudication, any party may suggest such incompetency or insanity to the court and it shall enter such order in respect thereto as justice may require.

(c) *Abatement ordered unless action continued.*—At any time after the death,

insanity or incompetency of a party, the court in which an action is pending, upon notice to such person as it directs and upon motion of any party aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than 12 months from the granting of the order.

(d) *Transfer of interest.*—In case of any transfer of interest other than by death, the action shall be continued in the name of the original party; but, upon motion of any party, the court may allow the person to whom the transfer is made to be joined with the original party.

(e) *Death of receiver of corporation.*—No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor or against the corporation in case a new receiver is not appointed and such successor or the corporation is automatically substituted as a party.

(f) *Public officers; death or separation from office.*—

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(g) *No abatement after verdict.*—After a verdict is rendered in any action, the action does not abate by reason of the death of a party, whether or not the cause of action upon which it is based is a type which survives. (1967, c. 954, s. 1.)

Comment. — Former § 1-74 and federal Rule 25 were generally comparable in providing for no automatic abatement of actions upon death, disability or transfer of interest of parties, but, instead, for a right to continue the action by or against substituted parties. The most important difference was in their respective ways of finally cutting off the right to continue. The federal rule allows two years within which parties may be substituted so as to continue the action, then for automatic dismissal if this has not been done within the period. Former § 1-74 allowed substitution and continuance on mere motion for one year after death or disability, and afterwards on supplemental complaint. No automatic dismissal was provided, but there was further provision that a party might be forced by the opposite party to either get substitution for continuation or suffer dismissal within a time specified by the court. Furthermore, former § 1-75 in a very awkward and questionable way imposed a duty on the adverse party to suggest to the court the death or disability of his opponent, and then a duty on the clerk to notify the proper representative to come in and file pleadings.

On balance, it was felt that the State procedure had served North Carolina well enough in this area and that accordingly the form of former § 1-74 should be followed. There has been an attempt, however, to dress the format up somewhat, using catchlines for separate sections and cleaning up some of the incomplete and ambiguous language.

Furthermore, there has been added section (f), tracking the language of federal Rule 25 (d), relating to death and separation of public officers. There is no comparable provision in the current law.

Finally, former § 1-75 was omitted entirely, on the basis that it was ambiguous, and that in apparently requiring new pleadings by substituted parties, it was not desirable. Its requirements have in fact been overlooked by the North Carolina court which has allowed substitution and continuation of actions without compliance with its provisions. See Alexander v. Patton, 90 N.C. 557 (1884).

The only danger in this scheme is that a party may try to lie back until a successor in interest has lost all chance of proceeding successfully and then coming in with a supplemental complaint and trying

to resurrect the successor to force a continuation within time specified under section (c). But the court has prevented plaintiffs from so acting. See Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Cross References.—As to survival of actions, see § 28-172. As to actions which do not survive, see § 28-175. As to receivers for corporations, see §§ 1-507.1 through 1-507.11, 55-127.

Editor's Note.—The cases cited in this note were decided under former § 1-74.

Section (a) Changes Common-Law Rule. —The rule of the common law that a personal right of action dies with the person has been changed by section (a) and § 28-172 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N.C. 347, 199 S.E. 276 (1938).

The rule of the common law that a personal right of action dies with the person has been changed. Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

Decedent's Cause of Action Can Be Prosecuted Only by Personal Representative.—A decedent's cause or right of action surviving his death can be continued and prosecuted only by his personal representative. Neal v. Associates Disct. Corp., 260 N.C. 771, 133 S.E.2d 699 (1963).

Death of a Party.—No action abates with death except as herein provided. Baggarly v. Calvert, 70 N.C. 688 (1874); Sledge v. Reid, 73 N.C. 440 (1875); Wood v. Watson, 107 N.C. 52, 12 S.E. 49 (1890). See Shields v. Lawrence, 72 N.C. 43 (1875); Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919).

In case of death, the court, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. Pennington v. Pennington, 75 N.C. 356 (1876).

Death, Resignation, or Removal of Representative.—Once personal representative of estate is duly appointed, if such representative dies, resigns, or is removed, the law contemplates a continuity of succession until estate has been fully administered, and upon death, resignation, or removal of representative who has properly brought action for wrongful death, action does not abate. Harrison v. Carter, 226 N.C. 36, 36 S.E.2d 700, 164 A.L.R. 697 (1946).

State's Action upon Official Bond.—In an action brought by the State upon official bonds, the relator is but an agent of the State in seeking to recover the moneys due, and if he dies or goes out of office the action does not abate. Davenport v. McKee, 98 N.C. 500, 4 S.E. 545 (1887).

Administrator d.b.n. Bound by Judgment. — A privity exists between an administrator de bonis non and the first administrator, as well in the case of plaintiff as of defendants, so that a judgment against the first administrator is conclusive evidence against the administrator de bonis non in an action to renew it. Thompson v. Badham, 70 N.C. 141 (1874).

When Action Abates. — Where a cause of action survived, the action does not abate by the death of the plaintiff ipso facto, but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months nor more than one year from the granting of the order. Moore v. North Carolina R.R., 74 N.C. 528 (1876).

In Moore v. Moore, 151 N.C. 555, 66 S.E. 598 (1909), Hoke, J., said: "Under this section [former § 1-74], where the right survives, an action does not abate by the death of a party, except by order of the court, Burnett v. Lyman, 141 N.C. 500, 54 S.E. 412, 115 Am. St. R. 691 (1906); and while we have held in Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907), that a failure of the court to make such order for a period of eight years or more, and when there was nothing to indicate that the heirs of deceased were aware that an action was pending against them, was such an abuse of legal discretion as to constitute error, and might be available in some instances as a defense, the principle does not apply, we think, to the facts presented here, when the mother of these heirs was and continued to be a party of record, and these heirs themselves, or all who were resident in the State, were served within two years from the death of their ancestor and within the time fixed by order of the court; for we hold that the order which was made in this case, by fair intendment, meant the next civil term, and did not contemplate the intervening criminal term of the court; and there was no error, therefore, in denying defendants' motion for abatement of the action."

A judgment is necessary to abate an action, for the court may, ex mero motu, enter judgment when it appears that plaintiff failed for a year to prosecute his action against the "representatives or successors in interest" of the original defendant, whose death has been suggested, though the records show there had been no dis-

continuance of the action. Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907).

An action which survives disability or death does not abate until a judgment of the court is entered to that effect. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

The power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative of successor in interest may not be invoked by a plaintiff who has kept his action in a semidormant condition for a number of years and then called defendant's heir into court after the heir, by elapse of time, is unable to make good his defense or that defense which the ancestor might have made. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Death of Part of Plaintiffs.—Where two of several plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. State ex rel. Coggins v. Flythe, 114 N.C. 274, 19 S.E. 701 (1894).

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, accrued, in whole or in part, 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).

ARTICLE 5.

Depositions and Discovery.

Rule 26. Depositions in a pending action.

(a) *When depositions may be taken.*—After the commencement of an action and before a final judgment, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 30 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison or of a patient in an institution or hospital for the mentally ill, mentally handicapped, or epileptic, or any other hospital, home, or institution, may be taken only by leave of court on such terms as the court prescribes.

(b) *Scope of examination.*—Unless otherwise ordered by the judge as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a

denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert.

(c) *Examination and cross-examination.*—Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) *Use of depositions.*—Any part or all of a deposition, so far as admissible under the rules of evidence, may be used at the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, against any party who was present or represented at the taking of the deposition or who had due notice thereof, as follows:

(1) When the deponent is a party adverse to the party offering the deposition in evidence or is a person who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership, or association which is a party adverse to the party offering the deposition in evidence, the deposition may be used for any purpose, whether or not deponent testifies at the trial or hearing.

(2) When the deponent testifies at the trial or hearing, the deposition may be used

a. By any party adverse to the party calling deponent as a witness, for the purpose of impeaching or contradicting the testimony of deponent as a witness, or as substantive evidence, and

b. By the party calling deponent as a witness, as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.

(3) Except as provided in subsections (1) and (2) of this section of this rule, a deposition may be used only if the court finds: (i) That the deponent is dead; or (ii) that the deponent is at a greater distance than 75 miles from the place of trial or hearing, unless it appears that the absence of the deponent was procured by the party offering the deposition; or (iii) that the deponent is a physician who either resides or maintains his office outside the county where the trial or hearing is held; or (iv) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (v) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (vi) upon motion and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. If the court makes any such finding, the deposition may be used by any party for any purpose, whether or not deponent is a party.

(4) If only a part of a deposition is offered in evidence by a party, any party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other part.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of this State or of any other state or of the United States has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the later action as if originally taken therefor.

(e) *Effect of taking or using depositions.*—A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The in-

troduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in section (d) (1). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section gives a broad right of discovery to any party to take the testimony of any person, including a party, by oral deposition, pursuant to Rule 30, or by written interrogatories, pursuant to Rule 31, for the purpose of discovery or for use as evidence or for both purposes. Under prior practice the depositions of persons might be taken and perpetuated by deposition, and under former § 1-568.1 et seq. the deposition of a party might be taken for the purpose of discovery or for use as evidence or for both purposes.

Under this rule the necessity of obtaining court authorization is avoided, except leave of court must be obtained when plaintiff seeks to take a deposition within 30 days after the commencement of the action. Under prior practice a deposition of a proposed witness might be taken without order of court (former § 8-71). Under former §§ 1-568.10 and 1-568.11, a court order was necessary for examination of an adverse party.

Attendance of witnesses may be compelled by subpoena; attendance of a party by notice. Sanctions are provided in Rule 37 (d) in the event a party fails to respond to the notice.

The last sentence of section (a) is much broader than the federal rule, which refers only to "a person confined in prison."

Section (b).—This section indicates the broad scope of examination and that it may cover not only evidence for use at the trial, but also inquiry into matters in themselves inadmissible at trial but which will lead to the discovery of evidence unless the court otherwise directs under Rule 30 (b) or (d).

Aside from the limitations of Rule 30 (b) and (d), section (b) contains three limitations: (1) The deponent may be examined regarding any matter which is relevant to the subject matter in the pending action. (2) The deponent may not be examined regarding a matter which is privileged. (3) The deponent shall not be required to produce or submit for inspection any writing or data prescribed in the last sentence of section (b). This limitation (3) is based upon the proposed 1946 amendment to Rule 30 (b).

Section (c).—This section is the same as the federal rule.

Section (d).—The use of a deposition at the trial stage is sharply limited by section (d). To be used, a deposition must not only satisfy one of the conditions of section (d), but also the limiting phrase in the first sentence of the section, "so far as admissible under the rules of evidence."

Section (e).—This section is added out of an abundance of caution.

Editor's Note.—The cases cited in this note were decided under former § 8-71.

For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

For note on discovery of expert information, see 47 N.C.L. Rev. 401 (1969).

The competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

Optional with Party Desiring the Evidence. — A party may take the deposition; he is not obliged to do so and it is optional with him whether he will or not. Sparrow v. Blount, 90 N.C. 514 (1884).

Right of Cross-Examination. — Where a cause has been referred and regularly proceeded with before a commissioner to take deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. Sugg v. St. Mary's Oil Engine Co., 193 N.C. 814, 138 S.E. 169 (1927).

Former § 8-71 did not contemplate taking deposition of person disqualified to give evidence in a case. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Hence, it had to be considered in connection with § 8-53, relating to confidential communications between physician and patient. Yow v. Pittman, 241 N.C. 69, 84

S.E.2d 297 (1954); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Judge May Not Enter Order in Chambers for Pretrial Examination of Physician.—The judge of the superior court has no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Defendants could not take the deposition of plaintiff's physician because under § 8-53, he is disqualified to testify as to information he acquired in attending plaintiff in a professional capacity. Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

Leading Question. — It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of the deposition. Bank v. Carr, 130 N.C. 479, 41 S.E. 876 (1902).

Cited in Pearce v. Barham, 271 N.C. 285, 156 S.E.2d 290 (1967).

Rule 27. Depositions before action or pending appeal.

(a) *Before action.*—

(1) Petition.—A person who desires to perpetuate his own testimony or that of another person regarding any matter may file a verified petition in the court in the county where any expected adverse party resides.

The petition shall be entitled in the name of the petitioner and shall show (i) that the petitioner expects that he, or his personal representative, heirs, legatees, or devisees, will be a party to an action cognizable in any court, but that he is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his interest therein, (iii) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the person to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service.—The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, or within such time as the court may direct, the notice shall be served in the appropriate manner provided in Rule 4 (j) (1) or (2) for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (j) (1) or (2), an attorney who shall represent them. If any expected adverse party is a minor or incompetent, the provisions of Rule 17 (c) shall apply.

(3) Order and Examination.—If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose deposition may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition.—If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 26 (d).

(b) *Depositions before action for obtaining information to prepare a complaint.*—

(1) Petition.—A person who expects to commence an action but who desires to obtain information from an expected adverse party or from any person for whose immediate benefit the expected action will be defended for the purpose of preparing a complaint may file a verified petition in the county where any expected adverse party resides or in the county where resides any person for whose immediate benefit the expected action will be defended. If an expected adverse party is not a natural person, the petition may be filed in the county where the expected adverse party has its principal office or place of business.

The petition shall be entitled in the name of the petitioner and shall show (i) that the petitioner expects to commence an action cognizable in a court of this State, (ii) the names and addresses of the expected adverse parties, (iii) the nature and purpose of the expected action, (iv) the subject matter of the expected action and the petitioner's interest therein, (v) why the petitioner is unable to prepare a complaint with the information presently available, and (vi) that the petition is filed in good faith. The petition shall also designate with reasonable particularity the matters as to which information will be sought.

(2) Notice and Service.—After the petition is filed, proceedings shall be in conformity with section (a) (2).

(3) Order and Examination.—If the court finds that the facts are as set forth in the petition and that the examination of an expected adverse party or such party's officer, agent or employee is necessary to enable the petitioner to prepare a complaint, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for obtaintaining information to prepare a complaint, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition.—If a deposition to obtain information to prepare a complaint is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 26 (d).

(c) *Pending appeal.*—If an appeal has been taken from the determination of any court or petition for review has been filed or before the taking of an appeal or the filing of a petition if the time therefor has not expired, the court in which the determination was made may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show (i) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each, (ii) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions

to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and upon the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(d) *Perpetuation by action.*—This rule does not limit the power of a court to entertain an action to perpetuate testimony. (1967, c. 954, s. 1.)

Comment. — The objectives here are to provide simple procedures for discovery when the purpose is preservation of testimony or the obtaining of information with which to prepare a complaint and further, in appropriate cases, to provide for discovery pending appeal.

Former §§ 8-85 to 8-88 provided for a special proceeding or a civil action to perpetuate testimony. Under section (a), the most significant change in respect to perpetuating testimony is that no summons is necessary. But there is a requirement of notice.

Section (b). — This section deals with discovery for the purpose of obtaining information to prepare a complaint. It carries forward all of the protections to a prospective defendant incorporated in former § 1-121. But, again, no service of process is necessary. After the contemplated order is obtained, the procedure set forth in the other discovery rules will apply.

Section (c). — This section adds something new in providing for the situation where it may be desirable to take a deposition pending an appeal.

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.*—Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken (i) before a person authorized to administer oaths by the laws of this State or of the United States or of the place where the examination is held, or (ii) before such person as may be appointed by the court in which the action is pending.

(b) *In foreign countries.*—In a foreign state or country depositions shall be taken (i) on notice before a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or (ii) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)."

(c) *Disqualifications for interests.*—No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action, unless the parties otherwise agree by stipulation as provided in Rule 29.

(d) *Depositions to be used outside this State.*—

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules 30 (b), 30 (d), and 45 (b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover

all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1.)

Comment.—This rule is the same as the federal rule except that "of this State" has been inserted in section (a), and section (d) has been added.

Under section (a) depositions for use in North Carolina need not be taken within the State. They may be taken wherever the party taking the deposition desires, subject to the protective provisions of Rule 30(b). However, a subpoena to require a witness to attend the deposition will not run outside the State. Many states have statutes comparable to present § 8-84, making their subpoena power available to compel residents to appear for depositions to be used in foreign states.

Section (d) has no counterpart in the federal rules. It is designed to permit courts in this State to assist parties in proceedings in other states to take depositions in this State for use in such proceedings. North Carolina now has such a statute as indicated above. This rule also requires the party taking a deposition to make a deposit insuring the payment of all fees and costs incident to the taking of the deposition. This practice will be new.

Editor's Note.—The cases cited in the following note were decided under former § 8-71.

Qualification of Commissioner Presumed.—A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. Gregg v. Mallett, 111 N.C. 74, 15 S.E. 936 (1892).

Mistake in Name.—Where the notice to take depositions correctly states the name of the commissioner appointed to take them, and is otherwise regular, it is error for the trial judge to exclude the depositions, as evidence, on account of a slight error in the spelling of the commissioner's name. Hardy v. Phoenix Mut. Life Ins. Co., 167 N.C. 22, 83 S.E. 5 (1914).

Commissioner Related to Parties.—The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant. Younce v. Broad River Lumber Co., 155 N.C. 239, 71 S.E. 329 (1911).

Rule 29. Stipulations regarding the taking of depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken, may be used in the same manner as other depositions. (1967, c. 954, s. 1.)

Comment. — This rule is identical with federal Rule 29. In many cases, saving time and expense is just as important as strict formality. It should be noted that the stipulation relates only to the formalities of taking depositions, and not to their use at trial. Hence, parties may stipulate as to time, place, and manner of taking of a deposition without waiving objections to its admissibility under Rule 26 (d).

Rule 30. Depositions upon oral examinations.

(a) *Notice of examination; time and place.*—A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State.

(b) *Orders for the protection of parties and deponents.*—After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown,

the judge of the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the judge or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from unreasonable annoyance, embarrassment, expense, or oppression.

(c) *Record of examination; oath; objections.* — The person before whom the deposition is to be taken shall administer an oath to the deponent and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or by some method by which the testimony is written or typed as it is given and transcribed unless the parties agree otherwise. Where transcription is requested by a party other than the one taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request. All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to the limitation imposed by an order under section (b) or section (d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the deponent and record the answers verbatim.

(d) *Motion to terminate or limit examination.*—At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order the person before whom the deposition is being taken to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in section (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the judge may impose upon either party or upon the deponent the requirement to pay such costs or expenses as the judge may deem reasonable.

(e) *Submission to deponent; changes; signing.*—When the deposition is transcribed, it need not be submitted to the deponent for his examination and signature unless one of the parties or the deponent makes a request therefor. When such request is made, the deposition shall be submitted to the deponent for examination, and any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the person before whom the deposition is taken with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent unless he refuses to sign. If the deponent refuses to sign, the person before whom the deposition is taken shall state on the record the fact that the deponent refused to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on motion to suppress under Rule 32 (d) the judge holds that the

reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing; copies; notice of filing.*—

(1) When a deposition is transcribed, the person before whom it was taken shall certify on the deposition that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. He shall then securely seal the original of the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of deponent]" and shall promptly file it and one copy with the court in which the action is pending or send it and one copy by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing and furnish a copy to all other parties.

(g) *Failure to attend or to serve subpoenas; expenses.*—

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) *Judge; definition.*—

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be either a resident judge of the judicial district or a judge regularly presiding over the courts of the district or any special superior court judge holding court within the judicial district or residing therein.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be either a resident judge of the judicial district or a judge regularly presiding over the courts, or any special superior court judge holding court within the judicial district or residing therein, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1.)

Comment.—This rule prescribes the procedure for taking depositions upon oral examination. Depositions upon written interrogatories are governed by Rule 31. The procedure fixed by Rule 30 governs depositions upon oral examination in all cases, whether a deposition with or without leave of court as provided in Rule 26 (a), or under an order of court for the perpetuation of testimony before action under Rule 27 (a) or under an order of court for the perpetuation of testimony pending appeal as provided in Rule 27 (b) or under order of court as provided in Rule 27 (c).

Section (a) differs from federal Rule 30 (a) in that a specific time for serving no-

tice prior to the taking of the deposition is fixed, instead of "reasonable notice" as is found in the federal rule. Furthermore, section (a) does not authorize the court to extend or shorten the time fixed by the rule. Such a provision is contained in federal Rule 30 (a).

Sections (b) and (d) provide for protection from abuse of the discovery procedure to either the opposing party or the person to be examined. Before the taking of the deposition begins, either may apply for protection under section (b). During the taking of the deposition either may apply for protection under section (d). Under section (b) application is made to the judge of the court in which the action is pending upon motion seasonably made. "Seasonably" means as soon as the person making the motion learns that he will need the protective order. *Moore's Federal Practice*, § 30.05, (2nd Ed.). Such a motion must comply with Rule 7 (b), be served and filed in compliance with Rule 5, and be served within the time provided in Rule 6 (d).

A change has been made in federal Rule 30 (c) in that a provision has been added with respect to the payment for transcribing when the transcription is requested by a party other than the party taking the deposition. In some cases the sole purpose of the deposition may be for discovery only, and not for use at the trial. Hence, the court should have this power.

The words "or by some method by which the testimony is written or typed as it is given" are inserted in section (c) for the purpose of indicating that, in the absence of agreement, testimony may be taken by any of the methods described.

As has been indicated, section (d) provides for protection during the taking of the deposition. Such a motion may be made before a judge of a court in which an action is pending or a judge of the court in which the deposition is being taken. Section (d) authorizes the judge to order either party or the deponent to pay such costs as may be deemed reasonable upon the granting or refusing of such a motion.

Section (e) changes former procedure to the extent that the deposition need not be signed by the deponent unless one of the parties or the deponent makes such a request.

Section (f) contains no provision for opening a deposition similar to former practice (repealed § 8-71). No good reason exists for continuing that practice, since in most cases all parties have copies of the deposition, and objections which have been entered at the taking of the deposition can be passed on at the time of trial.

Section (g) is identical with federal Rule 30 (g). Apparently there is no provision under present statutes for the taxing of expenses under such circumstances.

Editor's Note.—The cases cited in the following note were decided under former §§ 8-71, 8-72.

Presumed Regular.—The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day and at the designated place. Younce v. Broad River Lumber Co., 155 N.C. 239, 71 S.E. 329 (1911).

May Be Taken in Place of Business.—It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. Bank v. Carr, 130 N.C. 479, 41 S.E. 876 (1902).

Necessity of Sealing.—A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration; it need not be certified under the seal of the commissioners. Ward v. Ely, 12 N.C. 372 (1828).

Where a deposition was found among the papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open, it was held that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. Hill v. Bell, 61 N.C. 122 (1867).

Delay of Commission Insufficient for Continuance. — Commissions to take testimony are issued at the instance, and for the benefit, of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the nonexecution of the commission will be adjudged an insufficient reason for asking a continuance. Duncan v. Hill, 19 N.C. 291 (1837).

Attorney Mailing Deposition to Clerk.—Where the notary public taking a deposition in another state seals the same in an envelope addressed to the clerk of the superior court, the fact that the attorney of the party offering the deposition in evidence brings the sealed envelope back with him to this State and drops it in the mail, as requested by the notary, does not render

the deposition incompetent. Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947).

Duty of Witness to Answer.—The commissioner acts for the court, and it is the duty of the witness to answer proper questions propounded by him, just as though the examination is conducted before the judge or clerk. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

In General.—The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, or on a day when his presence is required at another place for the purpose of that very suit, so, on the other, it is held that the principle is complied with substantially, if the notice describes the place with reasonable certainty. Owens v. Kinsey, 51 N.C. 38 (1858).

Variance between Notice and Certificate.—A deposition certified to have been taken at the house of J.E. was objected to because the notice was to take it at the house of J.A.E., it was held, that it would be presumed that the notice and certificate referred to the same person. Ellmore v. Mills, 2 N.C. 359 (1796).

Alternative Days.—A notice to take a deposition on "the 5th or 6th" of a certain month was held sufficient. Kenedy v. Alexander, 2 N.C. 25 (1794).

On a Particular Day for Several Successive Weeks.—Notice to take a deposition on a particular day of every week for three successive months is not good. Bedell v. President & Dirs. of the State Bank, 12 N.C. 483 (1828).

Conflicting Dates. — Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appear by counsel and cross-examines the witnesses without making any objection at the time, this is a waiver as to any defect in the notice. Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906).

Certainty of Place.—A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if there be other descriptive terms used in the notice, less liable to mistake, by which such place may be identified. Pursell v. Long, 52 N.C. 102 (1859).

Notice to One of Joint Defendants.—Upon a bill against joint administrators relative to the acts of the intestate, of which the administrators put in a joint answer, a deposition taken by the plaintiff upon notice to one of the defendants only was excluded, though it was the deposition of the plaintiff's only witness, who had since died. Cox v. Smitherman, 37 N.C. 66 (1841).

Where Witnesses Not All Specially Mentioned.—Where notice was given to take the deposition of certain parties, specifically mentioned, "and others," and depositions of those particularly mentioned were not taken, it was held to be no ground for exception. McDugald v. Smith, 33 N.C. 576 (1850).

The notice directing the commissioner to take the depositions of persons named "and others," depositions taken of others than those named are admissible. In re Will of Rawlings, 170 N.C. 58, 86 S.E. 794 (1915).

Rule 31. Depositions of witnesses upon written interrogatories.

(a) *Serving interrogatories; notice.*—A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within five days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within three days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) *Person to take responses and prepare record.*—A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the person designated to take the deposition, who shall proceed promptly, in the manner provided by Rule 30 (c), (e) and (f), to take the testimony of the witnesses in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) *Notice of filing.*—When the deposition is filed, the party taking it shall give prompt notice of its filing and furnish a copy to all other parties.

(d) *Orders for the protection of parties and deponents.*—After the service of interrogatories and prior to the taking of the testimony of the deponent, a judge of the court in which the action is pending as defined in Rule 30 (h), on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination. (1967, c. 954, s. 1.)

Comment.—This rule provides an alternative method for taking depositions which a party may employ rather than taking the deposition on oral examination as provided for in Rule 30, and follows very closely federal Rule 31.

Under former § 8-71, when a deposition was returned to the court, the clerk was required to open and pass on it after giving parties or their attorneys not less than one day's notice. Section (c) simply requires the party taking the deposition to give notice of the filing of the deposition.

"Rule 31 (d) permits a party or a deponent to make a motion in the court in which the action is pending for any protective order specified in Rule 30. The motion, however, must be made prior to the taking of the testimony of the deponent. This time limitation upon the making of the motion is perfectly proper with respect to a party, but if applied also to a motion made by a deponent, it is inconsistent with the practice that the interrogatories are not to be shown to the deponent in advance or the taking of the deposition. While the time limitation imposed by Rule 30 (d) upon the making of a motion for a protective order is in terms applicable to a motion by a deponent, it is believed that the proper practice should be that the interrogatories should not be shown to the deponent in advance of the taking of his deposition, except upon consent of the parties, and that the deponent should be allowed to make a motion for a protective order during the taking of the deposition as provided in Rule 30 (d) for the making of a similar motion by a deponent upon an oral examination." 4 *Moore's Federal Practice,* § 31.06.

Rule 32. Errors and irregularities in depositions.

(a) *As to notice.*—All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to disqualification of person before whom taken.*—Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to taking of deposition.*—

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition.

(2) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

(d) *As to completion and return of deposition.*—Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, sealed, endorsed, transmitted, filed, or otherwise dealt with by the person before whom the deposition is taken under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

(e) *Objection to deposition before trial.*—The clerk shall file the deposition with the other papers in the action and notify all parties that it is on file and open for

inspection. Except as otherwise provided by this rule, any party may file written exceptions to the deposition either in whole or in part for any good cause. Such exceptions shall be passed upon by the judge on motion day or at pretrial. (1967, c. 954, s. 1.)

Comment.—The purpose of this rule is to require defects in the taking of depositions to be pointed out promptly in order that the erring party may have an opportunity to correct the errors and prevent waste of time and expense by a subsequent claim to suppress a deposition based upon some technical error.

Section (a) carries forward former § 1-568.23 (a).

Under former law objection based upon the disqualification of the person before whom the deposition is to be taken could be made at any time up to trial. Under section (b) such an objection would be unavailable at trial.

Sections (c) (1) and (2) follow verbatim federal Rule 32 (c) (1) and (3) and former § 1-568.23 (b) and (d).

Federal Rule 32 (c) (2), which is the same as former § 1-568.23 (c), has been omitted.

Section (d).—This section follows federal Rule 32 (d) verbatim and is quite similar to former §§ 1-568.22 and 1-568.23 (e) except in this rule objection must be made with "reasonable promptness," whereas, under former statutes, a motion to suppress must have been made within ten days after the deposition was filed.

Rule 33. Interrogatories to parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 30 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined, but the making of objections to certain interrogatories shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories.

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but a judge of the court in which the action is pending, as defined by Rule 30 (h), on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. (1967, c. 954, s. 1.)

Comment. — Under former § 1-568.17 a party might examine upon written interrogatories.

This rule provides that the scope of the interrogatories is the same as that for discovery generally, as set out in Rule 26 (b). Hence, interrogatories may be used for purposes of discovery. Also, the use of answers to interrogatories is limited by Rule 26 (d) as well as by ordinary rules of evidence.

The period in which plaintiff may not serve interrogatories without leave of court has been lengthened from 10 days, as in

federal Rule 33, to 30 days. This corresponds to the time for filing answer or other pleading or motion and thus preserves the general scheme by which a defendant is given 30 days to take his first action unless the court otherwise orders.

It should be noted that this rule does not require notice to parties other than the one to be examined. Former § 1-568.17 required that a copy of the order for examination and a copy of the interrogatories be delivered to all other parties.

The problems which might be presented in cases where the interrogatories call for documents to be attached are covered in Rule 26 (b), which governs the scope of the interrogatories.

Rule 34. Discovery and production of documents and things for inspection, copying or photographing.

Discovery on court order.—Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the clerk of the court in which an action is pending or a judge of the court in which an action is pending, as defined by Rule 30 (h) may

(1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or

(2) Order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. (1967, c. 954, s. 1; 1969, c. 895, s. 8.)

Comment.—Former statutes in a pending action authorized the court to order an inspection of writings (§ 8-89) and the production of documents (§ 8-90).

The protective provisions of Rule 30 (b) are incorporated in this rule by reference.

The provisions in this rule limiting the scope of the examination as permitted in Rule 26 (b) and the specification in Rule 26 (b) of documents which shall not be the subject of discovery would appear to provide explicit regulations on such matters and avoid complexities which have existed under the federal rules.

Same—1969 amendment.—(b) The 1969 amendment deleted former subsection (b) which dealt with discovery of certain documents without order of court. Since this whole area is now undergoing intensive study, it was thought desirable to delay action until a later date.

Editor's Note. — The 1969 amendment deleted former section (b), relating to discovery without court order.

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 8-89 and 8-90.

Rule Remedial and to Be Liberally Construed.—See Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928); H.L. Coble Constr. Co. v. Housing Authority, 244 N.C. 261, 93 S.E.2d 98 (1956); Diocese of W.N.C. v. Sale, 254 N.C. 218, 118 S.E.2d 399 (1961).

Provides Remedy Where Discovery Is Counsel's Objective. — See Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Substitute for Bill of Discovery.—Former § 8-89 was primarily designed and intended to afford the facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. Girard Nat'l Bank v. McArthur, 165 N.C. 374, 81 S.E. 327 (1914).

Prerequisite to Order for Discovery and Inspection.—As a prerequisite to an order

for pretrial discovery and inspection of documents, the courts, following their own procedure for discovery in aid of a bill of equity, have required the applicant to show by affidavit the necessity for the inspection and the materiality to the issue of the documents sought to be inspected. If the affidavit is insufficient, any order based upon it is invalid. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

The law will not permit a "fishing or ransacking expedition" either by subpoena duces tecum or a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Former §§ 8-89 and 8-90 did not supersede the subpoena duces tecum. Although the two are in some respects analogous, a subpoena duces tecum may not be used as a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Plaintiffs are not entitled to discover defendants' dealing with other persons. An order of examination is only in respect to those matters which relate to the action. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Discretion of Court.—Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

It is within the sound discretion of the trial court to order a party to give to the adverse party an inspection and copy of any books, papers and documents in his possession or under his control which contain evidence relating to the merits of the action or the defense thereto. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

When the requirements of the applicant, as set forth in former § 8-89 were met, former § 8-90 did nothing more than vest the granting of such application in the discretion of the judge. Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court, and the record failed to show that the requirements of former §§ 8-89 and 8-90 were met by plaintiff, or that the written statements were in court. Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

Where the motion is for inspection of writings in the possession of the corporate defendant, and the order allows inspection of writings in the possession of both the corporate and individual defendant, but both defendants are represented by the same counsel and it appears that the individual defendant was the president of the corporate defendant and that the writings referred to in the order all relate to business of the corporate defendant, abuse of discretion in granting the order is not shown. Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

Application for Order.—While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will be upheld. Bell v. Murchison Nat'l Bank, 196 N.C. 233, 145 S.E. 241 (1928).

Must Be Pertinent to Issue.—Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

When No Information Could Be Gained.—A person will not be ordered to allow an inspection of the paper-writing if the party making the request knows the contents thereof. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900), wherein the court said that the object of the statute was to enable a party to get information that he did not have, or to give him more definite information, or data, than he already had.

Inspection within Specified Time.—Former § 8-89 only authorized the judge to order one party to exhibit the writing to the other and required a copy to be given him or permit him to take a copy of the same, within a specified time. It was not intended that there should be an investigation of the controversies—a kind of inferior court or petty trial—with witnesses and lawyers on both sides. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

An examination of an adverse party, under former § 1-569 et seq., could be joined with an order under former § 8-89 for an inspection of writings, in the possession or under the control of the party

to be examined. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

Due Notice Required.—The inspection can only be had upon the order of the court, made after due notice. Vann v. Lawrence, 111 N.C. 32, 15 S.E. 1031 (1892).

What Constitutes Due Notice. — Due notice is notice sufficient to enable the party to have the document when called for. McDonald v. Carson, 95 N.C. 377 (1886).

Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. Beard v. Southern Ry., 143 N.C. 136, 55 S.E. 505 (1906).

Duration of Notice.—A notice to produce papers, etc., "on a trial to be had this day," is not confined to a trial on that day, but extends to a trial at a subsequent term. State v. Kimbrough, 13 N.C. 431 (1830).

Necessity that Complaint Be Filed.—A court could not under former § 8-90 order the production of papers by the defendant where no complaint had been filed, so that, in case the papers were not produced, the court could render judgment for the plaintiff, according to the provision of the section. Branson v. Fentress, 35 N.C. 165 (1851).

Acquiring Information Necessary to Filing of Complaint.—In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. Nance v. Gilmore Clinic, 230 N.C. 534, 53 S.E.2d 531 (1949), distinguishing Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947), in that the matter sought to be discovered in that case was not necessary as a basis for filing the complaint but related to a matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. The case distinguished does not hold that the statute is not available in seeking information to enable plaintiff to draft his complaint. Only in respect to the discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under this section to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. This is true even though their evidence may result in a pecuniary injury. Holt v. Southern Finishing & Warehouse Co., 116 N.C. 480, 21 S.E. 919 (1895).

Where No Answer Filed. — Where no answer has been filed, the defendant is not entitled to an order to inspect a check in possession of the plaintiff. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

Where Information to Be Used in Action against Third Party. — Though the point was not in issue, the court in Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947), stated that plaintiff may not proceed under former § 8-89 to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party.

Depositing Papers Not Required.—Former § 8-89 did not authorize the judge or clerk to issue an order that the respondent be required to deposit the papers in the clerk's office. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Extent of Admission. — The papers, when produced by the method prescribed, are competent evidence for all legitimate purposes. Austin v. Secrest, 91 N.C. 214 (1884).

Proof by Parol.—The contents of a paper writing cannot be proved by parol, unless notice has been given to the adverse party, who has it in possession to produce it on trial. Murchison v. McLeod, 47 N.C. 239 (1855).

Applicability of Res Judicata.—An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not res judicata and the motion can be renewed and a new order obtained. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Motion to Nonsuit.—A motion to nonsuit a plaintiff for not producing books or papers, cannot be made unless a previous order of the court has been obtained for the production of such books or papers. Graham v. Hamilton, 25 N.C. 381 (1843).

Where Inspection Refused.—Where the judge refuses an inspection which is of the character authorized, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947); H.L. Coble Constr. Co. v. Housing Authority, 244 N.C. 261, 93 S.E.2d 98 (1956); Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant. Rivenbark v. Shell Union Oil Corp., 217 N.C. 592, 8 S.E.2d 919 (1940).

And Must Show Materiality and Necessity.—It is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to be produced, and the mere averment that they are material and necessary is insufficient. Patterson v. Southern Ry., 219 N.C. 23, 12 S.E.2d 652 (1941).

Affidavit for Nonproduction. — Where the plaintiff's affidavit stated that he had not seen the letter (ordered produced) since he first sent it, that he had not knowingly destroyed it, and had made diligent search for it and could not find it, it was held to be sufficient cause shown for a discharge of the rule for its production. Fuller v. McMillan, 44 N.C. 206 (1853).

Appeal.—An appeal lies from an order requiring a person to allow an inspection of paper writings. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers unless the facts are stated upon which the application is based. Maxwell v. McDowell, 50 N.C. 391 (1858).

Rule 35. Physical and mental examination of persons.

(a) *Order for examination.*—In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30 (h), may order the party to submit to a physical or mental or blood examination by a physician, or to produce for such examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of findings.*—

(1) If requested by the party against whom an order is made under section (a) or by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party or person examined a like report of any examination, previously or thereafter made, of the same condition. If the party or person examined refuses to deliver such report, the judge on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report, the judge may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same condition. (1967, c. 954, s. 1.)

Comment.—*Section (a).* — This section differs from federal Rule 35 (a) only in the inclusion of certain changes proposed by the Advisory Committee in its 1955 re-

port. Such inclusions make clear the right to require a blood test in an action in which blood relationships are in controversy. The provision for the examination of a person in the custody or under the legal control of a party will permit the examination of a minor or incompetent.

This procedure is new to North Carolina practice. However, the right to require the plaintiff in a civil action to recover personal injuries to submit to a physical examination was recognized in Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928). Section 8-50.1 authorizes the court in actions in which the question of paternity arises to order a blood test.

Section (b). — This section permits the party examined to obtain the report of the physician making the examination. Since the party causing the examination could not obtain a copy of such a report made at the instance of the examined party because he might claim the report was privileged, this rule expressly provides that after the examined party requests a copy of the report of the examination made at the instance of the party causing the examination, the latter is entitled upon request to receive a report from the party examined of any examination previously or thereafter made concerning the same mental or physical examination.

The court is given the discretionary power to order that a copy of the report be furnished to any other party to the action.

Rule 36. Admission of facts and of genuineness of documents.

(a) *Request for admission.* — After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action, leave to do so must be obtained. Such leave may be granted with or without notice, and by the clerk of the court in which the action is pending or by a judge of the court in which the action is pending, as defined by Rule 30 (h). Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 20 days after service thereof or within such shorter or longer time as may be allowed on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either

(1) A sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or

(2) Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power.

(b) *Procedure on objections.*—If written objections are made, the party serving the request may, on motion and notice to all other parties, apply to a judge of the court in which the action is pending, as defined by Rule 30 (h), for an order directing the objecting party to respond to the request. The party serving the request may apply, in like manner, for a similar order when he regards the reasons set forth for neither admitting or denying the request as insufficient.

(c) *Use of admissions; effect thereof.*—Objection to the use of an admission

obtained under this rule at the trial or hearing may be made irrespective of whether there has been prior objection. Any admission made pursuant to this rule is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may the admission be used against him in any other proceeding. (1967, c. 954, s. 1.)

Comment.—Pretrial admissions of genuineness of documents were governed by former § 8-91. The provisions of this statute regarding taxation of costs are carried forward in Rule 37 (c).

The last sentence of section (a) is designed to preclude a party from offering lack of knowledge as a ground for refusing to admit when, in fact, he has the means to such knowledge reasonably within his power. To allow such a technical ground for refusal on any other basis would render the effect of the admission provision practically useless.

Section (b) does not appear in the federal rule. This section places the burden on the party serving the request to answer to interrogatories or detail reasons why he cannot.

Rule 37. Failure to make discovery; consequences.

(a) *Failure to answer.*—If a party or other deponent does not answer any question propounded upon oral examination, the examination shall be completed on other matters and then adjourned. Thereafter, on five days' notice to all persons affected thereby, the proponent may apply to a judge of the court in which the action is pending or a judge of the court in the county where the deposition is being taken, as defined by Rule 30 (h), for an order compelling an answer. Upon the failure of a deponent to answer any interrogatory submitted under Rule 31 or upon the failure of a party to answer any interrogatory submitted under Rule 33, the proponent may on like notice make like application for such an order. If the motion is granted, the order shall fix a time and place for further examination or a time for responding to the interrogatory as the case may be. No additional notice of examination need be given.

(b) *Failure to comply with order or to answer after denial of protective order.*—

(1) If a party or other witness fails without good cause to be sworn or fails without good cause to answer any question or interrogatory after being directed to do so by the judge, such failure may be considered a contempt of court.

(2) Other consequences:

If any party or an officer or managing agent of a party fails without good cause to obey an order made under section (a) of this rule requiring him to answer designated questions or interrogatories, or an order made under Rule 34, Rule 35 or Rule 36, the judge may make such orders in respect to the failure to answer as are just. The relief granted may include, if just, the following:

a. An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental or blood condition sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition sought to be examined.

c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or the question or interrogatory is answered, or dismissing the action or proceed-

ing or any part thereof, or rendering a judgment by default against the disobedient party.

d. When a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in paragraphs a, b and c of this subsection of this rule unless the party failing to comply shows that he is unable to produce such person for examination.

(c) *Expenses on refusal to admit.*—If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the genuineness of any such document or the truth of any such matter of fact is thereafter established by the admission of such party, or by the verdict of the jury, or by a finding by the court when there is a trial without a jury, he may apply to the judge for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, excluding attorney's fees. If the judge finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

(d) *Failure of party to attend or serve answers.*—If a party or an officer or managing agent of a party without good cause fails to appear before the person before whom the deposition is to be taken, after being served with a proper notice, or without good cause fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, a judge of the court in which the action is pending, as defined by Rule 30 (h), on motion and notice may make such orders as may be just including, among others, the striking of all or any part of any pleading of that party, or dismissing the action or proceeding or any part thereof, or the entry of a judgment by default against that party. (1967, c. 954, s. 1.)

Comment.—Under § 8-78 and former §§ 1-568.18 and 1-568.19, sanctions against either a deponent or adverse party for failure to answer or to appear are provided for. Under § 8-78 a deponent may be committed to jail upon warrant of the commissioner before whom the deposition is taken. Under former §§ 1-568.18 and 1-568.19 sanctions could be applied only upon order of court issued either by the clerk of superior court in which the action was pending or the judge having jurisdiction.

Under this rule sanctions can be applied only for failure to comply with a court order. Hence, if discovery procedure requires a court order as under Rules 34 or 35, failure to obey the order can be punished immediately under section (b) (2). But where the discovery procedure is set in motion by the parties themselves, the party seeking discovery must first obtain a court order under section (a) requiring the recalcitrant party or witness to make discovery. The only exception to this is found in section (d), which permits an immediate sanction against parties, their officers, or managing agents for a willful failure to appear.

Editor's Note. — For article on pretrial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

Article 6.

Trials.

Rule 38. Jury trial of right.

(a) *Right preserved.*—The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

(b) *Demand.*—Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

(c) *Demand—specification of issues.*—In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded

trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the last pleading directed to such issues or within 10 days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.

(d) *Waiver.*—Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action. (1967, c. 954, s. 1.)

Comment.—This rule and Rule 39 provide for the preservation of the right to jury trial and methods for claim and waiver of that right. The principal change effected is that waiver of right to jury trial is accomplished by a failure seasonably to demand jury trial.

North Carolina Const., Art. IV, § 12, specifically provides that jury trial can be waived, and former § 1-184 set up three methods by which there could be such waiver. They were: (1) By failing to appear at the trial; (2) by written consent filed with the clerk; and (3) by oral consent entered in the minutes. All three methods are retained. See Rule 39 (a). But a fourth is added which has as its object the early ascertainment of those cases in which there will be no jury. This knowledge is useful in calendaring a case and in counsel's preparation for trial.

The requirement of positive action by a party to preserve the right to jury trial is not at all new in certain areas—references and mandamus for example. In respect to references, see Simmons v. Lee, 230 N.C. 216, 53 S.E. 79 (1949). See also Rule 53 and the accompanying note. In respect to mandamus, see former § 1-513. This statute has been repealed and jury trial in respect to mandamus is now governed by this rule and Rule 39.

The procedure for demanding jury trial is simple. The demand may be within a pleading or endorsed thereon or by separate document. No particular form of words is prescribed. As to the time when the demand must be made, generally it will be "not later than 10 days after the service of the last pleading" directed to the issue in question. But it will be observed that section (c) makes it possible for a party to demand jury trial only for some of the issues. To adjust to the situation where, for example, a plaintiff in a negligence suit might have failed to demand jury trial on any issue and the defendant, at the last moment (on the 10th day after filing his answer), demands jury trial on only the damage issue, the rule allows the plaintiff 10 days after the service of the defendant's demand in which to demand jury trial on other issues.

The reference in section (d) to actions wherein jury trial cannot be waived would include actions for divorce not based on one year's separation. See § 50-10.

In keeping with present law [see J.L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905)], Rule 39 (b) authorizes a judge to disregard a waiver of jury trial.

Editor's Note.—For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969). For article on trial under the new rules, see 5 Wake Forest Intra. L. Rev. 138 (1969).

Rule 39. Trial by jury or by the court.

(a) *By jury.*—When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) *By the court.*—Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made

of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.*—In all actions not triable of right by a jury the court upon motion or if its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47 (a). (1967, c. 954, s. 1.)

Comment.—As indicated in the note to Rule 38, this rule carries forward the essence of former § 1-184 in respect to methods of waiver and the present power of the judge to require trial by jury, even though there has been a waiver. Moreover, provision is made for trial by jury when there is no right to such trial if the judge decides such a course is desirable or if the parties consent.

Rule 40. Assignment of cases for trial; continuances.

(a) The resident judge of any judicial district senior in point of continuous service on the superior court may provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district. Calendaring of actions for trial in the district court shall be in accordance with G.S. 7A-146. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. (1967, c. 954, s. 1; 1969, c. 895, s. 9.)

Comment.—This rule, as does the present Rule of Practice in the Superior Court, provides ultimately for judicial control of the calendar. The reference to the judge "senior in point of continuous service" is merely to designate the responsible judge in those districts having more than one judge.

Same—1969 amendment.—(b) The 1969 amendment added the provision concerning continuances. The previous code contained some detailed provisions on continuances. This brief provision was deemed appropriate out of an abundance of caution.

Editor's Note. — The 1969 amendment added "continuances" to the catchline to this rule, designated the former provisions of this rule as section (a) and added section (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23 (c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one

year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) *Involuntary dismissal; effect thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) *Dismissal of counterclaim; cross claim, or third-party claim.*—The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third-party claim.

(d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10.)

Comment.—*Section (a).* — The absolute right of a plaintiff to take a voluntary nonsuit for any or no reason at all at any time before verdict is beyond question under present law. Southeastern Fire Ins. Co. v. Walton, 256 N.C. 345, 123 S.E.2d 780 (1962). The vice of such an arrangement appears clearly in the following excerpt from an opinion of a federal judge:

"Before the effective date of [Rule 41] it not infrequently happened . . . that in a case . . . which had come to issue, perhaps after disposition of preliminary motions, which had gone to trial, in the trial of which plaintiff had introduced all his testimony, for the trial of which defendant had called witnesses from great distances and incurred great expense, the plaintiff would dismiss just at the moment the court was about to direct a verdict for defendant. The next day he might bring the same suit again. And the process might be repeated time after time. It was an outrageous imposition not only on the defendant but also on the court. Rule 41 has done much to put an end to that evil.

"The evil aimed at by the rule most largely is manifested in the extreme situation described. To a lesser extent it is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever . . . of having the suit

determined in his favor." McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940).

Under the rule, the plaintiff's absolute right of dismissal is confined to the period before answer or a motion for summary judgment—the period before which there has been a heavy expenditure of time and effort by the court and other parties. Thereafter, the plaintiff can dismiss only with the consent of the other parties or with the permission of the judge. This latter provision allowing dismissal with the permission of the judge should be ample to take care of the hardship case where, for quite legitimate reasons, the plaintiff is unable to press his claim. It should be noted, however, that the judge is authorized to condition the dismissal on terms. For the federal practice in respect to terms, see 5 *Moore's Federal Practice*, § 41.06.

It should also be observed that the first voluntary dismissal will have the same effect as is now accorded a voluntary nonsuit, i.e., it is not a judgment on the merits. But a second dismissal, no matter where the first action was brought, will be a judgment on the merits.

Section (b).—Under this section, whether the action be a nonjury action or a jury action, there may be a motion for a dismissal because of failure of a plaintiff to prosecute or for a failure "to comply with these rules or any order of court." The power of the court to dismiss for failure to prosecute is well established [see Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941)] and the rule merely gives statutory recognition of this power.

In respect to a motion for dismissal because of noncompliance with these rules or an order of court, the propriety of a dismissal will, of course, depend on the rule or order which has not been complied with. The rule does not undertake to say in what circumstances a dismissal will be proper any more than it attempts arbitrarily to declare what is a failure to prosecute.

In an action tried by the court without a jury, the rule provides for a motion similar to the familiar motion for compulsory nonsuit under former § 1-183. It is contemplated that where there is a jury trial, Rule 50 will come into play with its motion for a directed verdict. For a discussion of the interrelation of this rule and Rule 50, see the comment to Rule 50. The practice under section (b) will be much like that under former § 1-183. But there are some changes. The court is empowered to determine that its adjudication shall be on the merits and to find the facts in appropriate cases at the close of the plaintiff's evidence.

Section (c). — This section makes clear that the rule is applicable to all situations in which a claim is capable of being pressed under these rules.

Section (d).—This section makes certain that one, other than a plaintiff suing in forma pauperis, will have paid the costs in the first action before he can maintain a second action on the same claim.

Same — 1969 amendment. — The most significant change produced by the 1969 amendments to Rule 41 is that a claimant's unfettered right to a voluntary, nonprejudicial dismissal endures up to the moment he rests his case. But the amended Rule specifies, as did the earlier version, that a second dismissal shall operate as an adjudication upon the merits.

There has been an attempt to make clear that the right to bring a new action within one year, after either a voluntary or an involuntary dismissal, is dependent on the original action having been commenced before the relevant statute of limitations has run. To that end, the last sentences of subsections 41(a) (1) and 41(a) (2) and section 41(b) now speak of "an action commenced within the time prescribed therefor."

Subsection 41(a) (1) has been rewritten to provide that the right to bring a new action within one year applies in the case of a dismissal by stipulation if the parties do not "specify a shorter time." Basically, the rights of the parties have not been affected because a stipulation requires unanimity among the parties. If any party objects to the extension of the statute of limitations, he may refuse to sign the stipulation and thereby compel the claimant to seek the court's permission under subsection 41(a) (2).

Section 41(b) has been rewritten, in conformity with the present federal rule, to make it clear that a motion for involuntary dismissal *under Rule 41* is available at the close of the claimant's case only in an action tried by the court without a jury. When there is a jury and a defendant wishes to challenge the sufficiency of the evidence, he must resort to Rule 50.

A second objective in the rewriting of section 41(b) was to make clear that the court's power to dismiss on terms, that is, to condition the dismissal ("Unless the court in its order for dismissal otherwise specifies, . . .") extends to all dismissals other than voluntary dismissals under section 41(a). Thus, if there were a motion to dismiss under Rule 37(b) (2) (iii) for failure to comply with a discovery order,

the court, under the amended version of Rule 41(b), could in granting the motion specify that the dismissal was without prejudice.

Rule 50. Rule 50, both in its old version and in the new, contemplates that when a party moves for a directed verdict and his motion is denied or for any reason is not granted, that party may, after an adverse verdict or the failure of the jury to return a verdict, move for judgment notwithstanding the verdict. When the movant for a directed verdict who is not immediately successful later moves for a judgment notwithstanding the verdict and his motion is granted or denied, and there is an appeal, the powers of the appellate court are reasonably clear, as outlined in sections 50(c) and (d). But when the movant for a directed verdict later fails to move for a judgment notwithstanding the verdict, there has been in the federal courts uncertainty about the powers of an appellate court. See 5 Moore's Federal Practice §§ 2365-2374. The uncertainty revolves around the question of whether an appellate court can direct entry of judgment for a party who was erroneously denied a directed verdict but who later failed to move, as the Rule contemplates, for a motion for judgment notwithstanding the verdict. The Supreme Court ruled in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), that in the circumstances outlined the appellate court was limited to directing a new trial.

It might be said that the rationale of the Court's ruling in the *Cone* case rests on a desire that no final conclusive judgment be rendered against a party unless the trial judge has had an opportunity to consider whether the loser should be given another chance. The trial judge would not have this opportunity in the absence of some such rule as that enunciated in *Cone*.

The Commission has from the first embraced the *Cone* result. The Commission has gone further and attempted to meet some of the problems spawned by the *Cone* decision.

Its first effort was the rather clumsy one comprised in the last two sentences of Rule 50(b) as it was originally enacted. These two sentences have now been deleted and they should be forgotten.

In their stead, the General Assembly has added a new final sentence to what is now subsection 50(b) (1) and a new subsection 50(b) (2). These additions make clear the power of a trial judge, once there has been a motion for a directed verdict, to consider on his own motion, after entry of judgment (see Rule 58 as to when judgment is deemed to be entered), entry of judgment in accordance with the directed verdict motion. The additions also make clear that without some post-verdict consideration of a motion for judgment or the reserved motion for a directed verdict, the appellate court cannot, if it should find erroneous the failure to grant the motion for directed verdict, direct entry of judgment for the appellant but can only order a new trial.

Editor's Note. — The 1969 amendment rewrote sections (a), (b) and (c).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 42. Consolidation; separate trials.

(a) *Consolidation.*—When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. When actions involving a common question of law or fact are pending in both the superior and the district court of the same county, a judge of the superior court in which the action is pending may order all the actions consolidated, and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.*—The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues. (1967, c. 954, s. 1.)

Comment. — Section (a), providing for consolidation of actions "involving a common question of law or fact," invokes a power that North Carolina courts have long exercised. See McIntosh, *North Carolina Practice and Procedure* (1st ed.) pp. 536-537, § 506. Section (b) furnishes the court with the contrasting power of severance. With the multisided law suit made possible by these rules, it is safe to say that there will be more frequent occasion for the exercise of this power than formerly. Indeed, the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. Whether or not there should be a severance rests in the sound discretion of the judge. For occasions where severance has been thought appropriate, see 5 *Moore's Federal Practice*, § 42.03.

Rule 43. Evidence.

(a) *Form.*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

(b) *Examination of hostile witnesses and adverse parties.*—A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

(c) *Record of excluded evidence.*—In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which is was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(d) *Affirmation in lieu of oath.*—Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on motions.*—When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (1967, c. 954, s. 1.)

Comment. — While these rules do not deal extensively with questions of evidence, matters dealt with by the federal rules have been considered.

Section (a).—This section continues the usual practice of testimony being taken orally in open court. The "unless" clause refers principally to the provisions for the use of depositions in Rule 26 (d).

Section (b).—This section deals with the situation where a party is forced to call his adversary as a witness. Under former provisions of § 8-50, one was permitted in this situation to cross-examine the witness and to contradict him but not to impeach him. This latter restriction is removed on the theory that a party who is so desperate as to be forced to call his adversary as a witness should be allowed the greatest latitude in refuting his adversary's testimony, should that be desirable. Section (b) also enlarges and spells out in greater detail the category of witnesses to whom its special provisions apply. The former provisions of § 8-50 said only that where a corporation is a party, its "officers or agents" are within its scope.

Section (c). — This section continues present practice.

Section (d).—This section makes available to all the privilege of using an affirmation instead of an oath. Under § 11-4, only Quakers, Moravians, Dunkers and Mennonites are so privileged.

Section (e). — This section continues present practice.

Rule 44. Proof of official record.

(a) *Authentication of copy.*—An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is without the State of North Carolina but within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.*—A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.*—This rule does not prevent the proof of official records specified in Title 28, U.S.C. §§ 1738 and 1739 in the manner therein provided; nor of entry or lack of entry in official records by any method authorized by any other applicable statute or by the rules of evidence at common law. (1967, c. 954, s. 1.)

Comment.—North Carolina had no general statute, applying to all official custodians of records, in respect to the proof of official records. Section (a) supplies this omission and makes unnecessary reliance on statutes applicable to particular custodians and to particular situations. For reference to and discussion of the North Carolina statutes, see Stansbury, *North Carolina Evidence*, § 154.

Section (b) provides a simple method for producing evidence of nonexistence of a record.

Section (c), out of an abundance of caution, leaves as alternative methods of proof any methods now existing. For various statutes, see chapter 8 of the General Statutes, article 2 and article 3. 28 U.S.C., §§ 1738 and 1739 have to do with proof of records in other states and in territories and possessions of the United States. In addition, the two sections prescribe the "faith and credit" these records are to have when duly authenticated.

Rule 45. Subpoena.

(a) *For attendance of witnesses; issuances; form.*—A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *Issuance by a judge.*—Such subpoena may also be issued by any judge of the superior court, judge of the district court, or magistrate.

(c) *For production of documentary evidence.*—A subpoena may also command the person to whom it is directed to produce the records, books, papers, documents, or tangible things designated therein. Where the subpoena commands any custodian of public records to appear for the sole purpose of producing certain records in his custody, the custodian subpoenaed may, in lieu of a personal appearance,

tender to the court by registered mail certified copies of the records requested, together with an affidavit by the custodian as to the authentication of the records tendered or, if no such records are in his custody, an affidavit to that effect. Any original or certified copy or affidavit delivered under the provisions of this rule, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. The judge, upon motion to quash or modify made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may

(1) Quash or modify the subpoena if it is unreasonable and oppressive and in such case may order the party in whose behalf the subpoena is issued to pay the person to whom the subpoena is directed part or all of his reasonable expenses including attorneys' fees or

(2) Grant the motion unless the party in whose behalf the subpoena is issued advances the reasonable cost of producing the records, books, papers, documents, or tangible things.

(d) *Subpoena for taking depositions; place of examination.*—

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated records, books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of section (b) of Rule 30 and section (c) of this rule.

(2) A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) *Service.*—All subpoenas may be served by the sheriff, by his deputy, by a constable, by a coroner or by any other person who is not a party. Service may be made only by the delivery of a copy to the person named therein by any person authorized in this section to serve subpoenas, or by telephone communication with the person named therein by any process officer as specified in this section, or by mailing the subpoena, registered or certified mail, return receipts requested, by any process officer specified in this section. Personal service shall be proved by return of the process officer making service and by return under oath of any other person making service. Service by telephone communication shall be proved by return of the process officer noting the method of service. Service by registered or certified mail shall be proved by filing the return receipt with the return.

(f) *Punishment for failure to obey.*—Failure by any person without adequate cause to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. Failure by a party without adequate cause to obey a subpoena served upon him shall also subject such party to the sanctions provided in Rule 37 (d). (1967, c. 954, s. 1; 1969, c. 886, s. 1.)

Comment.—This rule would seem to be largely self-explanatory. An effort has been made to provide a convenient and highly flexible practice in respect to subpoenas. It will be noted that the subpoena is to be directed to the witness rather than to the sheriff as our present statute provides. The party obtaining the subpoena will deliver it to the appropriate sheriff or other proper person for service.

The differences between sections (a) and (c) on the one hand, and section (d) on the other should also be noted. In sections (a) and (c), it is contemplated that

the subpoena will issue from the court where the action is to be tried wherever the witness is likely to be found, while in section (d) the idea is that the subpoena shall issue from the court of the county where the deposition is to be taken. The limitations of section (d) in no way affect where the subpoena may be served nor do they in any way apply to sections (a) and (c).

Editor's Note. — The 1969 amendment rewrote the opening paragraph of section (c).

Session Laws 1969, c. 886, s. 3, as amended by Session Laws 1969, c. 1276, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 46. Objections and exceptions.

(a) *Rulings on admissibility of evidence.*—

(1) When there is objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified, it shall be deemed that a like objection has been made to any subsequent admission of evidence from the witness in question. Similarly, when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning.

(2) If there is proper objection to the admission of evidence and the objection is overruled, the ruling of the court shall be deemed excepted to by the party making the objection. If an objection to the admission of evidence is sustained or if the court for any reason excludes evidence offered by a party, the ruling of the court shall be deemed excepted to by the party offering the evidence.

(3) No objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action.

(b) *Rulings and orders not directed to the admissibility of evidence.*—With respect to rulings and orders of the court not directed to the admissiblity of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor; and if a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice him.

(c) *Instruction.*—If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections. (1967, c. 954, s. 1.)

Comment.—Section (a) (1) is aimed at situations where repeated objections in respect to the admission of evidence have been necessary in order to assure review. In Shelton v. Southern Ry., 193 N.C. 670, 139 S.E. 232 (1927), the court declared:

"It is thoroughly established in this State that, if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination, the benefit of the exception is ordinarily lost."

This proposition has recently been reaffirmed in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 294, 130 S.E.2d 625

(1963). Thus, apparently the only course of safety for counsel to follow under prior practice would be to object at every opportunity. It would seem that a single objection should suffice in either of the two situations specified in subsection (1).

Section (a) (2) continues the present practice.

Section (a) (3) continues the present practice of making unnecessary objection or exception with respect to questions propounded by a juror or by the judge. See former § 1-206 (d).

Section (b), it will be noted, applies to all nonevidentiary rulings and orders. In this respect, it is new. However, the general principle of the section has been in North Carolina practice for some time in respect to rulings on motions for nonsuit. See former § 1-183.

Section (c) continues present practice. See former § 1-206, subsection (b), and the note to Rule 51.

Cross References.—As to exceptions in case on appeal, see § 1-282. As to instructions generally, see Rule 51 and §§ 1-180, 1-181, 1-182.

Editor's Note.—The cases cited in the following note were decided under former § 1-206.

Errors Should Be Pointed Out.—Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. Williams v. Johnston, 94 N.C. 633 (1886); State v. English, 164 N.C. 497, 80 S.E. 72 (1913). See Streator v. Streator, 145 N.C. 337, 9 S.E. 112 (1907); Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913).

A "broadside" exception cannot be entertained on appeal. Kelly v. Johnson, 135 N.C. 650, 47 S.E. 672 (1904); Jackson v. Williams, 152 N.C. 203, 67 S.E. 755 (1910).

Formal Objections to Charge Not Required.—Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in proper time; and when exceptions are taken, they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal. Paul v. Burton, 180 N.C. 45, 104 S.E. 37 (1920). See Rice v. Swannanoa-Berkeley Hotel Co., 209 N.C. 519, 184 S.E. 3 (1936).

Omitted Charge Is Not Error without Request.—An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. Fry v. Currie, 91 N.C. 436 (1884).

But Request for Correct Written Instruction Is Not Required.—Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for by the excepting counsel. Lee v. Williams, 112 N.C. 510, 17 S.E. 165 (1893).

Time for Exceptions to Instructions.—In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial but may set out exceptions for the first time in his case on appeal. State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950). See Cherry v. Atlantic Coast Line R.R., 186 N.C. 263, 119 S.E. 361 (1923).

Rule 47. Jurors.

Inquiry as to the fitness and competency of any person to serve as a juror and the challenging of such person shall be as provided in chapter 9 of the General Statutes. (1967, c. 954, s. 1.)

Rule 48. Juries of less than twelve—majority verdict.

Except in actions in which a jury is required by statute, the parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. (1967, c. 954, s. 1.)

Comment. — Since jury trial may be waived entirely, it is certainly appropriate with the consent of the parties that trial be by a jury of less than 12 and that the usual rule of unanimity not prevail. The rule recognizes the exception in actions for divorce provided by § 50-10. Under the rule therefore, if there is a jury trial in a divorce action (there may not be; § 50-10 provides for waiver when the ground alleged is one year's separation) it will be by a jury of 12 and the rule of unanimity will prevail.

Rule 49. Verdicts.

(a) *General and special verdicts.*—The judge may require a jury to return either a general or a special verdict and in all cases may instruct the jury, if it renders a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. A general verdict is that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only.

(b) *Framing of issues.*—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reducing to writing, before or during the trial.

(c) *Waiver of jury trial on issue.*—If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

(d) *Special finding inconsistent with general verdict.*—Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly. (1967, c. 954, s. 1.)

Comment.—A distinguished scholar has said that the North Carolina verdict practice "has enabled, more than any other factor perhaps, a very small judiciary to care for the litigation of one of the larger states." Green, *A New Development in Jury Trial,* 13 ABAJ 715, at p. 716 (1927). The Commission shares this high opinion of the North Carolina practice and, in its more essential respects, the Commission proposed its retention. It will be observed that sections (a), (b) and (d) are practically drawn verbatim from former §§ 1-200 [section (b) of this rule]; 1-201 [the last two sentences of section (a)]; § 1-202 [section (d)]; former § 1-203 [the first sentence of section (a)].

There are some changes produced by the rule. Former § 1-203 permitted the jury "in their discretion" to return either a general or special verdict "in every action for the recovery of money only or specific real property." No instances of an exercise or this discretion were known to the Commission, and it saw no purpose in not allowing the judge to control the form of verdict. Accordingly, it omitted any reference to the jury's discretion in this respect.

Section (c) changes the law in respect to issues omitted by the judge in submitting a case to the jury. The right to jury trial on such issues would be lost in the absence of a demand for such submission and the judge would be empowered to make a finding on the issue in question. The idea is that the inadvertent omission of an issue ought not to jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. Ample means for a party to protect his right to jury trial on all issues are clearly available. All he has to do is demand their submission "before the jury retires."

Section (c) also employs, in the case of an omitted issue and an omitted finding by the judge, a presumption of a finding in accord with the judgment. Formerly, in this situation, nothing was presumed in support of the judgment in jury cases. Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Finally, it will be observed that the rule speaks of issues "raised in the pleadings or by the evidence." Normally, the issues will be raised by the pleadings but under Rule 15 (b) provision is made for regarding the pleadings as amended whenever an issue outside the pleadings is tried with consent of the parties, express or implied. Thus, it will not be essential for the pleadings to reflect, on every occasion, all the issues.

Editor's Note.—The cases cited in this note were decided under former §§ 1-196, 1-200 and 1-201.

The Supreme Court, in construing provisions substantially the same as section (b) in former § 1-200, laid down several rules: (1) The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment; (2) of the issues raised by the pleadings, the judge may, in his discretion, submit one or many, pro-

vided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon.

Section (b) is mandatory, and where no issues are tendered by either party, it is the duty of the judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the requirements is absolutely essential, not only to the fair trial of the case, but to an intelligent appreciation of its merits upon an appeal. Denmark v. Atlantic & N.C.R.R., 107 N.C. 185, 12 S.E. 54 (1890); Burton v. Rosemary Mfg. Co., 132 N.C. 17, 43 S.E. 480 (1903); Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945). See Stanback v. Haywood, 209 N.C. 798, 184 S.E. 831 (1936), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

It should be borne in mind that the system contemplates distinct findings upon material issues. These should be submitted where it can be done without repetition or confusion. Emery v. Raleigh & G.R.R., 102 N.C. 209, 9 S.E. 139 (1889). It is not necessary that the language of the pleadings should be incorporated in the issues, or that it should be clearly followed in drawing them.

While the pleadings are to be construed with a view to substantial justice between the parties, the proof must conform substantially to the allegation. As was said by the Supreme Court in Parsley v. Nicholson, 65 N.C. 207 (1871), "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure, the essential principles still remain and have only been modified as to the technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty." See Braswell v. Johnston, 108 N.C. 150, 12 S.E. 911 (1891); Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

For an excellent discussion by the Supreme Court of the provisions and requirements of former § 1-200, see Piedmont Wagon Co. v. Byrd, 119 N.C. 460, 26 S.E. 144 (1896).

Provisions Mandatory.—These provisions are mandatory. It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

The submission of issues is not a mere matter within the discretion of the court, but it is now a mandatory requirement of the law, and a failure to observe this requirement will entitle the party who has not in some way lost the right to have the error of the court corrected. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

General Verdict.—The verdict is general when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted. Morrison v. Watson, 95 N.C. 479 (1886); Porter v. Western N.C.R.R., 97 N.C. 66, 2 S.E. 591 (1887).

Special Verdict Cannot Be Added to.—"In any case, the trial judge may decline to receive a special verdict, and insist that the jury return a general verdict of guilty or not guilty; but when a special verdict is found by the jury, neither the trial court nor the appellate court can add any fact not directly found, nor can its existence be presumed." State v. Colonial Club, 154 N.C. 177, 69 S.E. 771 (1910).

Where Findings of Jury in Conflict.—If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. Morrison v. Watson, 95 N.C. 479 (1886). And where such is the case, the rule that requires a special verdict to prevail over a general one has no application. Porter v. Western N.C.R.R., 97 N.C. 66, 2 S.E. 581 (1887).

Presence of Parties. — A party has the right to be present upon the rendition of the verdict, State v. Jones, 91 N.C. 654 (1884). This right is personal to the parties themselves, and the absence of the counsel at the rendition is not a ground for a new trial. Barger Bros. v. Alley, 167 N.C. 362, 83 S.E. 612 (1914).

The entry of a verdict against a plaintiff who is not present either in person or by attorney is irregular. Graham v. Tate, 77 N.C. 120 (1877).

Waiver of Right to Be Present.—The right of the parties to be present when the verdict is returned in a civil case is waivable. Barger Bros. v. Alley, 167 N.C. 362, 83 S.E. 612 (1914).

Polling Jury Is Not Indispensable but May Be Asked for.—It is not essential to the validity of the proceedings that the jury be polled, this being merely a privilege which may be asked for by either party. State v. Toole, 106 N.C. 736, 11 S.E. 168 (1890); Smith v. Paul, 133 N.C. 66, 45 S.E. 348 (1903).

The right of a party to have the jury polled after the rendition of its verdict exists in civil as well as criminal cases. State v. Young, 77 N.C. 498 (1877); State v. Toole, 106 N.C. 736, 11 S.E. 168 (1890); Smith v. Paul, 133 N.C. 66, 45 S.E. 348 (1903).

Dissent or Disagreement of Jurors.—On a poll of the jury, the dissent of one juror renders the verdict invalid. Owens v. Southern Ry., 123 N.C. 183, 31 S.E. 383 (1898); but mere reluctance on the part of one juror will not be fatal to the verdict. Lowe v. Morgan, 125 N.C. 301, 34 S.E. 442 (1899).

When Issues Sufficient.—It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Single Issue Sufficient.—It is not error for the court to submit only an issue involving the question whether a plaintiff has been injured and has sustained damage through the negligence of a defendant, even where contributory negligence is set up as a defense. McAdoo v. Richmond & D.R.R., 105 N.C. 140, 11 S.E. 316 (1890); Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

Of the issues raised by the pleadings, the judge who tries the case may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

The judge is required to submit such issues as are necessary to settle the material controversies arising on the pleadings. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

It is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, without admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

Issues of fact raised by the pleadings must be submitted to the jury. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

Only Issues "Material to Be Tried" Are to Be Submitted.—Even though the facts relating to a particular issue are controverted in the pleadings, when such issue is not "material to be tried" and is not determinative of the rights of the parties, it is error to submit such issue. Henry Vann Co. v. Barefoot, 249 N.C. 22, 105 S.E.2d 104 (1958).

It is necessary to submit to the jury only such issues as arise upon the pleadings and are material to be tried. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

The court need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of this section is fully met. O'Briant v. O'Briant, 239 N.C. 101, 79 S.E.2d 252 (1953).

Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to jury in the form tendered. Griffin v. United Servs., Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945); Durham Lumber Co. v. Wrenn-Wilson Constr. Co., 249 N.C. 680, 107 S.E.2d 538 (1959); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

It is within the sound discretion of the trial judge to determine what issues shall

be submitted, and to frame them subject to the restrictions that the verdict constitutes a sufficient basis for a judgment; and that it does not appear that a party was debarred for want of an additional issue or issues of the opportunity to present to the jury some view of the law arising out of the evidence. Stanback v. Haywood, 209 N.C. 798, 184 S.E. 831 (1936).

Ordinarily it is within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form thereof. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Issues Generally Precede Testimony.—It is contemplated that the issues shall be drawn before the introduction of testimony. Beasley v. Surles, 140 N.C. 605, 53 S.E. 360 (1906).

Multiplicity of Issues.—It is not contemplated or required that an issue shall be submitted to the jury as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so. Patton v. Western N.C.R.R., 96 N.C. 455, 1 S.E. 863 (1887).

The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential and when found by the jury only furnish facts which would be evidence to prove the main issue, should never be submitted. Patton v. Western N.C.R.R., 96 N.C. 455, 1 S.E. 863 (1887).

Insufficient Issues.—Where in an action for damages, the defendant tendered the issues: (1) Were plaintiff's injuries caused by the defendant's negligence? (2) Was there contributory negligence on the part of the plaintiff? (3) What damage is the plaintiff entitled to recover?, and the court declined to submit these, but substituted instead a single issue—What damages, if any, is the plaintiff entitled to recover?—it was held to be error. Denmark v. Atlantic & N.C.R.R., 107 N.C. 185, 12 S.E. 54 (1890).

In an action to recover on policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to valid delivery and payment of first premium, and court declined to submit such issues or to submit others of similar import, which would be determinative of questions presented, appellate court will remand for new trial. Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945).

Separate Causes of Action.—Where the plaintiff brings a single suit on two distinct causes of action, a separate issue should be submitted as to the damages arising on each separate cause of action. Kelly v. Durham Traction Co., 133 N.C. 418, 45 S.E. 826 (1903).

Inconsistent Causes of Action.—Where the plaintiff alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint. Griffin v. Atlantic Coast Line R.R., 134 N.C. 101, 46 S.E. 7 (1903).

Court Adding Issue of Contributory Negligence.—Where the plaintiff brought suit against two defendants as joint tortfeasors, one defendant answering alleging contributory negligence and one defendant not filing an answer, and where the plaintiff tendered issues of negligence of the answering defendant, the court adding the issue of contributory negligence arising upon the pleading of this defendant, it was held that, as a rule, the court must submit the issue arising on the pleadings, but the plaintiff waived this by tendering only one issue as to the answering defendant, and allowing the case to be tried on that theory. Ammons v. Fisher, 208 N.C. 712, 182 S.E. 479 (1935).

Where Complaint Differs from Issue.—Where a contract alleged in the complaint is different from that submitted in the issue, an instruction that if the contract was as alleged, the issue should be answered in the affirmative, is error. Dickens v. Perkins, 134 N.C. 220, 46 S.E. 490 (1904).

Where Issues Not Determinative.—A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered. Merchants Nat'l. Bank v. Carolina Broom Co., 188 N.C. 508, 125 S.E. 12 (1924).

An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or defendant's defense, is alleged by one party and denied

by the other. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969), construing former § 1-198.

An issue of fact arises on the pleadings whenever a material fact is maintained by one part and controverted by the other. Wells v. Clayton, 236 N.C. 103, 72 S.E.2d 16 (1952); In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. Wells v. Clayton, 236 N.C. 103, 72 S.E.2d 16 (1952); In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

An issue of fact arises when the answer controverts a material allegation of the complaint. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

Material Fact Not Denied Is Taken as True.—If a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Although the parties may not agree upon improper issues they may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

But stipulations do not dispense with necessity that pleadings support proof. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The pleadings must support the judgment, which may not based on facts not alleged in the complaint and entirely inconsistent with it. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. Griffin v. United Servs., Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897); Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).

When the facts constituting a waiver do not appear in the pleadings, the party relying thereon must specially plead the defense, and it must be pleaded with certainty and particularity and established by the greater weight of the evidence. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Denial of Allegation of Wrongful Possession.—In an action to recover possession of personalty, defendant's denial of the allegation that she is in the wrongful possession raises an issue for the jury, since even though plaintiff be owner of the property, it does not follow that defendant is in the wrongful possession thereof. Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).

Sufficiency of Verdict. — The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Issues May Not Be Tendered or Objected to on Appeal.—If defendant has not tendered issues, or otherwise objected to trial on the issue submitted, it cannot do so on appeal. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Section (a) is in accord with the case of State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891), and is approved as the better practice. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Manner of Arriving at General Verdict. —In arriving at a general verdict, the jurors take the law as given by the court and apply the law to the facts as they find them to be, and reach a general conclusion, usually "guilty" or "not guilty." State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Form of Special Verdict. — Ordinarily, the form of a special verdict is a written recital of the jury's findings of the ultimate material facts. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

It was originally a requirement in this jurisdiction that the special verdict state that the jury finds the accused guilty if, in the opinion of the court upon the facts found, he is guilty, and not guilty if, in the opinion of the court, the facts found do not establish guilt. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do, or do not, constitute in law the offense charged. State v. Stewart, 91 N.C. 566 (1884). The procedure outlined in State v. Love, 238 N.C. 283, 77 S.E.2d 501 (1953), and cases tried in accordance with that procedure will not be held erroneous by reason of such procedure. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Court May Enter Judgment Thereon.—Upon the special verdict in a case, the court should simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly. Indeed, the simple entry of judgment in favor of or against the defendant would be sufficient. It is plain and convenient, will prevent further conflict of decision, and should be observed. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

If Material Facts Are Found No General Verdict Is Necessary.—Where there is a special verdict, finding the material facts, no general verdict of guilt or innocence is necessary. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964), citing State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891).

But Special Verdict Must Find Sufficient Facts to Permit Conclusion upon Which Judgment Rests.—A special verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

A special verdict is defective if a material finding is omitted. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

In a prosecution for willful nonsupport of an illegitimate child, 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).

The verdict of the jury on the issues of paternity and nonsupport is in the nature of a special verdict. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) *When made; effect.*—A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.*—

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned,

the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50 (b) (1) or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50 (b) (1).

(c) *Motion for judgment notwithstanding the verdict—conditional rulings on grant of motion.*—

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Motion for judgment notwithstanding the verdict—denial of motion.*—If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (1967, c. 954, s. 1; 1969, c. 895, s. 11.)

Comment.—It will be recalled that Rule 41 (b) provides the procedure in those cases tried to the court where the party defending believes the evidence of his adversary is insufficient to permit a recovery. Section (a) of this rule provides the procedure in comparable circumstances in those cases tried by jury. It further provides a procedure whereby a claimant in a jury trial may urge that he is entitled to a recovery as a matter of law.

The rule contemplates that a party defending may move for a directed verdict at the close of his adversary's evidence or at the close of all the evidence whether or not he has made a prior motion. The rule further contemplates that any party may move for a directed verdict at the close of all the evidence.

Some important changes are effected by Rules 41 (a) and 50 (a) taken together. Formerly, a party defending had available the motion for nonsuit provided by former § 1-183. Judgment pursuant to a grant of the motion was not a judgment on the merits. In addition, any party had available the common-law motion for a directed verdict which does, if granted, result in a judgment on the merits. Everett v. Williams, 152 N.C. 117, 67 S.E. 265 (1910). Despite the greater potential of the directed verdict, the motion was infrequently employed because the claimant could always, under prior practice, forestall the directed verdict by taking a voluntary nonsuit.

Under the rules, at the close of the claimant's evidence, the party defending in

a jury trial will be restricted to the directed verdict motion—a motion that if granted will result in a judgment on the merits disposing of the case finally in the absence of reversal on appeal. But it should be remembered that the judge will have power under Rule 41 (a) (2) on the claimant's motion to allow a dismissal that is not on the merits.

The last sentence in section (a) is simply for the purpose of avoiding a useless formality. When a judge decides that a directed verdict is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve. In these circumstances, it is an idle gesture to require the jury to go through the motions of returning the verdict directed.

Section (b), providing for a motion for judgment notwithstanding the verdict or, as it is commonly called "a judgment NOV" (an abbreviation for non obstante veredicto) introduces an entirely new procedure to North Carolina practice. It is true that North Carolina had a judgment NOV of sorts—for use in a situation where the party against whom a verdict is rendered would have been entitled to a judgment on the pleadings. See McIntosh, *North Carolina Practice and Procedure* (1st ed.), § 612. The judgment NOV in this rule is an altogether different affair. In essence, it involves allowing a judge to consider the question of the sufficiency of the evidence after the jury has returned a verdict.

This power has been sought—unsuccessfully it must be said—by superior court judges on more than one occasion. See, e.g., Batson v. City Laundry Co., 202 N.C. 560, 163 S.E. 600 (1932); Jones v. Dixie Fire Ins. Co., 210 N.C. 559, 187 S.E. 769 (1936). A moment's reflection will show why. A motion challenging the sufficiency of the evidence will often present a close question of great difficulty. A jury verdict for the movant eliminates this question and an appeal based on the ruling on the motion. But under prior practice, the judge was not permitted to consider the question raised by the motion after submitting the case to the jury. He was required to rule, finally, before the case was submitted.

If the motion was granted, there would likely be an appeal. If the trial judge was affirmed, it was quite possible that the appeal was unnecessary since the jury, had it been allowed to consider the evidence, might well have found for the movant. If the trial judge was reversed, there would have to be a new trial, repeating much of the expenditure in time and effort that was put into the first trial because there was no verdict on which judgment could be entered.

Under the rule, whenever a motion for a directed verdict made at the close of all the evidence is not granted, it will be deemed that the judge submitted the case to the jury having reserved for later determination the legal question raised by the motion. Thus, if there is a verdict for the nonmovant or if for some reason a verdict is not returned, the judge can reconsider the sufficiency of the evidence and, if convinced that it is insufficient, can grant the motion. If, on appeal it should prove that the judge was correct, that is, that he properly granted the motion, then the appellate court can affirm and, in appropriate cases, order judgment entered for the movant. On the other hand, if it should prove that the trial judge improperly granted the motion, the appellate court is not restricted to granting a new trial, as under the prior practice, but can order judgment entered on the verdict.

The utility of the judgment NOV must be obvious. It will certainly eliminate some appeals and it will certainly eliminate some second trials.

Turning now to the procedure for employing the motion for judgment NOV, it will be observed that making an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment NOV. 5 *Moore's Federal Practice*, § 50.08 and cases cited.

Second, it will be observed that the motion can, but need not be, coupled with a motion for a new trial. If it is joined with a motion for a new trial, the proper procedure, as laid down by the Supreme Court in Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 Sup. Ct. 189, 85 L. Ed. 147 (1940) and as spelled out in sections (c) and (d) is for the court to rule on both motions. If the motion for judgment is granted and this is approved on appeal, the lower court's ruling on the movant's (verdict loser's) motion for new trial becomes irrelevant. Final judgment for the movant is affirmed. If, however, the lower court is reversed on appeal as to the motion for judgment, then its ruling on the new trial motion becomes a matter of importance. If the movant (verdict loser) was granted a new trial, "the new trial shall proceed unless the appellate court has otherwise ordered." Of course, the appellate court might very well "otherwise order" since the nonmovant (verdict winner) could assert on appeal not only error in the grant of the motion for judgment but error in the grant of the new trial. If the movant

was denied a new trial although granted a judgment NOV, he can, under section (c), "assert error in that denial" on appeal.

Section (d) deals with the situation where the motion for judgment is denied. The movant may have coupled with his motion a motion for new trial. If the new trial motion was also denied, then the movant could appeal in respect to both motions. If the appellate court reverses as to the motion for judgment, it can order judgment for the movant or a new trial as the case may be. If the appellate court affirms in respect to the motion for judgment, it may of course reverse or affirm in respect to the new trial motion.

Editor's Note. — The 1969 amendment rewrote section (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Rule 51. Instructions to jury.

(a) *Judge to explain law but give no opinion on facts.*—In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties.

(b) *Requests for special instructions.*—Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the clerk as a part of the record.

(c) *Judge not to comment on verdict.*—The judge shall make no comment on any verdict in open court in the presence or hearing of any member of the jury panel; and if any judge shall make any comment as herein prohibited or shall praise or criticize any jury on account of its verdict, whether such praise, criticism or comment be made inadvertently or intentionally, such praise, criticism or comment by the judge shall for any party to any other action remaining to be tried constitute valid grounds as a matter of right for a continuance of any action to a time when all members of the jury panel are no longer serving. The provisions of this section shall not be applicable upon the hearing of motions for a new trial or for judgment notwithstanding the verdict. (1967, c. 954, s. 1.)

Comment.—The effort here, except for minor changes, has been to carry forward the substance of the present law. The prohibition on comment by the judge has been retained. His duty to charge has been retained. The automatic exception to any errors in respect to the charge, formerly contained in § 1-206, subsection (c), has been retained in Rule 46.

Rule 52. Findings by the court.

(a) *Findings.*—

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41 (b). Similarly, findings of fact and con-

clusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) *Review on appeal.*—When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.)

Comment. — This rule largely follows prior law, incorporating little of the federal rule. Former § 1-185 called for written findings and conclusions of law "upon trial of an issue of fact by the court." In respect to motions and provisional remedies, the Commission has been guided by the North Carolina case law. See Millhiser v. Balsley, 106 N.C. 433, 11 S.E. 314 (1890); Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896). The reference to Rule 41 (b) has to do with the situation when the trial judge is dismissing an action at the close of the plaintiff's evidence with the determination that the dismissal shall be on the merits. In this situation, both Rules 41 and 52 contemplate that the judge shall make written findings and conclusions.

Same — 1969 amendment. — (a) The amendment to Rule 52(a) and the addition of subsections (1) and (2) to section (a) merely assign numbers to the paragraphs. The other change is a matter of grammar.

The amendment added subsection (3) which is new. It provides that when findings are necessary by the court, it is sufficient if the findings of fact and conclusions of law appear in the decision or memorandum. The main purpose here is to make it clear that no particular form is required, and it is sufficient if the findings of fact and conclusions of law are distinguishable.

Editor's Note. — The 1969 amendment rewrote section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 1-184 and 1-185.

Waiver of a jury trial invests the trial judge with the dual capacity of judge and juror, and it is his duty to weigh the evidence, find the facts, and upon the conflicting inferences of causation of plaintiff's injuries, to draw the inferences; the ultimate issue is for him. Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964).

The waiver of trial by jury invests the trial judge with the dual capacity of judge and juror. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The effect of the submission to the judge is to invest him with the dual capacity of judge and juror. He is to hear the evidence and pass upon its competency and admissibility as judge, and determine its weight and sufficiency as juror. The rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

The trial judge becomes both judge and juror. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Without Waiver Judge Cannot Enter Order Deciding Issue of Fact. — Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a

decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

A guardian ad litem and his attorney may waive jury trial. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Waiver by Consent to Pay Additur. — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by N.C. Const., Art. I, § 19, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958).

The judge who tries an issue of fact is required to do three things: (1) To find the facts on the issue of fact submitted to him; (2) to declare the conclusions of law arising on the facts found by him; and (3) to adjudicate the rights of the parties accordingly. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961).

Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required to do three things: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Duty of Judge to Consider and Weigh All Competent Evidence.—When trial by jury is waived, it is the trial judge's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it is entitled to. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

It is the duty of the trial judge to consider and weigh all competent evidence before him. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And to Determine Its Weight and Credibility and Inferences to Be Drawn Therefrom.—When trial by jury is waived, it is the trial judge's province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The trial judge passes upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

The trial judge determines which inferences shall be drawn and which shall be rejected if different inferences may be drawn from the evidence. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Findings of fact by the court have the force and effect of a verdict by a jury. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

There are two kinds of facts, ultimate facts and evidentiary facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

The trial judge is required to find and state the ultimate facts only. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. The trial judge is required to find and state the ultimate facts only. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951). See St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

The trial judge is required to find and state the ultimate facts only, and not the evidentiary or subsidiary facts required to prove the ultimate facts. Bridges v. Jackson, 255 N.C. 333, 121 S.E.2d 542 (1961).

In a trial by the court under agreement of the parties, the court is required to find

and state only the ultimate facts. McCallum v. Old Republic Life Ins. Co., 262 N.C. 375, 137 S.E.2d 164 (1964).

Separate Conclusions of Facts and Law.—A judge of the superior court, in passing upon a mixed question of law and fact, should state the facts found and the conclusions of law separately. Foushee v. Pattershall, 67 N.C. 453 (1872); Walker v. Walker, 204 N.C. 210, 167 S.E. 818 (1933). See Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943); Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

The judge complies with the requirement that he state his findings of fact and conclusions of law separately if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951).

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself. Wynne v. Allen, 245 N.C. 421, 96 S.E.2d 422 (1957).

The judge must state his findings of fact and conclusions of law separately. The judge complies with this requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

When trial by jury is waived and issues of fact are tried by the court, the court is required to give its decision with its findings of fact and conclusions of law stated separately. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Judge's Findings of Fact Are Conclusive.—Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. Poole v. Gentry, 229 N.C. 266, 49 S.E.2d 464 (1948); Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); Turnage Co. v. Morton, 240 N.C. 94, 81 S.E.2d 135 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

Upon waiver of jury trial, the court's findings of fact have the force and effect of a verdict by jury. Textile Ins. Co. v. Lambeth, 250 N.C. 1, 108 S.E.2d 36 (1959); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

When the parties to a civil action waive trial by jury, as they may do, and agree that the presiding judge may find the facts in respect to the issues of fact raised by the pleadings, his findings of fact have the force and effect of a verdict by a jury upon the issues involved. And his findings of fact are conclusive on appeal, if there is evidence to support them. State Trust Co. v. M & J Fin. Corp., 238 N.C. 478, 78 S.E.2d 327 (1953).

Where the parties waive a jury trial and there are no exceptions to the findings of fact by the judge, it will be presumed that they are supported by competent evidence, and are binding on appeal. Tanner v. Ervin, 250 N.C. 602, 109 S.E.2d 460 (1959).

When a trial by jury has been waived by the parties for the judge to find the facts his findings thereof are conclusive on appeal if there is evidence to support them. Yarborough v. Moore, 151 N.C. 116, 65 S.E. 763 (1909); Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914). See Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

Findings of fact by the court are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

When a trial by jury has been waived by the parties for the judge to find the facts, his findings thereof are conclusive on appeal if there is evidence to support them. Yarborough v. Moore, 151 N.C. 116, 65 S.E. 763 (1909); Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914). See Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943).

Failure of judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause does not render the judgment void, there being a substantial compliance with this section. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Trial of Case on Agreed Statement of Facts.—See U Drive It Auto Co. v. Atlantic Fire Ins. Co., 239 N.C. 416, 80 S.E.2d 35 (1954).

Where the parties submit the cause upon stipulation of facts, the hearing is on the facts stipulated, and assignment of error for failure of the court to make certain requested findings of fact and conclusions of law is inapposite. Competitor Liaison Bureau of Nascar v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957).

Findings Dictated by Judge to Reporter.—Where the judge dictates his findings to the court reporter and causes the reporter to transcribe them, it amounts to a finding of the facts by the judge in writing. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Verdict on Issues Submitted by Court to Itself.—Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. Anderson v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965).

Unless the action is a small claim, it is irregular for the court to render a verdict on issues submitted to itself. Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

Exception to Judgment Presents Only Question Whether Facts Found Support It.—An exception to a judgment rendered in a trial by the court, without exception to the evidence or the court's findings of fact, presents the sole question of whether the facts found support the judgment. Best v. Garris, 211 N.C. 305, 190 S.E. 221 (1937).

Failure to Except.—Where the court simply responded formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment will be affirmed. Parks v. Davis, 98 N.C. 481, 4 S.E. 202 (1887).

Judgment of Nonsuit. — Where, upon waiver of jury trial in accordance with this section, the court makes no specific findings of fact but enters judgment of involuntary nonsuit, the only question presented is whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959); Oldham & Worth v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is sufficient finding of facts by the court. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Sufficient Compliance.—See Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951).

Where the court does nothing more than indicate from what source the facts may be gleaned, it is not a sufficient compliance with the requirement that the court's decision shall contain a statement of the facts found. Shore v. Norfolk Nat'l Bank, 207 N.C. 798, 178 S.E. 572 (1935).

The decision of the judge in writing, with a separate statement of his findings of fact and conclusions of law is sufficient. Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914).

Where the court fully and completely sets out the facts found by him and renders judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately as required by this section, cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found. Dailey v. Washington Nat'l Ins. Co., 208 N.C. 817, 182 S.E. 332 (1935).

Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is sufficient finding of facts by the court. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940).

Insufficient Compliance. — Statements of facts found by court held insufficient compliance with the requirement of this section. Jamison v. Charlotte, 239 N.C. 423, 79 S.E.2d 797 (1954).

No New Trial if Judgment Shows Findings and Legal Basis.—Where jury trial is waived and the court acts both as judge and jury, it is irregular for the court to render a verdict on issues submitted to itself, but in the absence of objection and exception, a new trial will not be ordered for this cause if from the judgment it can be determined what the court found the ultimate facts to be and what the legal basis of the judgment is. Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Rule 53. Referees.

(a) *Kinds of reference.*—

(1) By consent.—Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue.

(2) Compulsory.—Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.

d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

(b) *Jury trial.*—

(1) Where the reference is by consent, the parties waive the right to have any of the issues within the scope of the reference passed on by a jury.

(2) A compulsory reference does not deprive any party of his right to a trial by jury, which right he may preserve by

a. Objecting to the order of compulsory reference at the time it is made, and

b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and

c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

(c) *Appointment.*—The parties may agree in writing upon one or more persons not exceeding three, and a reference shall be ordered to such person or persons in appropriate cases. If the parties do not agree, the court shall appoint one or more referees, not exceeding three, but no person shall be appointed referee to whom all parties in the action object.

(d) *Compensation.*—The compensation to be allowed a referee shall be fixed by the court and charged in the bill of costs. After appointment of a referee, the court may from time to time order advancements by one or more of the parties of sums to be applied to the referee's compensation. Such advancements may be apportioned between the parties in such manner as the court sees fit. Advancements so made shall be taken into account in the final fixing of costs and such adjustments made as the court then deems proper.

(e) *Powers.*—The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order,

every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. The referee shall have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the judge and upon the same terms and with like effect. The referee shall have the same power as the judge to preserve order and punish all violations thereof, to compel the attendance of witnesses before him by attachment, and to punish them as for contempt for nonattendance or for refusal to be sworn or to testify. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45.

(f) *Proceedings.*—

(1) Meetings.—When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to all other parties and the referee, may apply to the court for an order requiring the referee to expedite the proceedings and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte, or, in his discretion, may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Statement of Accounts.—When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant or other qualified accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(3) Testimony Reduced to Writing.—The testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record.

(g) *Report.*—

(1) Contents and Filing.—The referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted. If required to make findings of fact and conclusions of law, he shall set them forth separately in the report. He shall file the report with the clerk of the court in which the action is pending and unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The clerk shall forthwith mail to all parties notice of the filing.

(2) Exceptions and Review.—All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or

may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge. (1967, c. 954, s. 1; 1969, c. 895, s. 13.)

Comment.—Generally, the rules leave the reference practice as it was. But some changes are made.

Section (a). — The Commission has included all of the grounds for compulsory reference found in former § 1-189 except that providing for reference in actions "of which the courts of equity . . . had exclusive jurisdiction" prior to 1868.

Section (b). — In keeping with prior practice, the rule affirms the right of jury trial in compulsory reference cases. It goes further, and spells out, as former §§ 1-188 to 1-195 did not, just how the right of jury trial is to be preserved. The method of preserving jury trial is essentially the same as that required by the case law. See Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Section (c). — This section essentially makes no change.

Section (d). — The Commission thought it would be useful to include, as former §§ 1-188 to 1-195 did not, some details in respect to the compensation of referees.

Section (e).—The first sentence specifying the allowable flexibility in the order of reference is new. So far as the powers of the referee are concerned, they remain essentially unchanged except as enlarged by section (f).

Section (f).—Former §§ 1-188 to 1-195 contained no equivalent to subsection (2) but the Commission believes the new authority will be useful.

Section (g). — Here, for purposes of clarity, the rule goes into more detail than did former §§ 1-188 to 1-195 but the main outlines of the prior practice are retained.

Same—1969 amendment.—*Section (a).*— Rule 53(a) previously provided that all issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, and actions for divorce and separation.

There being no such action as an "action for divorce and separation," this ground has been deleted. The 1969 amendment added to the list: actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue. This language now conforms to previous rules concerning reference in domestic relations cases.

Editor's Note. — The 1969 amendment rewrote subsection (1) of section (a).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act no significance shall be attached to the fact that this act was enacted at a later date."

The cases cited in this note were decided under former §§ 1-188 through 1-190, 1-192 and 1-195.

When Order of Reference Permitted.— No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

Reference Does Not Deprive Court of Jurisdiction.—Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein pending the trial before the referee. McNeill v. Lawton, 97 N.C. 16, 1 S.E. 493 (1887).

Common-Law Arbitration. — The provisions of the Code of Civil Procedure did not repeal the common-law practice of reference to arbitrators. Keener v. Goodson, 89 N.C. 273 (1883).

Referee Has No Inherent Power. — A referee has no inherent or original powers and can only do those things expressly enumerated, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895).

But May Allow Amendments and Make New Parties.—The authority of the referee to allow amendments to pleadings and to make new parties was expressly given by former § 1-192. Sheffield v. Alexander, 194 N.C. 744, 140 S.E. 726 (1927), citing Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894); Blanton v. Bostic, 126 N.C. 418, 35 S.E. 1035 (1900); Rosenbacher & Bro. v. Martin, 170 N.C. 236, 86 S.E. 785 (1915).

A referee has power to admit new parties to an action. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

However, a notice issued by a referee and served upon a surety on the administrator's bond to appear before him, no order having been made to make such surety a party, is not a legal process effective to bring him into court. Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894).

To review the action of the referee in permitting amendments to pleadings and the making of new parties, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal. Sheffield v. Alexander, 194 N.C. 744, 140 S.E. 726 (1927).

Power to Enforce Rulings.—The referee has power to enforce obedience to the rulings on the trial of the issues before him, just as the court would have upon the trial before it. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133 (1880).

What May Be Referred by Consent.—All or any of the issues in an action may be referred by consent of the parties. Lusk v. Clayton, 70 N.C. 185 (1874).

No Appeal from Decision as to Issues Referred.—Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties, and the finding of the trial court is conclusive. Barrett v. Henry, 85 N.C. 322 (1881).

Judge May Disregard Agreement to Refer.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. Lumber Co. v. Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905).

Order Entered of Record Sufficient.—An order of reference by consent entered of record is a sufficient compliance with the requirement that the consent be in writing. And when entered it must stand until a full report is made. White v. Utley, 86 N.C. 415 (1882).

Referee Selected by Parties Must Discharge Duties.—The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. Perry v. Tupper, 77 N.C. 413 (1877).

And Setting Report Aside Does Not Revoke Reference.—When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. Flemming v. Roberts, 77 N.C. 415 (1877).

Consent Generally Necessary to Vacate Reference by Consent.—Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. Morisey v. Swinson, 104 N.C. 555, 10 S.E. 754 (1889); Keystone Driller Co. v. Worth, 117 N.C. 515, 23 S.E. 427 (1895). Unless a sufficient cause therefor is made to appear. Patrick v. Richmond & D.R.R., 101 N.C. 602, 8 S.E. 172 (1888).

The court has discretionary power to grant or refuse a compulsory reference, and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

Former § 1-189 stipulated that "the court may ... direct a reference" in certain classes or types of cases. It is manifest that the verb "may" was used in this connection in its ordinary sense as implying permissive, and not mandatory, action or conduct. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

Motion for Compulsory Reference Must Be Timely.—A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. Peyton v. Hamilton-Brown Shoe Co., 167 N.C. 280, 83 S.E. 487 (1914).

It is not error to refuse a compulsory reference, when the motion to refer is not until after the close of the evidence. Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889).

The right of a party to move for compulsory reference is waived unless made before the jury has been empaneled, but the rule does not apply where reference is ordered by the court of its own motion. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

The Court Has Discretionary Power to Grant or Refuse Reference.—The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court. Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

Order Not Permitted Until Parties Are at Issue.—No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When the parties agree upon a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke it without the con-

sent of both parties. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Setting Aside Order of Reference.—Once the order of reference is made, and particularly after the report has been filed, it cannot be set aside except for good and sufficient cause assigned and made to appear to the court. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

In order for one superior court judge to set aside an order of compulsory reference entered by another, the motion would have to go to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Reference on All Issues Precedes adjudication of Liability.—A compulsory reference to hear and determine all matters in controversy, precedes any adjudication by the court of the liability of the parties. Governor ex rel. Trustees of Univ. of N.C. v. Lassiter, 83 N.C. 38 (1880).

But Complete Defense to Should Be First Decided. — See Sloan v. McMahon, 85 N.C. 296 (1881); Commissioners of Iredell County v. White, 123 N.C. 534, 31 S.E. 670 (1898); Bank of Tarboro v. Fidelity & Deposit Co., 126 N.C. 320, 35 S.E. 588 (1900); Graves v. Pritchett, 207 N.C. 518, 177 S.E. 641 (1935); Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940); Grady v. Parker, 230 N.C. 166, 52 S.E.2d 273 (1949); Reynolds v. Morton, 205 N.C. 491, 171 S.E. 781 (1933).

Incomplete Defense Does Not Bar Reference.—A party to an action may not successfully object to a compulsory reference when the same is allowed by this section and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him. Murchison Nat'l Bank v. McCormick, 192 N.C. 42, 133 S.E. 183 (1926).

Compulsory Reference of One Cause of Action.—Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of a particular case the court's order of compulsory reference of one of the causes of action was upheld, it appearing that the action involved a long account and that the controversy was so involved that it could not be readily presented to a jury, former § 1-189 being liberally construed to afford the salutary procedure therein provided. Fry v. Pomona Mills, Inc., 206 N.C. 768, 175 S.E. 156 (1934).

Compulsory Reference Consolidating Actions.—Where a suit to set aside a deed to lands, an action for possession, and a petition for dower, have been consolidated, an allegation of the wife's adultery is in bar of the wife's right, and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form, it is improvidently entered. Lee v. Thornton, 176 N.C. 208, 97 S.E. 23 (1918).

Action by Ward against Guardian. — Where in an action by a gaurdian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained before final judgment, it was held not to be error in the court to direct a mistrial and order a reference. Sutton v. Schonwald, 80 N.C. 20 (1879).

Action on Administration Bond.—A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be the subject of a compulsory reference. Flack v. Dawson, 69 N.C. 42 (1873).

Suit by Creditor against Executor.—In an action by a creditor against an executor if the defendant denies the debt, and also that he has assets, the issue as to the debt is tried in the ordinary way; and if the debt be established, a reference is to be had to ascertain the amount of the debts and their several classes, and upon the coming in of the report a judgment will be entered in favor of all the creditors who have proved their debts, for such part of the fund as they may be entitled to. Heilig v. Foard, 64 N.C. 710 (1870).

Suit on Confessed Judgment.—A compulsory reference could not be ordered by the court in a suit on a judgment confessed by the defendants as executors before the Civil War, where the only matters of defense were payments made by them in Confederate currency during the war and alleged counterclaims for notes due from the plaintiffs to them as executors. Hall v. Craige, 65 N.C. 51 (1871).

Location of Dividing Line.—A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of

the premises. Waller v. Dudley, 194 N.C. 139, 138 S.E. 595 (1927).

Contract for Rent.—Where the question involved in the action is the amount of rent due under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory reference. Kearns v. Huff, 191 N.C. 593, 132 S.E. 566 (1926).

Suit to Sell Corporation Assets.—Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake, it was a proper case for a reference. Pinchback v. Mining Co., 137 N.C. 171, 49 S.E. 106 (1904).

An action in ejectment in which defendants plead the statutes of limitation of twenty and seven years (§§ 1-38 through 1-40) is not subject to compulsory reference. Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951).

Power of Court to Vacate Compulsory Reference.—Where the trial judge has ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. American Trust Co. v. Jenkins, 196 N.C. 428, 146 S.E. 68 (1929).

Consent Necessary to Vacate Reference.—Where an action is once referred, the order of reference cannot be annulled except by the consent of all parties. Keystone Driller Co. v. Worth, 117 N.C. 515, 23 S.E. 427 (1895).

Failure to Refer Not Error.—Where the controversy involves the taking of a long account, it should be referred, but where it has otherwise been tried, without error or prejudice to the appellant, the judgment of the trial court will not be disturbed. Ragland v. Lassiter-Ragland, Inc., 174 N.C. 579, 94 S.E. 100 (1917).

Right to Jury Trial. — A reference made by consent is a waiver of the right of trial by a jury. Green v. Castlebury, 70 N.C. 20 (1874); In re Parker, 209 N.C. 693, 184 S.E. 532 (1936); Anderson v. McRae, 211 N.C. 197, 189 S.E. 639 (1937).

Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, either party has the right to have all issues of fact which arise on the pleadings submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. State ex rel. Armfield v. Brown, 70 N.C. 27 (1874); State ex rel. Carr v. Askew, 94 N.C. 194 (1886).

By a compulsory reference the parties waive nothing, and are still entitled to a trial by jury on the issues as if no reference had been made. Green v. Castlebury, 70 N.C. 20 (1874); State ex rel. Carr v. Askew, 94 N.C. 194 (1886).

In a case of a compulsory reference either party may, at some stage of the proceedings to be determined by the court, demand a trial by jury of the issues arising in the report of the referee. State ex rel. Armfield v. Brown, 70 N.C. 27 (1874).

In case of a compulsory reference a litigant can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for the issues. Wilson v. Featherstone, 120 N.C. 446, 27 S.E. 124 (1897).

But to avail himself of this right he should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined. Yelverton v. Coley, 101 N.C. 248, 7 S.E. 672 (1888).

The right to trial by jury in civil cases may be waived, and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions, and demand a jury trial on each of the issues thus tendered. Booker v. Highlands, 198 N.C. 282, 151 S.E. 635 (1930); Marshville Cotton Mills, Inc. v. Maslin, 200 N.C. 328, 156 S.E. 484 (1931); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

While a compulsory reference does not deprive either party of his constitutional

right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

A failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury. Belvin v. Raleigh Paper Co., 123 N.C. 138, 31 S.E. 655 (1898).

By excepting to an order of court referring to a long account between the parties as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference. Green Sea Lumber Co. v. Pemberton, 188 N.C. 532, 125 S.E. 119 (1924).

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. Brown v. Buchanan, 194 N.C. 675, 140 S.E. 749 (1927).

Where a case is one properly subject to a compulsory reference, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. Atlantic Joint Stock Land Bank v. Fisher, 206 N.C. 412, 173 S.E. 907 (1934).

A compulsory reference does not deprive one of the right to trial by jury. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

A compulsory reference does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. And the report of the referee, consisting of his findings of fact and conclusions of law, are incompetent as evidence before the jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951). See Solon Lodge v. Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957).

By objecting to the order of compulsory reference when entered, and by, after the referee's report was filed, filing in apt time exceptions to particular findings of fact made by the referee, tendering issues and demanding a jury trial on each issue tendered, defendants complied with procedural requirements to preserve their right to a jury trial. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 232 S.E.2d 161 (1963).

In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Booker v. Highlands, 198 N.C. 282, 151 S.E. 635 (1930); Marshville Cotton Mills v. Maslin, 200 N.C. 328, 156 S.E. 484 (1931); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949); Better Home Furniture Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236 (1956).

In order to preserve his right to a jury trial in a compulsory reference where the referee's report is adverse to him, a party must comply with each of these procedural requirements: 1. He must object to the order of compulsory reference at the time it is made. 2. He must file specific exceptions to particular findings of fact made by the referee within thirty days after the referee delivers his report to the clerk of the court in which the action is pending. 3. He must formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions to the referee's report. 4. He must set forth in his exceptions to the referee's report a definite demand for a jury trial on each issue so tendered. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Where a party objects to a compulsory reference, makes proper exceptions to the findings of fact and conclusions of law of the referee, and tenders the issue of title raised by the pleadings, he has preserved his right to trial by jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951).

A party to a compulsory reference waives his right to a jury trial by failing to take the proper steps to save it. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Where a party makes no demand in his exceptions to the referee's report for a jury trial on the issues tendered by him, he waives his constitutional right to have a jury determine the controverted issues of fact. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Defendants, by not excepting to the order of compulsory reference when made and by proceeding with the trial before the referee, did not preserve the right to chal-

lenge the order upon the ground that it should not have been entered before an alleged plea of accord and satisfaction had been passed on, or any other plea in bar they may have alleged. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

When Exception to Refusal of Jury Trial Untenable. — Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable. Nantahala Power & Light Co. v. Horton, 249 N.C. 300, 106 S.E.2d 461 (1959).

Purpose of Reference Where Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and the exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The taking of an account must be necessary, and the accounting taken should have some direct relation to the ultimate disposition of the case. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

Where Examination of Long Account Required.—Where the verdict of the jury establishes that plaintiff is entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, the ascertainment of the amount requires an examination of a long account, and the court is empowered to order a compulsory reference to determine such amount. Parker v. Helms, 231 N.C. 334, 56 S.E.2d 659 (1949).

What Constitutes a "Long Account".— There is no statutory or judicial definition of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case, and the account in controversy was correctly classified as a "long account." Dayton Rubber Mfg. Co. v. Horn, 203 N.C. 732, 167 S.E. 42 (1932).

What constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action. Fry v. Pomona Mills, Inc., 206 N.C. 768, 175 S.E. 156 (1934).

A compulsory reference is not authorized on the ground that the trial requires the examination of long accounts in an action instituted to recover on a promissory note or an account where the receipt of each and every payment alleged to have been made thereon is admitted. Where numerous payments on an indebtedness have been made, the case involves only a matter of computation of figures and has none of the elements of a long account with charges and discharges, as contemplated in this section. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953). See Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

Where an action involved purchases on account over a period of years, it could not be said that the action did not require the examination of a long account. Farmers Cooperative Exchange v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

To hear evidence requiring the examination of a long account involving the books and records of the defendant corporation, numerous calculations of interest, an examination of numerous exhibits, and the determination of the fair value of the stock of the corporation, would be the equivalent of the examination of a long account which would justify the order of reference. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

It could not be said as a matter of law from reading the pleadings that plaintiff's cause of action did not require the consideration of a "long account." Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

Where action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery, services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year subsequent to the termination of the civil action, it could not be said as a matter of law that the cause of action does not require the consideration of a long account, and defendants' exception to the order of compuslory reference on this ground could not be sustained. Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940).

Issues of Fact and Law May Be Referred. —Under the provisions of former § 1-172, a judge was authorized to order a compulsory reference as to all of the issues, both of fact and of law. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

Appointment of Referee by Court. — Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Referee Cannot Be Appointed to Attend and Determine Rights at Meeting.—It is not contemplated that a referee be appointed to attend a meeting, such as the annual meeting of the members of an association, and there make determinations relating to the respective rights of contesting parties during the progress of such meeting. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When Nonsuit Allowed.—A plaintiff may take a nonsuit while the case is pending before a referee, if the case be one in which he is entitled to do so. McNeill v. Lawton, 97 N.C. 16, 1 S.E. 493 (1887).

However, in cases purely equitable in their nature, if a reference for an account has been ordered and a report made, the plaintiff will not be allowed to take judgment of nonsuit. Boyle v. Stallings, 140 N.C. 524, 53 S.E. 346 (1906).

Report of Referee as Evidence. — The referee's findings of fact and conclusions of law are not competent as evidence in the trial of the issue raised by exceptions to the report. Cherry v. Andrews, 231 N.C. 261, 56 S.E.2d 703 (1949).

Referee's Duty as to Report. — It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defense, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. State ex rel. Klutts v. McKenzie, 65 N.C. 102 (1871); Earp v. Richardson, 75 N.C. 84 (1876).

The referee should ordinarily enter his rulings on each objection to the evidence taken before him; but where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of his rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on, and findings from the evidence reported. Pack v. Katzin, 215 N.C. 233, 1 S.E.2d 566 (1939).

Unfinished Report.—It is error for the judge to pass upon exceptions to an unfinished report. White v. Utley, 86 N.C. 415 (1882).

All Evidence Not Reported.—That the referee has not reported all the evidence is not a ground of exception. If all the evidence is not sent up, the remedy of the prejudiced party is, by application to the judge for an order directing the referee to send up that which has been omitted. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

When Findings of Referee Are Conclusive.—On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. Williamson v. Spivey, 224 N.C. 311, 30 S.E.2d 46 (1944).

The findings of fact by a referee, adopted by the trial judge, are conclusive. Joyner v. Stancil, 108 N.C. 153, 12 S.E. 912 (1891), following Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

The findings of fact of the referee, approved by the judge, are conclusive on appeal if there is any competent evidence to support them. Morpul, Inc. v. Mayo Knitting Mill, 265 N.C. 257, 143 S.E.2d 707 (1965).

On a consent reference, findings of fact made by a referee, in the absence of exceptions thereto, are conclusive on the hearings in the superior court as they are on appeal to the Supreme Court. The findings to which no exceptions are entered become in effect facts agreed. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951). See Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Presumption.—The findings of fact reported by a referee are presumed to be right unless shown to be wrong. If there is no evidence to support them, they will not be sustained. Green v. Jones, 78 N.C. 265 (1878).

Report Has Effect of Special Verdict. —Where the reference is by consent the referee's report has the effect of a special verdict. Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889). Subject however to the right of either party, on notice, to move the court to review his report, to set it aside, to modify or confirm it. Barrett v. Henry, 85 N.C. 322 (1881).

But Party May Except.—A party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. Hardaway Contracting Co. v. Western Carolina Power Co., 195 N.C. 649, 143 S.E. 241 (1928).

Exceptions to Referee's Report Must Be Specific.—An exception to the report of a referee must be specific; it must point out the conclusion at which it is aimed at the precise error complained of. Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

An exception to the admission of evidence by a referee which is not specific, but is vague and indefinite in form, will not be considered. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence. Wilson v. Featherstone, 120 N.C. 446, 27 S.E. 124 (1897).

An exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. Commissioners v. Erwin, 140 N.C. 193, 52 S.E. 785 (1905).

Failure to Specify Objection Constitutes Waiver.—Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. Keystone Driller Co. v. Worth, 117 N.C. 515, 23 S.E. 427 (1895).

Discretion of Judge — Recommittal of Case.—The supervisory power of the trial judge over the referee's report is broad and comprehensive. Dumas v. Morrison, 175 N.C. 431, 95 S.E. 775 (1918). In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. Mills v. Apex Ins. & Realty Co., 196 N.C. 223, 145 S.E. 26 (1928), citing State ex rel. Commissioners v. Magnin, 85 N.C. 114 (1881); Lutz v. Cline, 89 N.C. 186 (1883); State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922); Coleman v. McCullough, 190 N.C. 590, 130 S.E. 508 (1925); Carolina Mineral Co. v. Young, 211 N.C. 387, 190 S.E. 520 (1937).

Same—Reference to Another Referee.—Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge may not refer it to another referee with partial approval thereof for action upon the unapproved parts. Mills v. Apex Ins. & Realty Co., 196 N.C. 223, 145 S.E. 26 (1928).

Same—Setting Aside Reference. — The judge, in his discretion, may set aside a reference after the report is filed and proceed and try the case. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899).

Same—Submitting Issues to Jury.—It is not the duty of a judge, in passing on exceptions to a referee's report, to decide all questions of fact without a jury, but on the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information. Maxwell v. Maxwell, 67 N.C. 383 (1872).

The continuance of the case and the allowance of time to file exceptions to the referee's report are matters within the discretion of the court. White v. Price, 237 N.C. 347, 75 S.E.2d 244 (1953).

Purpose of Exceptions Where Reference Is by Consent.—If the reference is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge, who, in the exercise of his supervisory power may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. This he may do, however, only in passing upon exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Purpose of Exceptions Where Reference Is Compulsory and Right to Jury Trial Reserved.—When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and the exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The trial judge must act upon the report even in a compulsory reference where the right to the trial by jury has been preserved. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge cannot affirm the report of the referee prior to the time for filing exceptions where there has been no waiver of the right to file them. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Even when a report is set aside for cause, the order of reference is not thereby revoked; it continues. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge does not have the power ex mero motu to vacate a report upon which

no attack had been made by any of the parties; the authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge of the superior court may affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of a referee, or he may make additional findings of fact and enter judgment on the report as thus amended. But this does not mean that the judge may, ex mero motu, vacate a report upon which no attack has been made by any of the parties. The authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951). See Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Discretion of Judge.—A judge of the superior court has a wide latitude of discretion over the report of a referee, with power to review, modify, confirm in whole or in part, or to set aside the report. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

The report of the referee is under the control of the court, and the power of review is a broad one as the court may set aside, modify, or confirm it in whole or in part. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and form his judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When an action came on to be heard on exceptions to a referee's report, the judge of the superior court had authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or he could make additional findings of fact and enter judgment on the report as amended by him. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

Additional Matters Incorporated in Report.—The fact that the referee in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporates in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, was not prejudicial. McCormick v. Smith, 246 N.C. 425, 98 S.E.2d 448 (1957).

Time of Filing Exceptions.—Where motion to remove the referee is made prior to the time his report is filed, and an appeal is taken from the granting of the motion, the superior court, upon the certification of the decision of the Supreme Court, reversing the judgment, has discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Motion for Voluntary Nonsuit Does Not Preclude Filing of Exceptions.—Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause does not preclude her from filing exceptions to the referee's report. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

Premature Entry of Judgment. — Where the record discloses that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, and the record discloses no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation is error appearing on the face of the record. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

An action on a note given to finance an automobile, in which all payments alleged by defendant are admitted by plaintiff, does not involve a long account with charges and discharges and is not subject to compulsory reference, notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953).

Action on Conditional Sales Contract. —In an action to recover a specified sum and interest alleged to be due and owing to the plaintiff as the holder in due course of a conditional sales contract alleged to have been executed and delivered by the defendant, in which action no equitable relief is sought, the lower court has no power to authorize a compulsory reference. Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

Processioning Proceeding. — A controversy by stipulation of the parties that

boundary only was involved became, in effect, a processioning proceeding and was properly referred. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

A case involving a complicated question of boundary which required a personal view of the premises was a proper case for a compulsory reference. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

When Decisions Reviewable.—There is no ground for exception on appeal unless action by the judge is not supported by sufficient evidence, or error has been committed in receiving or rejecting testimony upon which it is based. Caudell v. Blair, 254 N.C. 438, 119 S.E.2d 172 (1961).

Appeal before Judgment Premature.—In Leroy v. Saliba, 182 N.C. 575, 108 S.E. 303 (1921), it was said: "The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and must be dismissed. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment."

When Decisions Reviewable. — The decision of the judge in revising the report of a referee, is available as to questions of law, but not as to the findings of fact. Vaughan v. Lewellyn, 94 N.C. 472 (1886).

The appellate court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. Boyle v. Stallings, 140 N.C. 524, 53 S.E. 346 (1906); Lindsay v. Brawley, 226 N.C. 468, 38 S.E.2d 528 (1946).

The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899).

The superior court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. Wallace v. Benner, 200 N.C. 124, 156 S.E. 795 (1931). But the findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899); Anderson v. McRae, 211 N.C. 197, 189 S.E. 639 (1937); Dent v. English Mica Co., 212 N.C. 241, 193 S.E. 165 (1937); Holder v. Home Mtg. Co., 214 N.C. 128, 198 S.E. 589 (1938).

Upon appeal in a consent reference the superior court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or part and substitute other findings supported by the evidence. Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946).

Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them, the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. Thigpen v. Farmers Banking & Trust Co., 203 N.C. 291, 165 S.E. 720 (1932).

Where an appeal is taken from the action of the trial court in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the court which it is sought to have reviewed, and the case ought not to be sent to the appellate court to be heard only on the exceptions taken to the ruling of the referee. Traders Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

No Appeal from Order Recommitting Report. — Where the court orders a compulsory reference, an appeal does not lie from an order recommitting the report of the referee for the correction of errors and irregularities. State ex rel. Commissioners v. Magnin, 85 N.C. 114 (1881).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

(a) *Definition.*—A judgment is either interlocutory or the final determination of the rights of the parties.

(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the

court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*—A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (1967, c. 954, s. 1.)

Comment. — *Section (a).* — This section carries forward the definition of a judgment formerly contained in § 1-208.

Section (b). — These rules, with their liberalized provisions for expanding the size of a lawsuit, make it highly desirable in the multi-party and multi-claim lawsuit that there be provision for expediting appeals, in certain instances, from rulings terminating the litigation in respect to fewer than all the parties or all the claims. Otherwise, it may well be, if the aggrieved party must delay his appeal until all parties and claims have been disposed of, that the delay will be intolerable. On the other hand, there may be cases which should be presented in their entirety to the appellate court even at the price of delaying one party or another.

In considering this section, it should be remembered that § 1-277 was left intact except as it is modified by this section. In other words, appeals will continue to lie only when a "party aggrieved" has been deprived of a "substantial right," or from a final judgment. The modification here is that when there is no just reason for delay and when there is an express determination to that effect, the unit to which the finality concept shall be applied is by this rule made a smaller one. Thus, if two claims are presented to the trial court and one of them is the subject of a disputed ruling, an appeal will lie if the ruling would have been appealable in an action involving that claim alone and if the judge makes the requisite determination.

Conversely, in the absence of a determination by the trial judge, it is clear that there can be no appellate review irrespective of the nature of the ruling of the trial court, unless elsewhere expressly authorized. Section 1-277 is not such an express authorization. Thus, it will be seen that in the absence of a determination by the trial judge, a lawyer can safely delay in prosecuting his appeal. When there is such a determination, the situation will not be as clear. There must be in addition either a final judgment or a ruling affecting a "substantial right" for an appeal to lie. When these conditions obtain has not heretofore been altogether clear, and will not be under these rules. The only course of safety will be to press for review.

Section (c).—This section is a restatement of prior law.

Editors' Note.—The cases cited in the following note were decided under former § 1-208.

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

Definition of Final Judgment.—A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. Fleming v. Roberts, 84 N.C. 532 (1881); Sanders v. May, 173 N.C. 47, 91 S.E. 526 (1917); Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

Definition of Interlocutory Order. — An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. Johnson v. Robertson, 171 N.C. 194, 88 S.E. 231 (1916); Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

An interlocutory order remains in the control of and in the breast of the court, and upon good cause shown it may be amended, modified, changed, or rescinded, as the court may think proper. Maxwell v. Blair, 95 N.C. 317 (1886).

An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is "subject to change by the court during the pendency of the action to meet the exigencies of the case." Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

A judgment is interlocutory when subject to change by the court, during the pendency of the action, to meet the exigencies of the case. Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964).

Nature of Judgment.—In its ordinary acceptation, a judgment is the conclusion of the law or facts admitted or in some way established. Sedbury v. Southern Express Co., 164 N.C. 363, 79 S.E. 286 (1913).

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundation of legal repose. Williams v. Woodhouse, 14 N.C. 257 (1831).

Sanction of Court. — Every judgment should and must have the sanction of the court, except in case of consent judgments, and those must be entered with its knowledge and permission. Branch v. Walker, 92 N.C. 87 (1885).

Relief Granted.—Since the gist of the accepted definition of a judgment is "the final determination of the rights of the parties to an action," courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. Lee v. Pearce, 68 N.C. 77 (1873); Hutchinson v. Smith, 68 N.C. 354 (1873); McCown v. Sims, 69 N.C. 159 (1873).

A judgment may grant to the defendant any affirmative relief to which he may be entitled. Hutchinson v. Smith, 68 N.C. 354 (1873).

Judgment as a Contract. — While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal Constitution which forbids that contracts should be impaired by state legislation. Mottu v. Davis, 151 N.C. 237, 65 S.E. 969 (1909).

However, judgments are considered as contracts to distinguish a cause of action thereon from one ex delicto. Moore v. Nowell, 94 N.C. 265 (1886).

It is not proper to enter a partial judgment on the pleadings for a part of a litigant's claim, leaving controverted issues of fact relating to other parts of such claim open for subsequent trial. Erickson v. Starling, 235 N.C. 643, 71 S.E.2d 384 (1952).

Rule 55. Default.

(a) *Entry.*—When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.*—Judgment by default may be entered as follows:

(1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in article 29A of chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge.—In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

(c) *Service by publication or without the State.*—When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclosure mortgages thereon such bond shall not be required.

(d) *Setting aside default.*—For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60 (b).

(e) *Plaintiffs, counterclaimants, cross claimants.*—The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(f) *Judgment against the State of North Carolina.*—No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1.)

Comment.—The State statutes presented a hodgepodge. Although former § 1-211 purported by its literal terms to give an exclusive listing of all the cases in which judgment by default final might be given, there were various other authorizations for such judgments scattered throughout the procedural and substantive sections. Section 1-212 then purportedly rounded out the scheme by providing that in all other cases "except those mentioned in § 1-211," judgment by default and inquiry might be given. This was obviously in literal conflict with all sections other than former § 1-211 which specifically authorized judgment by default final.

Although failure to file appropriate responsive pleading to a claim for affirmative relief is the usual basis for default judgment, other grounds appear: e.g. failure to file required bonds (former § 1-211 4 and § 1-525), failure to comply with pretrial discovery orders (former §§ 1-568.19, 8-89), and filing of "frivolous" pleadings (former § 1-219).

By § 1-209, clerks of superior court were authorized to enter all judgments by default authorized generally by § 1-209, and former §§ 1-211 and 1-213. This jurisdiction given clerks is concurrent with that of the superior court judge. Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948). But some of the other scattered statutes authorizing judgments by default apparently contemplate that in the specific situations dealt with only the judge may enter judgment (e.g. § 1-525). Where the concurrent jurisdiction existed however, the appellate jurisdiction of the superior court judge as to the clerk's entry of judgment was retained (former § 1-220).

Although not made plain in the statutes, it has been held that though there is a "right" to a judgment upon default, the court may always in the exercise of its discretion allow time to answer when mo-

tion for judgment by default is made. Kruger v. Bank of Commerce, 123 N.C. 16, 31 S.E. 270 (1898). And of course, such judgments, as others, may be set aside after entry either by the clerk who entered them (former § 1-220), or by any appropriate judge for the usual reasons, i.e., excusable neglect, mistake, surprise, etc.

The main infirmities in the prior North Carolina practice as codified were thought to be (1) a general lack of symmetry and orderliness in the style and pattern of the various statutes, and (2) as a matter of substance, too much power and too much readiness in clerks to enter judgments which may thereafter be hard to set aside.

Accordingly, it was felt that federal Rule 55, with some few modifications to accommodate certain actions found in state practice and not in federal should be adopted, partially supplanting certain of the statutes which dealt with default judgments.

The federal rule approach actually contemplates a two-stage approach to judgment by default: The entry of default by the clerk; and thereafter the entry of judgment by default. Federal Rule 55 (b) (1) provides that the clerk may only enter judgments by default in a very limited context, when (a) the claim is for a sum certain or for a computable sum, and (b) the default is for want of appearance, and (c) the defaulting party is neither an infant nor incompetent. This approach of limiting the clerk's power to the purely ministerial functions of (a) making entry of default in all cases, and (b) entering judgment itself in only this very limited context is felt to be wise.

The basic federal scheme continues by providing in 55 (b) (2) that in all other cases than the very limited area spelled out in 55 (b) (1), judgment itself may only be entered by the judge. Thus, in all cases where (a) the claim is not for a sum certain or computable, or (b) the defaulting party has appeared, or (c) the defaulting party is an infant or incompetent, only the judge may actually enter judgment. And except where the defaulting party has made no appearance, he must be given notice, and the entry of the judgment is in all instances in the discretion of the judge. It is believed that deliberately pointing up the discretionary nature of this power to enter judgment by default at this stage is wise, and will result in an overall saving of time by prompting full inquiry into the matter at the pre-entry stage rather than, as under prior practice, having discretion in the matter exercised usually after judgment has already been entered.

Note next that the delineation between judges' and clerks' power is not the delineation between judgments by "default final" and those by "default and inquiry." This distinction indeed is not retained in literal terms in the federal rule pattern. Obviously those very limited judgments within the power of the clerk to enter are judgments by default final. But the judge may enter either type under 55 (b) (2). Instead of using this terminology, however, the rule as presented approaches the matter pragmatically by providing that when in order to enter final judgment something further must be done after entry of default, e.g. when an account must be taken or a jury trial had on an issue of damages or any other, the judge orders that done which is necessary. Thus, there is no intermediate judgment by "default and inquiry," but an entry of default in all cases and a final judgment by default entered only after everything required to its entry has been done. The same conceptions were involved in former § 1-212.

Section (c).—The Commission here attempted to take abundant precaution to protect the nonappearing defendant.

Section (d).—This section provides for setting aside default entries and judgments by default and ties the basis therefor into Rule 60 (b) providing generally for setting aside judgments. Former § 1-220 and existing case law expressed this conception so that this involves no real change.

Section (e).—This section makes it plain that the general provisions of the rule apply as well to defendants and third-party plaintiffs as to plaintiffs seeking affirmative relief. This conception was expressed less artfully in former § 1-213 as to defendants and North Carolina actually had no express provision for default judgments in favor of third-party plaintiffs, or crossclaims. This is necessary now particularly in view of the third-party practice liberalization provided in other rules.

Section (f).—This section seems to be self-explanatory.

A default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant the plaintiff's recovery. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969), decided under former § 1-211.

A complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969), decided under former § 1-211.

Where judgment by default is irregularly and improvidently entered by the assistant clerk of the superior court, the clerk of the superior court has authority to vacate the same upon motion in the cause. Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968), decided under former § 1-211.

Rule 56. Summary judgment.

(a) *For claimant.*—A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.*—If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.*—Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the rea-

sonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1.)

Comment.—While it has long been urged in North Carolina, see Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L. Rev., 211 (1936), and while, in one form or another, it has been adopted in a majority of the states, the procedure provided by this rule is wholly new to North Carolina. It adds a powerful new weapon for the just, swift and efficient disposition of claims or defenses patently without merit. The rule provides a device whereby it can expeditiously be determined whether or not there exists between the parties a genuine issue as to any material fact. It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist.

Under prior procedure, if the pleadings disclosed an issue of fact, a trial was generally necessary even though there might in actuality be no genuine dispute at all as to the facts. It was enough if the issue was formally raised by the pleadings. Significantly, however, the code drafters were well aware that there might indeed be no issue of material fact present even though the pleadings appeared to present one. They thus provided that sham and irrelevant defenses could be stricken, former § 1-126, that irrelevant and redundant matter might be stricken, former § 1-153, and that a frivolous demurrer, answer or reply might be disregarded, former § 1-219. But, for reasons that need not be examined here, these devices have not proved equal to the task of identifying those claims or defenses in which there was no genuine dispute as to a material fact.

The great merit of the summary judgment is that it does provide a device for identifying the factually groundless claim or defense. It does so by enabling the parties to lay before the court materials extraneous to the pleadings. If these materials reveal any dispute as to a material fact, summary judgment is precluded. But as section (e) makes clear, a party cannot necessarily rely on the pleadings to show the existence of such a dispute.

The operation of the rule can be illustrated by supposing an action to recover damages for personal injuries. The sole defense offered is that the plaintiff's exclusive remedy is afforded by the Workmen's Compensation Act. The plaintiff moves for summary judgment, supporting his motion with affidavits which on their face show that the act is inapplicable to the defendant's enterprise. At the hearing on the motion, the defendant can forestall summary judgment simply by producing an affidavit, deposition or interrogatory or oral testimony tending to show that he does come under the act. If, on the other hand, he does nothing, entry of partial summary judgment, leaving for later jury determination the amount of damages, can be entered against him. He has failed to show that there is a genuine issue as to any material fact except damages.

The defendant might also move for a summary judgment in the case supposed. If he shows, without any contrary showing by the plaintiff, that the act applies, then it would be appropriate to enter judgment for the defendant. Of course, section (f) permits the refusal of the motion when a party presents reasons for his inability to present affidavits opposing the motion.

It will be observed that section (e) requires that supporting and opposing affidavits "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence."

Editor's Note.—For article on the new summary judgment rule in North Carolina, see 5 Wake Forest Intra. L. Rev. 87 (1969).

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to article 26, chapter 1, General Statutes of North Carolina, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar. (1967, c. 954, s. 1.)

Comment.—This rule tracks the language of federal Rule 57, changed only by reference to the state statutory law, which spells out in detail the scope, procedure for obtaining, and effect of declaratory judgment. The comparable federal statutory law is 28 U.S.C.A. §§ 2201, 2202 a much more general statute than the state statute. The North Carolina Declaratory Judgment Act, to which reference is made, is essentially the Uniform Declaratory Judgment Act. The Commission felt that

except for one minor change in respect of jury trial, the need for which is developed below, it should retain this basic statutory law and not substitute the more general federal type formulation. Professor Borchard, father of both, felt that state declaratory judgment acts should be more specific and detailed than the basic federal statutory authority needed to be. This separate practice rule simply refers to the basic act and in effect says (what is perhaps not strictly necessary in view of the coverage rule, Rule 1) that action for this relief as other actions shall be governed by these rules.

This rule does also make specific the right to jury trial as in other actions. Although this reflects a background of separate law and equity administration with resulting problems of jury right in the federal system in "new" kinds of actions, problems not presented in the North Carolina completely fused code practice, it does no harm to leave in this reference. Indeed, the North Carolina act itself, in § 1-261, states the basic right to jury trial of fact issues in this type of action.

The provision that, "The existence of another adequate remedy does not preclude a judgment for declaratory relief . . ." merely states more plainly and bolsters what is implicit in the act itself when in § 1-253 it is provided that the power to grant declaratory relief exists "whether or not further relief is or could be claimed." The federal act contains similar language in § 2201, but the federal rules draftsman thought it expedient to solidify this in the rule itself. No reason appears to depart from this. The critical substantive point here is that this language preserves the discretionary right of the court when asked to declare rights to decline to do so, possibly on the basis of existence of another remedy, but not necessarily to do so.

The provision for advancing trial of declaratory actions seems wise and would not apparently violate any State procedural customs or rules, within which peremptory settings are familiar practice.

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54 (b) : Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof. (1967, c. 954, s. 1.)

Comment.—Entry of judgment, as distinguished from rendition of judgment, is a critical moment under these rules. Time periods for the filing of certain motions are keyed to the moment of entry. It is therefore highly desirable that the moment of entry of judgment be easily identifiable and it is also desirable that fair notice be given all parties of the entry of judgment. The rule is drawn to achieve these objectives.

The first paragraph deals with the simple case when judgment is rendered in open court. Presumably all parties will have notice. There is no necessity for the judge to sign the judgment. This is in keeping with prior law. See former § 1-205. Of course, the rule recognizes in the judge a power to give a "contrary direction" to that contained in the rule. Accordingly, if a lawyer wishes the judgment to incorporate particular matters, or to be delayed, he may make a motion to this effect.

The second paragraph deals with the more complex judgment but again one rendered in open court. Here approval by the judge of the form of the judgment filed is necessary. Presumably, he would indi-

cate this approval by signing the judgment but this approval is not necessary to the "entry" of judgment.

The third paragraph deals with all judgments, simple or not, "not rendered in open court." In such cases, specific notice is required to be given before a judgment will be deemed to have been entered.

Rule 59. New trials; amendment of judgments.

(a) *Grounds.*—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;
(2) Misconduct of the jury or prevailing party;
(3) Accident or surprise which ordinary prudence could not have guarded against;
(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
(5) Manifest disregard by the jury of the instructions of the court;
(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
(8) Error in law occurring at the trial and objected to by the party making the motion, or
(9) Any other reason heretofore recognized as grounds for new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for motion.*—A motion for a new trial shall be served not later than 10 days after entry of the judgment.

(c) *Time for serving affidavits.*—When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 30 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.*—Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.*—A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment. (1967, c. 954, s. 1.)

Comment.—*Section (a).*—Here, in listing the grounds for new trial, the rule goes beyond the prior statutory law as set forth in former § 1-207 to include all those grounds for new trial which have been approved by North Carolina case law. Former § 1-207 made express mention of only three grounds for new trial—exceptions, insufficient evidence, and excessive damages. But the court has approved new trial in a number of other situations: Where the damages are inadequate, Hinton v. Cline, 238 N.C. 136, 76 S.E.2d 162 (1953); where the verdict is defective, Vandiford v. Vandiford, 215 N.C. 461, 2 S.E.2d 364 (1939); where there is misconduct of or affecting the jury, In re Will of Hall, 252 N.C. 70, 113 S.E.2d 1 (1960); Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); where there is newly discovered evidence, Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945); where there are irregularities in the trial, Lupton v. Spencer, 173 N.C. 126, 91 S.E. 718 (1917); where there is surprise, Hardy v. Hardy, 128 N.C. 178, 38 S.E. 815 (1901); when equity and

justice so require, Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (b).—Here there is a new requirement as to the time within which a motion for new trial must be made. It will be observed that the time is keyed to the "entry of judgment." As to what constitutes "entry of judgment," see Rule 58

Section (c). — While the practice prescribed here did not previously enjoy statutory sanction, a similar practice had been approved by the court. See Brown v. Town of Hillsboro, 185 N.C. 368, 117 S.E. 41 (1923); Allen v. Gooding, 174 N.C. 271, 93 S.E. 740 (1917).

Section (d).—Again, no prior statute is comparable to the section, but the Commission believes the practice has been approved by the Supreme Court. See Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (e). — This section would seem to be self-explanatory.

Editor's Note.—The cases cited in the following note were decided under former § 1-207.

Court Not Empowered to Change Verdict.—See Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922); Bundy v. Sutton, 207 N.C. 422, 177 S.E. 420 (1934); Edwards v. Upchurch, 212 N.C. 249, 193 S.E. 19 (1937); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927).

Where Jury Commits Palpable Error.—When it appears from the evidence, the charge of the court, and the verdict, that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. Hussey v. Atlantic Coast Line R.R., 183 N.C. 7, 110 S.E. 599 (1922).

Discretion of Court and Review Thereof.—See Hoke v. Tilley, 174 N.C. 658, 94 S.E. 446 (1917); Ziglar v. Ziglar, 226 N.C. 102, 36 S.E.2d 657 (1946); King v. Byrd, 229 N.C. 177, 47 S.E.2d 856 (1948); Carolina Coach Co. v. Central Motor Lines, 229 N.C. 650, 50 S.E.2d 909 (1948); Anderson v. Holland, 209 N.C. 746, 184 S.E. 511 (1936); Baily v. Dibbrell Mineral Co., 183 N.C. 525, 112 S.E. 29 (1922); Goodman v. Goodman, 201 N.C. 808, 161 S.E. 686 (1931); Strayhorn v. Fidelity Bank, 203 N.C. 383, 166 S.E. 312 (1932); Harrison v. Metropolitan Life Ins. Co., 207 N.C. 487, 177 S.E. 423 (1934); Manufacturers' Fin. Acceptance Corp. v. Jones, 203 N.C. 523, 166 S.E. 504 (1932); Brantley v. Collie, 205 N.C. 229, 171 S.E. 88 (1933); Hawley v. Powell, 222 N.C. 713, 24 S.E.2d 523 (1943); Alligood v. Shelton, 224 N.C. 754, 32 S.E.2d 350 (1944); Pruitt v. Ray, 230 N.C. 322, 52 S.E.2d 876 (1949).

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.*—Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void;
(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and

(3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) *Judgments rendered by the clerk.*—The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law. (1967, c. 954, s. 1.)

I. In General.
II. The Relief.
III. Application of the Principles.
A. Neglect of Party.
B. Neglect of Counsel.
C. Omissions.
IV. Pleading and Practice.

I. IN GENERAL.

Comment.—The prior North Carolina law was that the court could correct clerical mistakes at any time by motion in the cause, either in or out of term. The motion to correct a clerical error need not be made to the same judge who tried the cause.

There were two statutes dealing with the subject matter. Former § 1-220 provided in effect that where there had been personal service upon the defendant the court could set aside a judgment for mistake, surprise, inadvertence or excusable neglect within one year from the rendition of the judgment. Section 1-108 formerly provided in effect that where there had been constructive service only the defendant must be allowed to defend even after judgment at any time within one year after notice of the judgment but within five years after rendition of the judgment. In any such case the judge must find the facts concerning the mistake, surprise, etc., and that the defendant had a meritorious defense and he must reduce this information to writing.

In reference to section (b) (3) of the federal rule, North Carolina makes a distinction in extrinsic and intrinsic fraud and in the manner in which such judgment may be attacked.

There is not as much difference between the federal rule and the North Carolina as first blush would indicate. Actually, the federal rule uses very succinct language to incorporate most of the results obtained under the North Carolina statutes and case law. As noted above the prior North Carolina practice distinguished between the rights of a defendant who was personally served and a defendant against whom constructive notice was served.

Editor's Note.—The cases cited in this note were decided under former § 1-220.

Former § 1-220 was not applicable to proceedings before the Industrial Commission, because the Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969).

Section (b) Applies Only to Matters of Fact.—See Skinner v. Terry, 107 N.C. 103, 12 S.E. 118 (1890); Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

Relief given on the ground of "mistake, inadvertence, surprise or excusable neglect" refers to mistake of fact and not of law. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Or for Excusable Neglect.—The larger part of the court's jurisdiction is invoked under "excusable neglect" where there is neither mistake of law nor fact. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

A judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact or law. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

The remedy provided is restricted to the parties aggrieved by the judgment or order sought to be set aside, and the superior court has no power to set aside a judgment or order once rendered upon motion of a stranger to the cause. In re Hood, 208 N.C. 509, 181 S.E. 621 (1935), citing Smith v. City of New Bern, 73 N.C. 303 (1875); Edwards v. Phillips, 91 N.C. 355 (1884).

Section (b) Is Applicable to Both Adult and Infant Parties.—In application for relief no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. Mauney v. Gidney, 88 N.C. 200 (1883).

But Not to Irregular Verdicts.—Where an irregular verdict is rendered by the court, the same cannot be set aside or altered under the provisions of this section. Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905); Gough v. Bell, 180 N.C. 268, 104 S.E. 535 (1920); Hood v. Stewart, 209 N.C. 424, 184 S.E. 36 (1936).

The surprise contemplated by section (b) is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

Excusable Neglect and Meritorious Defense.—A judgment may be set aside if the moving party can show excusable neglect, and that he has a meritorious defense. Dunn v. Jones, 195 N.C. 354, 142 S.E. 320 (1928). See Henderson Chevrolet Co. v. Ingle, 202 N.C. 158, 162 S.E. 219 (1932); Bowie v. Tucker, 206 N.C. 56, 173 S.E. 28 (1934), aff'g 197 N.C. 671, 150 S.E. 200 (1929); Jones v. Craddock, 211 N.C. 382, 190 S.E. 224 (1937).

The action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties in statu quo, will be upheld on appeal, the record disclosing that the answer of the defendant set up a meritorious defense. Cagle v. Williamson, 200 N.C. 727, 158 S.E. 391 (1931).

Court held without discretion to vacate default judgment except upon a finding of fatal irregularity or excusable neglect and meritorious defense. Wilson v. Thaggard, 225 N.C. 348, 34 S.E.2d 140 (1945).

Where the answer and record disclose a meritorious defense, the denial of the trial court of a motion to set aside the judgment because defendant had offered no evidence of a meritorious defense, is erroneous. Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

The court's order setting aside a judgment by default against a corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. Hershey Corp. v. Atlantic Coast Line R.R., 203 N.C. 184, 165 S.E. 550 (1932).

Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station, but the ticket saleswoman failed to notify defendant, and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

The question of meritorious defense becomes immaterial in the absence of sufficient showing of excusable neglect. Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945); Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946).

Where a cause has been remanded to the State from the federal court by the latter court, and the clerk of the former court has had entered, without notice to defendant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the federal court, and the order of remand has been regularly made, upon motion of the plaintiff's attorney, the judge of the superior court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

A party must show excusable neglect and a meritorious defense to be entitled to have the judgment set aside. Sawyer v. Sawyer, 1 N.C. App. 400, 161 S.E.2d 625 (1968).

In order to have a judgment set aside under this section, the movant must show excusable neglect. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

Excusable Neglect Alone Is Insufficient.—A party, moving in apt time to set aside a judgment taken against him, on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. Hanford v. McSwain, 230 N.C. 229, 53 S.E.2d 84 (1949). See Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951); State v. O'Connor, 223 N.C. 469, 27 S.E.2d 88 (1943); Bowie v. Tucker, 197 N.C. 671, 150 S.E. 200 (1929).

The absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

And a want of a sufficient showing of a meritorious defense renders the question of excusable neglect immaterial. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Meritorious Defense or Cause of Action Must Be Shown.—In order to set aside a judgment for mistake, surprise, or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. Farmers & Merchants Bank v. Duke, 187 N.C. 386, 122 S.E. 1 (1924); Hill v. Huffines Hotel Co., 188 N.C. 586, 125 S.E. 266 (1924). See Fellos v. Allen, 202 N.C. 375, 162 S.E. 905 (1932); Hooks v. Neighbors, 211 N.C. 382, 190 S.E. 236 (1937); Garrett v. Trent, 216 N.C. 162, 4 S.E.2d 319 (1939).

Existence of a meritorious cause of action is a prerequisite to relief on motion to vacate former judgment. Craver v. Spaugh, 226 N.C. 450, 38 S.E.2d 525 (1946).

A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as prima facie amounts to a valid defense; whether the defense is valid, is a question to be determined by the court, not the party. Mauney v. Gidney, 88 N.C. 200 (1883).

A denial of a motion to set aside a judgment will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the appellate court will not consider affidavits for the purpose of finding facts in motions of this sort. Clayton v. Clark, 212 N.C. 374, 193 S.E. 404 (1937).

Same — When Defendant Non Compos Mentis.—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. Farmers & Merchants Bank v. Duke, 187 N.C. 386, 122 S.E. 1 (1924).

Whether the neglect is excusable is to be determined with reference to the litigant's neglect, and not that of his attorney, or a defendant's insurer. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

A verification of a complaint which is sworn to with uplifted hand rather than on the Bible is not a sufficient ground for setting aside a judgment entered by default. Fellos v. Allen, 202 N.C. 375, 162 S.E. 905 (1932).

Consent Judgment. — Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given. The burden is on the party attacking the judgment to show facts which will entitle him to relief. Gardiner v. May, 172 N.C. 192, 89 S.E. 955 (1916).

Where, upon a motion to set aside a judgment for surprise and excusable neglect, on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, the finding is conclusive on the appellate court upon appeal, and the order refusing the motions will be upheld. Alston v. Southern Ry., 207 N.C. 114, 176 S.E. 292 (1934).

The "Mistake, etc.," Must Be of the Party Seeking Relief. — Section (b) applies only where the mistake, surprise, etc., is that of the party seeking relief and has no application where the mistake and surprise arise from the fraudulent conduct of another, Boyden v. Williams, 80 N.C. 95 (1879); nor where a motion is made to correct an erroneous judgment rendered at a former term if it appears that the error committed was that of the court and not that of the party. Simmons v. Dowd, 77 N.C. 155 (1877).

Facts Must Be Found and Stated.—Before a judge can vacate a judgment on the grounds of excusable neglect he must find and state the facts. Clegg v. New York White Soapstone Co., 66 N.C. 391 (1872); Powell v. Weith, 66 N.C. 423 (1872).

Where there are no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect, it is error for court to allow defendant's motion to set aside judgment. Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946).

Determination by Court. — Upon the facts found the court determines, as a matter of law, whether or not they con-

stitute excusable neglect, and whether or not they show a meritorious defense; and from such ruling either party may appeal. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Attention Required by Parties Duly Served with Summons.—Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968); Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

Facts Insufficient to Support Conclusion of Excusable Neglect.—If the facts are insufficient to support the conclusion of excusable neglect, an order setting aside the judgment will be reversed. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Decision Is Reviewable.—The mistake, surprise, inadvertence, or excusable neglect, as a ground for relieving a party from a judgment, etc., is a question of law, and if the judge below errs in his ruling in regard thereto, his decision is subject to review. Powell v. Weith, 68 N.C. 342 (1873).

II. THE RELIEF.

Relief under Section (b) Is Discretionary with Judge.—The application for relief is addressed to the discretion of the judge presiding. Bank of Statesville v. Foote, 77 N.C. 131 (1877).

The discretion to set aside a judgment is not given unless there has been excusable neglect. If the judge finds correctly that the negligence was inexcusable, that ends the motion; if he finds correctly that the negligence was not excusable, his discretion to set aside is not reviewable, unless in case of gross abuse of discretion. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899).

The setting aside of a judgment is in the sound legal discretion of the trial judge. Dunn v. Jones, 195 N.C. 354, 142 S.E. 320 (1928).

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise, or excusable neglect is a legal discretion and reviewable. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

A rehearing is not a matter of right, but rests in the sound discretion of the court. Williams v. Alexander, 70 N.C. 665 (1874).

Nature of Relief.—A judgment may be set aside, in whole or in part; the court is invested with full legal discretion over the matter. Geer v. Reams, 88 N.C. 197 (1883).

Refusal to Entertain Motion.—The provisions of section (b) make it discretionary with a judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise the discretion conferred on him by law. Hudgins v. White, 65 N.C. 393 (1871).

Modification by One Judge of Judgment Rendered by Another. — Where on notice and showing that there was on the part of the complainant a mistake, inadvertence, surprise, or excusable neglect by which he was injured, the judgment rendered against him may be modified by a judge other than the one by whom it was rendered. Johnson v. Marcom, 121 N.C. 83, 28 S.E. 58 (1897).

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

For the personal inattention of a suitor no relief can be granted. Ellington, Royster & Co. v. Wicker, 87 N.C. 14 (1882).

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there is no evidence in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute. Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945).

Mistake as to Nature of Summons. — The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measure to answer the same, is not such excusable neglect as entitled him to relief. White v. Snow, 71 N.C. 232 (1874). See Holden v. Purefoy, 108 N.C. 163, 12 S.E. 848 (1891), where

relief was granted a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

Where Party Very Old and Forgetful.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action does not show excusable neglect. Pierce v. Eller, 167 N.C. 672, 83 S.E. 758 (1914).

Sickness of Party.—Where the defendant was of sound mind, and, though his bodily infirmities confined him, carried on business and defended other suits, a default judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities. Jernigan v. Jernigan, 179 N.C. 237, 102 S.E. 310 (1920).

Sickness of Attorney. — Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence, and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, are sufficient to support the court's order setting aside a default judgment under this section. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Sickness of Family. — Where the defendant indorser of a note was required by the illness of his wife to be outside the State, and the complaint was filed on the first day of the term, and judgment by default was entered two days later, there was sufficient excuse for failure to answer to justify the opening of the default. Bank of Union v. Brock, 174 N.C. 547, 94 S.E. 301 (1917).

Where Party Obligated to Question His Counsel.—While, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is inexcusable neglect and relief will be denied. Holland v. Edgecombe Benevolent Ass'n, 176 N.C. 86, 97 S.E. 150 (1918).

Where the defendant, upon the suggestion of his counsel, allows judgment by default to go against him, he cannot, upon discovering that the recovery is greater than he had anticipated, seek relief under this section for his action does not amount to excusable neglect. State ex rel. Hodgin v. Matthews, 81 N.C. 289 (1879).

Where Endeavor Is Made to Compromise.—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. Union Guano Co. v. Middlesex Supply Co., 181 N.C. 210, 106 S.E. 832 (1921).

Misled by Conversation between Counsel.—The fact that the party was misled by a conversation between his counsel and the attorney for the adversary does not entitle him to relief under this section. Hutchinson v. Rumfelt, 83 N.C. 441 (1880).

Change of Post Office.—A judgment by default will not be set aside on the ground of excusable neglect, when it appears that defendants changed their post office and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at their former post office, and no communication being addressed to their counsel concerning the matter until eleven months after the time for answering the complaint had expired. Vick v. Baker, 122 N.C. 98, 29 S.E. 64 (1898).

Attorney's Death within Knowledge of Client. — Where an attorney, in whose hands a cause has been placed, dies and the client has notice of such fact and fails to file his answer at the proper time, he cannot later claim relief under this section on the ground of excusable neglect. Simpson v. Brown, 117 N.C. 482, 23 S.E. 441 (1895).

Wife's neglect to file answer upon assurances of her husband that he would do so is excusable in joint action against them. Wachovia Bank & Trust Co. v. Turner, 202 N.C. 162, 162 S.E. 221 (1932).

Absence from Trial.—It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, and where he without cause remains out of court, he cannot claim relief under this section as his act amounts to inexcusable neglect. Cobb v. O'Hagan, 81 N.C. 293 (1879).

The fact that an order in the cause, which in effect deprived the plaintiff of the right of appeal, was made at midnight when the plaintiff was absent and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the trial, constitutes a case of "excusable neglect." Long v. Cole, 74 N.C. 267 (1876).

Where it appears that a party was in the courtroom at the time the court announced that motions in his case would be heard the following day, his motion to set aside an order made on the day stipulated on the ground of excusable neglect is properly denied. Abernethy v. First Sec. Trust Co., 211 N.C. 450, 190 S.E. 735 (1937).

Failure to Defend after Denial of Motion for Continuance. — Where the trial court finds that defendants and their attorney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the courtroom without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment will be affirmed on appeal. Carter v. Anderson, 208 N.C. 529, 181 S.E. 750 (1935).

B. Neglect of Counsel.

Dividing Line between Cases Difficult to Determine.—It is difficult to deduce any distinct practical principle from the numerous adjudications, or to run a well-defined line separating those neglects that are, from those that are not, excusable, and hence the facts relied on must be arranged on the one and then on the other side of that line, in each case as they arise. Mebane v. Mebane, 80 N.C. 34 (1879).

Gross Negligence of Attorney. — The omission of an attorney, retained as counsel in a cause, to perform his duty as such in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated under this section. Griel v. Vernon, 65 N.C. 76 (1871); Wiley v. Logan, 94 N.C. 564 (1886); and this is especially true where the counsel is insolvent and unable to respond in damages for his negligence. Bayer v. Raleigh & A. Air Line R.R., 125 N.C. 17, 34 S.E. 100 (1899). See English v. English, 87 N.C. 497 (1882); Deal v. Palmer, 68 N.C. 215 (1873).

Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no negligence himself, the attorney's negligence in failing to appear and answer will not be imputed to such party in proceeding to vacate default judgment, but the law will excuse the party and afford him relief. Stallings v. Spruill, 176 N.C. 121, 96 S.E. 890 (1918).

Where defendants who employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned, verified their answers promptly and entrusted them to their attorneys for filing, attorneys' failure to file the answers within time required by law was not due to such negligence on part of defendants as deprived the judge of power to grant them relief from a default judgment under this section. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the State, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trail without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. Meece v. Commercial Credit Co., 201 N.C. 139, 159 S.E. 17 (1931).

Where Counsel Instructed to Employ Other Counsel.—Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the superior court setting aside the judgment for his excusable neglect when otherwise correct will be sustained on appeal. Helderman v. Hartsell Mills Co., 192 N.C. 626, 135 S.E. 627 (1926).

Where Counsel Does Not Receive by Mail.—The refusal of a motion to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him. Clayton v. Adams, 206 N.C. 920, 175 S.E. 185 (1934).

Client Misinformed by Attorney as to Time of Trial.—When a defendant moved to vacate a judgment, upon the ground of excusable neglect, and the excuse as-

signed was that his counsel, by mistake, had misinformed him as to the time of holding court whereby he failed to answer, it was held that the excuse was not sufficient, when the facts show that the defendant did not suffer harm by the mistake of his counsel. Clegg v. New York White Soap Stone Co., 67 N.C. 302 (1872).

Where an attorney has ample notice as to the day of the trial, the continued absence of the client for two successive calls is inexcusable neglect for which no relief can be had under this section. Henry v. Clayton, 85 N.C. 372 (1881).

Disqualification or Withdrawal of Counsel During Pendency of Trial.—Pending a reference, the counsel for a party to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc., in the cause, neglected to retain another counsel. It was held, that this did not require the court to set aside the report and recommit the matter passed upon therein. Smith v. Smith, 101 N.C. 461, 8 S.E. 128 (1888).

The withdrawal of defendant's attorney from the case by leave of court when the case is called for trial constitutes "surprise." Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

Though an attorney may withdraw from a case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where for the failure of such notice a judgment upon a verdict has been obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it is correct for the trial judge to grant his motion under this section. Gosnell v. Hilliard, 205 N.C. 297, 171 S.E. 52 (1933).

Where the court finds that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw the case, and was told he would have to employ other counsel, and the case continued to the next term, the motion made by himself and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, surprise, and excusable neglect is properly refused. Baer v. McCall, 212 N.C. 389, 193 S.E. 406 (1937).

The court's permitting counsel for defendant to withdraw from the case, upon the calling of the case for trial, in the absence of notice to defendant, constitutes "surprise" but does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense. Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 801 (1940).

Mistaken Legal Advice. — Mistaken legal advice by counsel acted on by client, is not remediable—being a mistake of law and not of fact. Phifer v. Travellers Ins. Co., 123 N.C. 405, 31 S.E. 715 (1898).

Attorney Prevented from Examining Complaint. — On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the remainder of the term was absent in obedience to a summons as a witness. It was held that the defendant's neglect was excusable. Wynne v. Prairie, 86 N.C. 73 (1882).

Where Negligence of Attorney Attributable to Party.—A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified, though means of easy communication in ample time were available, the neglect of the attorneys being personally attributable to the party of the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N.C. 437, 130 S.E. 12 (1925).

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944).

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect. Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944).

Where it appears upon the defendant's motion to set aside a judgment by default that the same was regularly calendared for trial, the defendant had notice thereof and

was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion. Gaster v. Thomas, 188 N.C. 346, 124 S.E. 609 (1924); but where no laches are attributable to the client, he will be granted relief. Geer v. Reams, 88 N.C. 197 (1883).

Removal to Federal Court.—Where the clerk has erroneously granted defendants' motion to remove a cause to the federal court, the moving defendants may assume that no further proceedings will be had in the State court until the cause has been remanded from the federal court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendants to file answer will not be disturbed on appeal. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

C. Omissions.

Duty of Court to Supply Omissions.—It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of the action or the verity of its records, as made — and no lapse of time will debar the court of the power to discharge this duty. Walton v. Pearson, 85 N.C. 35 (1881).

May Not Be Collaterally Attacked.—The effect of an amendment made by the court cannot be collaterally considered, but must be done in a proceeding brought for that purpose. Foster v. Woodfin, 65 N.C. 29 (1871).

IV. PLEADING AND PRACTICE.

Burden of Proof. — A party seeking to vacate a judgment is always at default, and the burden is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion. Kerchner v. Baker, 82 N.C. 169 (1880).

Failure of Judge to State Facts Found. —When, in setting aside a judgment for excusable negligence, the judge does not state the ground on which he founded his order, his action will be upheld if in any aspect of the case it would be proper. D.J. Foley, Bro. & Co. v. Bank & Lovick, 92 N.C. 476 (1885).

In setting aside a judgment, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient. Parnell v. Ivey, 213 N.C. 644, 197 S.E. 128 (1938).

Appeal from Order of Clerk.—See Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944); Kerr v. North Carolina Joint Stock Land Bank, 205 N.C. 410, 171 S.E. 367 (1933).

Presumption on Appeal. — When the court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate court must assume that the question of "excusable neglect" was passed upon. Clegg v. New York White Soap Stone Co., 67 N.C. 302 (1872).

Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movants have shown excusable neglect and meritorious defense. Radeker v. Royal Pines Park, Inc., 207 N.C. 209, 176 S.E. 285 (1934).

Right of Appeal May Be Lost. — The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party who has lost the right by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity or for other causes. Badger v. Daniel, 82 N.C. 468 (1880).

Same—Certiorari.—The writ of certiorari, as a substitute for an appeal lost, will be granted only when the petitioner shows that he has been diligent, and there has been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other person or cause in some way connected with it and not within his control. Williamson v. Boykin, 99 N.C. 238, 5 S.E. 378 (1888); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

Questions Reviewable on Appeal.— Whether upon the facts found by the judge, the neglect of attorneys for defendants to file answers to the complaint within the

time required by statute was excusable, or whether, in any event, such neglect was imputable to defendants, are questions of law, with respect to which the conclusions of the judge are reviewable on appeal. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

Discretion of Judge Not Reviewable on Appeal.—The appellate court can review on appeal what is a mistake, surprise, or excusable neglect, but it cannot review the discretion exercised by a judge of the superior court. Branch v. Walker, 92 N.C. 87 (1885); D.J. Foley, Bro. & Co. v. Blank & Lovick, 92 N.C. 476 (1885). But should the judge set aside a judgment upon a state of facts which did not bring the case within the scope of the statute (now the rule), his action would be subject to correction on appeal. Beck v. Bellamy, 93 N.C. 129 (1885).

When the judge grants the relief, in the exercise of his discretion, that conclusion is not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect, may be reviewed, and if it be determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone by the statute (now rule). H. Weil & Bro. v. Woodard, 104 N.C. 94, 10 S.E. 129 (1889).

Where, on a motion to set aside a default judgment the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the appellate court being bound by the findings when supported by evidence. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Same — Abuse of Discretionary Power.—The refusal of a motion to set aside a judgment on the grounds of surprise or excusable neglect is a matter of discretion with the judge below and cannot be reviewed on appeal, unless it should appear that such discretion was abused. Cowles v. Cowles, 121 N.C. 272, 28 S.E. 476 (1897).

After hearing the evidence and finding the facts, the action of the judge is conclusive upon the parties, from which there is no appeal; yet this discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the judge mistake the meaning of "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review. Hudgins v. White, 65 N.C. 393 (1871); Albertson v. Terry, 108 N.C. 75, 12 S.E. 892 (1891).

Findings of Trial Court Conclusive.—The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect are conclusive on appeal when supported by any competent evidence. Carter v. Anderson, 208 N.C. 529, 181 S.E. 750 (1935).

Upon motion to set aside a judgment, the findings of the court as to excusable neglect and meritorious defense are conclusive on appeal when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. Hanford v. McSwain, 230 N.C. 229, 53 S.E.2d 84 (1949). See Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

Where Remedy Sought by Independent Action.—The institution of an independent action in lieu of a renewal of the motion is such an abandonment of the remedy by motion as worked a discontinuance of the same. Norwood v. King, 86 N.C. 81 (1882).

Rule 61. Harmless error.

No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right. (1967, c. 954, s. 1.)

Comment.—The substance of this rule has been many times endorsed by the court. See e.g., Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1937).

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions—injunctions and receiverships.* — Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for

an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion for new trial or for judgment.*—In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(c) *Injunction pending appeal.*—When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay upon appeal.*—When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295.

When stay is had by giving supersedeas bond, the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal as the case may be, and stay is then effective when the supersedeas bond is approved by the court.

(e) *Stay in favor of North Carolina or agency thereof.*—When an appeal is taken by the State of North Carolina or an officer in his official capacity or agency thereof or by direction of any department or agency of the State of North Carolina and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) *Power of appellate court not limited.*—The provisions of this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of judgment as to multiple claims or multiple parties.*—When a court has ordered a final judgment under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (1967, c. 954, s. 1.)

Comment.—While in general this rule leaves the present North Carolina law intact in this area, it does make some specific provisions in order to tie in the procedure here employed to other rules.

Rule 63. Disability of a judge.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then those duties may be performed:

(1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If such judge is himself under a disability, then the resident judge

of the district senior in point of service on the superior court may perform those duties. If a resident judge, while holding court in his own district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the Chief Justice of the Supreme Court.

(2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

If the substituted judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. (1967, c. 954, s. 1.)

Comment. — Formerly, there was no statutory prescription in respect to the problem dealt with by this rule. It can be seen, however, that in particular cases where a verdict has already been returned or findings of fact and conclusions of law filed and then the trial judge is unable to continue to function, it will be highly useful to have some judge authorized to step into the breach.

ARTICLE 8.

Miscellaneous.

Rule 64. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of this State. (1967, c. 954, s. 1.)

Comment.—This rule seems to be self-explanatory.

Rule 65. Injunctions.

(a) *Preliminary injunction; notice.*—No preliminary injunction shall be issued without notice to the adverse party.

(b) *Temporary restraining order; notice; hearing; duration.*—A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e).

(c) *Security.*—No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule. In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of the plaintiff spouse as a condition precedent to the issuing of a temporary restraining order or preliminary injunction enjoining the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit, until further order of the court, but damages may be awarded against such party in accord with this rule.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security and the sureties thereon if their addresses are known.

(d) *Form and scope of injunction or restraining order.*—Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

(e) *Damages on dissolution.*—An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury. (1967, c. 954, s. 1.)

Comment.—

Practice Prior to Rule

While a plaintiff may be entitled to legal and equitable relief in a civil action, the preliminary injunction continues to be an extraordinary and provisional remedy and will not be granted except where adequate relief cannot be had without it. Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946).

When temporary injunction issued. — The form of relief may be a preliminary injunction or restraining order, which may be issued:

(1) To preserve the status quo pending the action. As a rule, a mandatory order or injunction will not be made as a preliminary injunction except when the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line Ry. v. Atlantic Coast Line Ry., 237 N.C. 88, 74 S.E.2d 430 (1953).

(2) To protect the subject matter of the action.

(3) To prevent fraudulent transfer. See § 1-485.

Time of issuing. — The preliminary injunction may be granted at the time of commencing the action or at any time afterwards, before judgment. Requisites are (a) affidavits; (b) summons.

When notice required. — When the restraining order is asked for as a preliminary motion, notice is not required, but if the judge deems it proper that the other party should be heard, he may issue a show cause order, and the defendant may, in the meantime, be restrained. A restraining order cannot be granted by a judge for a longer time than twenty days, without notice. After the defendant has answered, an injunction will not be granted except upon notice. However, the defendant may be restrained pending such action. See former §§ 1-490, 1-491, 1-492.

Undertaking.—Upon granting a restraining order or an order for an injunction, the judge shall require a written undertaking. See former § 1-496.

Appeals.—Upon appeal from a judgment vacating a restraining order or denying a perpetual injunction where the injunction is the principal relief sought, the court, in its discretion, may require plaintiff to give bond and continue the restraining order pending the appeal. See § 1-500.

Damages in injunction. — A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and against his sureties without the requirement of malice or want of probable cause, which damages may be obtained by a reference or otherwise, as the judge directs. See former § 1-497.

Practice Under Rule

This rule is substantially the same as federal Rule 65.

Section (a).—This section provides that no preliminary injunction shall be issued without notice to the adverse party. While the rule does not specify the type of notice, proper service of the complaint and summons upon the party or his proper agent have been held sufficient. The court must have in personam jurisdiction. Section (b) specifies the time for hearing. On the hearing, the pleadings, if verified, and other affidavits have been held sufficient to grant a preliminary injunction.

The principal change here is the requirement of notice. Ordinarily, the purpose of the preliminary or interlocutory injunction is to preserve the status quo until the issues are determined after final hearing. Section (b) takes care of the situation where immediate action is necessary.

Section (b). — A restraining order is a temporary order, entered in an action, without notice, if necessary, and upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties. The ex parte restraining order is, under this section, then, subject to definite time limitations and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision. Such ex parte order must be upon verified facts. Note, also, that such order granted without notice expires by its terms within such time after entry, not to exceed ten days, unless the time is, for good cause shown, extended.

Section (c).—The requirements with respect to security as set forth in this section are similar to the requirements of former § 1-496.

In general, there are two methods for enforcement of liability on a bond or other security given to secure the issuance of a restraining order or preliminary injunction: An independent action or motion for judgment in the injunction action. The second paragraph of section (c) deals with this second method of enforcement. Since this motion procedure is part of the "equity suit," there is no right to trial by jury on the issues raised. If, however, an independent action is brought, this would be one of law, and a right to jury would be preserved.

Section (d).—The requirement that the judge state the reasons for granting the injunction and the acts to be restrained is new. Under prior law no particular form of order was required, although the decisions hold that "the defendant shall be given authentic notification of the mandate of the court or judge." Davis v. Champion Fiber Co., 150 N.C. 84, 63 S.E. 178 (1908). There does not appear to be a statute as explicit as the final clause of section (d) with respect to the parties affected by the action.

Section (e).—This is substantially the same provision as is found in former § 1-497.

Editor's Note. — The cases cited in the following note were decided under former §§ 1-496, 1-497.

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Absent an express decision that plaintiff was not entitled to the temporary restraining order, the question is whether the order rendered was the equivalent of such a decision. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Voluntary and Unconditional Dismissal by Plaintiff. — In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond as required by former § 1-496, the voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Proof.—To sustain an action for damages, it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some

wrong on the part of plaintiff. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Burden.—The burden of proof was on defendant to show as a prerequisite to his right to recover damages from plaintiff and its surety either that the court had finally decided plaintiff was not entitled to the temporary restraining order or that something had occurred equivalent to such a decision. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Effect of Injunction Rightfully Awarded but Properly Dissolved.—If an injunction is rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Hence, a judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Provision for Security Is Mandatory.—The provision that the plaintiff in injunction give bond is mandatory and the amount fixed by the judge is conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires, or thinks it necessary for his protection. James v. Withers, 114 N.C. 474, 19 S.E. 367 (1894); McAden v. Watkins, 191 N.C. 105, 131 S.E. 375 (1926).

Effect of Failure to Require Bond.—The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. Young v. Rollins, 90 N.C. 125 (1884).

Burden of Proof as to Amount of Damages.—Before judgment can be given upon an injunction bond, the party alleging that he had been damnified by reason of said injunction must establish the quantum of damages sustained. Hyman v. Devereux, 65 N.C. 588 (1871). And this amount does not include the personal expenses in attending the hearing. Midgett v. Vann, 158 N.C. 128, 73 S.E. 801 (1912). For full discussion as to attorneys' fees, see Hyman v. Devereux, 65 N.C. 588 (1871).

Failure to give the required undertaking is merely an irregularity which will be cured by a subsequent execution thereof. McKay v. Chapin, 120 N.C. 159, 26 S.E. 701 (1897); Standard Bonded Warehouse Co. v. Cooper & Griffin, Inc., 30 F.2d 842 (W.D.N.C. 1929).

Where Money Deposited without Sureties.—Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum, it seems that a deposit in money of the sum named will be sufficient; but whether so or not, the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it will supply the alleged defect, and prevent the injunction from being vacated on that account. Richards v. Baurman, 65 N.C. 162 (1871).

Undertaking Given Prior to Restraining Order.—Where an undertaking has been given before the issue of a restraining order, it is not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiff unless it be shown that the bond already given is insufficient. Preiss v. Cohen, 112 N.C. 278, 17 S.E. 520 (1893).

In an action to abate a public nuisance plaintiff relator was not required to give an undertaking, the provisions of former § 1-496 not being applicable. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Procedure to Recover Damages.—It is not contemplated that a separate action shall be brought upon an injunction bond but the damages sustained by reason of an injunction shall be ascertained by proper proceedings in the same action, and may be by reference or otherwise as the judge shall direct. North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co., 79 N.C. 48 (1878). See Crawford v. Pearson, 116 N.C. 718, 21 S.E. 561 (1895); Nansemond Timber Co. v. Rountree, 122 N.C. 45, 29 S.E. 61 (1898).

The provision, requiring a bond in an injunction to cover the defendant's damages, and this further provision for the recovery thereof in the same action, do not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to an action on the bond when the damages sought are in excess of that amount. Shute v. Shute, 180 N.C. 386, 104 S.E. 764 (1920).

Want of Probable Cause Need Not Be Alleged.—See Crawford v. Pearson, 116 N.C. 718, 21 S.E. 561 (1895).

Rule 66.

Omitted.

Rule 67.

Omitted.

Rule 68. Offer of judgment and disclaimer.

(a) *Offer of judgment.*—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) *Conditional offer of judgment for damages.*—A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages. (1967, c. 954, s. 1.)

Comment.—Both sections of the rule would seem to be self-explanatory. They encompass the substance of former §§ 1-541 and 1-542. Former § 1-543, permitting a disclaimer of title by the defendant in trespass actions together with an offer to make amends, was repealed on the theory that its purpose can be accomplished by use of section (a).

Editor's Note.—The cases cited in the following note were decided under former §§ 1-541, 1-542.

Nature of Offer Required.—An offer of compromise to be sufficient must be in a form that will enable the plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney-at-law, since otherwise the clerk would not be authorized to enter judgment against all. Williamson v. Lock's Creek Canal Co., 84 N.C. 629 (1881).

The defendant would have no right to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Stephens v. Koonce, 103 N.C. 266, 9 S.E. 315 (1889).

Unaccepted Tender of Judgment. — The purpose of former § 1-541 could be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict before the judge, to enable him to adjudge who shall pay the costs. A. Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913).

In A. Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913), it was said: "The statute [former § 1-541] authorizing a tender of judgment says that the tender, when not accepted, is to be deemed withdrawn, and cannot be given in evidence, and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced."

When defendants tender judgment for a smaller amount on another and different

liability from that alleged in the complaint, and plaintiff does not accept, the tender is thereby withdrawn, and upon judgment of nonsuit on the cause alleged, plaintiff is not entitled to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. Doggett Lumber Co. v. Perry, 213 N.C. 533, 196 S.E. 831 (1938).

Agreement as Evidence Fixing Damages. — Where, pending an action to recover for damages done to a lot of tobacco which the plaintiff had bought and paid for under a guarantee of soundness by the defendants, an agreement was entered into adjusting the amount of damage per pound which the plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party, it was held that such an agreement was not an offer of compromise and was admissible on the trial of the action to determine the amount of the plaintiff's recovery. Garrett v. Pegram, 120 N.C. 288, 26 S.E. 778 (1897).

A defendant may not defeat the purpose of § 1-510 by undertaking to make a tender. McKay v. McNair Inv. Co., 228 N.C. 290, 45 S.E.2d 358 (1947).

Conditional Tender Should Accompany Answer.—A conditional tender may accompany an answer, and this alone is its proper placing so far as a pleading is concerned, or in reply to a counterclaim. Hall v. Telegraph Co., 139 N.C. 369, 52 S.E. 50 (1905).

Tender of judgment which is not made until after nonsuit has been entered and plaintiff has appealed therefrom and the session of court has expired, did not comply with former § 1-541. Oldham & Worth v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Costs—When Tender Sufficient to Stop. —A tender of payment, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. Dr. Shoop Family Medicine Co. v. Davenport, 163 N.C. 294, 79 S.E. 602 (1913).

Same — When Taxed on Plaintiff. — Where a plaintiff is given judgment for no more than the amount tendered by the defendant, costs from the time the tender was made should be taxed on the plaintiff. Cowles v. Provident Life Assurance Soc'y, 170 N.C. 368, 87 S.E. 119 (1915).

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. Webster v. Wachovia Bank & Trust Co., 208 N.C. 759, 182 S.E. 333 (1935).

Same — When Taxed on Defendant. — Where, in a justice's court, judgment was rendered against two defendants, and one appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the superior court, the plaintiff was entitled to costs. Wyatt v. Wilson, 152 N.C. 276, 67 S.E. 501 (1910).

Error to Dismiss.—Where on the admissions in the pleadings the plaintiff is entitled to recover any amount, it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, and had paid it into court subject to the plaintiff's order does not vary this result. Penn v. King, 202 N.C. 174, 162 S.E. 376 (1932).

Rule 68.1. Confession of judgment.

(a) *For present or future liability.*—A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by this rule. Such judgment may be for money due or for money that may become due. Such judgment may also be entered for alimony or for support of minor children.

(b) *Procedure.*—A prospective defendant desiring to confess judgment shall file with the clerk of the superior court as provided in section (c) a statement in writing signed and verified by such defendant authorizing the entry of judgment for the amount stated. The statement shall contain the name of the prospective plaintiff, his county of residence, the name of the defendant, his county of residence, and shall concisely show why the defendant is or may become liable to the plaintiff.

If either the plaintiff or defendant is not a natural person, for the purposes of this rule its county of residence shall be considered to be the county in which it has its principal place of business, whether in this State or not.

(c) *Where entered.*—Judgment by confession may be entered only in the county where the defendant resides or has real property or in the county where the plaintiff resides but the entry of judgment in any county shall be conclusive evidence that this section has been complied with.

(d) *Form of entry.*—When a statement in conformity with this rule is filed with the clerk of the superior court, the clerk shall enter judgment thereon for the amount confessed, and docket the judgment as in other cases, with costs, together with disbursements. The statement, with the judgment, shall become the judgment roll.

(e) *Force and effect.*—Judgments entered in conformity with this rule shall have the same effect as other judgments except that no judgment by confession shall be held to be res judicata as to any fact in any civil action except in an action on the judgment confessed. When such judgment is for alimony or support of minor children, the failure of the defendant to make any payments as required by such judgment shall subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders. Executions may be issued and enforced in the same manner as upon other judgments. When the full amount of the judgment is not all due, or is payable in installments, and the installments are not all due, execution may issue upon such judgment for the collection of such sums as have become due and shall be in usual form. Notwithstanding the issue and satisfaction of such execution, the judgment remains as security for the sums thereafter to become due; and whenever any further sum becomes due, execution may in like manner be issued. (1967, c. 954, s. 1.)

Comment.—While this rule largely follows former §§ 1-247, 1-248 and 1-249, there are some changes.

That part of former § 1-247 expressly allowing judgment to be confessed "to secure any person against contingent liability on behalf of the defendant" has been omitted. Otherwise, there has been no change in respect to the subject matter for which judgment may be confessed.

The provisions in respect to the particular county in which judgment may be confessed have been changed. Formerly, § 1-249 permitted a judgment to be confessed where the defendant resided or "has property." Since it would seem to be a simple matter for a defendant to have property in any county (simply by wearing his clothes there), the possibility of abuse of the procedure by nonresidents for the benefit of nonresidents is present. The rule therefore specifies that the property must be real property. More importantly, it provides that judgment may be confessed also in the county of the plaintiff's residence. It will be observed that section (c), after stating the appropriate counties for the confession of judgment, provides that entry of judgment is conclusive evidence that the section has been complied with. This, in effect, puts the responsibility on the clerks for the enforcement of this section. At any rate, it prevents any nice inquiry as to whether it has been complied with.

Editor's Note.—The cases cited in the following note were decided under former §§ 1-247 through 1-249.

For note as to consent judgments for alimony, see 35 N.C.L. Rev. 405 (1957).

Provisions Are Procedural Only. — See Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F.2d 790 (4th Cir. 1935).

They are in derogation of common right, and must be strictly construed. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

And Strictly Construed. — Strict compliance with the provisions of former § 1-248 was required, and if all the requirements were not met the judgment was void because of a want of jurisdiction in the court to render judgment, which was apparent on the face of the proceedings. Smith v. Smith, 117 N.C. 348, 23 S.E. 270 (1895).

It was essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of former § 1-248. These were essential matters required by the section to confer jurisdiction on the court, and to insure validity of the judgment. Farmers Bank v. McCullers, 201 N.C. 440, 160 S.E. 494 (1931).

Substantial Compliance Required. — See Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

The rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Court Must Have Jurisdiction.—It is essential that the court have jurisdiction before a judgment on confession can be validly entered. Slocumb v. Cape Fear Shingle Co., 110 N.C. 24, 14 S.E. 622 (1892).

Where the requirements with respect to the form and contents of the statement have been fully complied with, the court acquires jurisdiction, and a judgment by confession, as authorized by the debtor in the statement, is valid for all purposes. Cline v. Cline, 209 N.C. 531, 183 S.E. 904 (1936).

The verified statement is jurisdictional, both as to its filing and as to its contents. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 9, 18 S.E.2d 698 (1942).

Same—May Be Collaterally Impeached.—Judgment, void if for want of jurisdiction in the court, if such appears on the record, may be collaterally impeached in any court in which the question arises. Hervey v. Edmunds, 68 N.C. 243 (1873).

Manner of Attacking Judgment by Confession for Fraud.—See Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890); George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

For What Judgment May Be Confessed.—A judgment by confession may be taken to cover a future debt. Bank of Georgia v. Higginbottom, 34 U.S. 48, 9 L. Ed. 46 (1835).

A judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. Gear v. Parish, 46 U.S. (5 How.) 168, 12 L. Ed. 100 (1847).

Confession by Partner.—It would seem to be well settled that, even before dissolution, one partner cannot confess judgment so as to bind his copartners. Hall v. Lanning, 91 U.S. 160, 23 L. Ed. 271 (1875).

Confession by Guardian.—A judgment confessed by a guardian of one non compos mentis, if the statement required be verified by the guardian in the absence of fraud, is not irregular. McAden v. Hooker, 74 N.C. 24 (1876).

In White v. Albertson, 14 N.C. 241 (1831), the process had been served on the guardian alone, and not on the infants also, as it should have been, and the guardian permitted judgment against the infants by nil dicit; yet it was held that the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him in that case. The analogy between infants and lunatics is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular. McAden v. Hooker, 74 N.C. 24 (1876).

A judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, though they style themselves as executors in making such a confession. Hall v. Craige, 65 N.C. 51 (1871).

Confession by Corporation.—A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements are complied with. Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

Same—Authority Should Be Shown.—A corporation may confess judgment, without action, in or out of term, but the record should show that the officer or person who represented the corporation in the proceedings was duly authorized to act, and that he did act under the direction of his principal. Nimocks v. Cape Fear Shingle Co., 110 N.C. 20, 14 S.E. 622 (1892).

Construction of Warrant of Attorney.—It seems to be an established principle that an authority given by warrant of attorney to confess a judgment against the maker of a note must be clear and explicit and strictly construed, and the court cannot supply any supposed omissions of the parties. National Exch. Bank v. Wiley, 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904).

Confession May Be Made to State.—A person may confess a judgment, or recognizance on record, to the State for a sum of money, as well as to an individual. Therefore, where A was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the State for the fine and costs, it was held that the judgment could not afterwards be set aside. State v. Love, 23 N.C. 264 (1840).

Verified Statement of Facts Required.—A judgment confessed must contain a verified statement of the facts and transactions out of which the indebtedness arose. Davenport v. Leary, 95 N.C. 203 (1886). And a mere statement that the debts are bona fide due, without embracing the account which was filed, is not a sufficient compliance. Davenport v. Leary, 95 N.C. 203 (1886). See Davidson v. Alexander, 84 N.C. 621 (1881); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894) (holding that confession is suf-

ficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price, and value of the goods).

The filing of the concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. Davidson v. Alexander, 84 N.C. 621 (1881).

A confession of judgment being a proceeding in derogation of a common right, former § 1-248 required, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, and an averment that the debt for which the judgment is confessed "is justly due." Smith v. Smith, 117 N.C. 348, 23 S.E. 270 (1895).

A judgment confessed upon the statement that defendant is indebted to the plaintiff in a certain sum "arising from the acceptance of a draft," setting out a copy thereof, is irregular and void. Davidson v. Alexander, 84 N.C. 621 (1881).

A statement that the amount was due by a certain note described in the judgment, that said note became due on a day named, and that the consideration was cotton sold and delivered—was a compliance with former § 1-248. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Where the affidavit stated that the amount was due on a bond under seal for borrowed money, due and payable 2 November, 1876, it was held that the statement was sufficient. George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements, and is void. Farmers Bank v. McCullers, 201 N.C. 440, 160 S.E. 494 (1931).

Confession of Judgment with Defeasance.—It is a well recognized practice to confess a judgment with a defeasance, and the courts will take notice of the condition, and will not permit an execution to issue in violation of it. Hardy v. Reynolds, 69 N.C. 5 (1873).

A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors, and does not vitiate the judgment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Showing That Debt Is Due Sufficient without Statement.—A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due by a certain promissory note due and payable on a day named, and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute, provided the statement is true, for then it follows that it is shown that the amount is justly due. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Description of the Nature of the Indebtedness Sufficient.—The failure to file with the confession of judgment the note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Mere filing and entry of a verified statement, although recorded on the judgment docket, and cross-indexed as judgments are, will not be effective as a judgment. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

The failure to comply with the mandatory terms of former § 1-248 and especially the want of rendition of judgment upon the statement and affidavit of the defendant was not a mere irregularity, but constituted a fatal defect, rendering the proceeding of no effect as against creditors whose judgments were subsequently docketed. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Where Statement Does Not Expressly Authorize Filing.—Although a confession of judgment does not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is equivalent to an express authority for its entry and sufficiently conforms to the statute. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

When and Where Judgment Entered.—The mere fact that the judgments were entered in the nighttime and in the law office of counsel, which was near to the courthouse and convenient, did not render them void or irregular. Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

Failure to Endorse Judgment on Verified Statement Does Not Affect Validity.—The failure to endorse the judgment on the verified statement was an irregularity which does not affect the validity of the judgment, which the entry on the judgment docket made by the clerk, or under his immediate supervision, shows was rendered by the court. Cline v. Cline, 209 N.C. 531, 183 S.E. 904 (1936).

Lien from Date of Docketing.—A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

Judgment Containing Irregularities.—Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it will be set aside or quashed. Nimocks v. Cape Fear Shingle Co., 110 N.C. 20, 14 S.E. 622 (1892).

Same—Judgments by Confession May Be Amended as Other Judgments.—Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Same — Irregularities Only May Be Cured by Amendment.—If the proceeding is so defective in form and substance that it is void upon its face, no amendment can be made to give it life; but if there are irregularities they may be cured by amendment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Same—Who May Set Aside the Judgment.—A judgment may be set aside for irregularity only upon the application of a party thereto. George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

Parol Evidence Not Admissible to Vary Judgment.—Where a judgment is confessed by one against himself, and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. Davidson v. Alexander, 84 N.C. 620 (1881).

Distinction between Attack on Judgment by Creditors of Debtor and by Debtor Himself.—There is a distinction between challenges to the validity of a confessed judgment made by creditors of the confessing debtor, and by the debtor himself. Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961).

Defendant was estopped to question the validity of his own confessed judgment for alimony. See Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961).

Rule 69.

Omitted.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt. If real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to execution upon application to the clerk upon payment of the necessary fees. (1967, c. 954, s. 1.)

Comment.—While preserving the essence of the former vesting statute, § 1-227, the rule as drafted makes two changes. First, where a party has been directed in a judgment to perform an act and has failed to so perform, it imports into the statutes for the first time authorization for the court to have someone else to perform the act with "like effect as if done by the party." Perhaps this authorization is most obviously applicable to specific performance decrees, yet it should be noted that

it is not limited to transfers of title but extends to all acts which the court might properly direct in a judgment. Second, the rule makes it clear that a judgment divesting title and vesting it in others "has the effect of a conveyance" without further words being added to the effect that the judgment "shall be regarded as a deed of conveyance." See Morris v. White, 96 N.C. 91, 2 S.E. 254 (1887), and Evans v. Brendle, 173 N.C. 149, 91 S.E. 723 (1917).

Editor's Note.—The cases cited in the following note were decided under former § 1-227.

Consent Judgments and Decrees.—See Rollins v. Henry, 78 N.C. 342 (1878); In re Will of Smith, 249 N.C. 563, 107 S.E.2d 89 (1959).

Rule 71 to Rule 83.

Omitted.

Rule 84. Forms.

The following forms are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate:

(1) Complaint on a Promissory Note.

1. On or about ....., 19.., defendant executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on ....., 19...., the sum of ..... dollars with interest thereon at the rate of .... percent per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore, plaintiff demands judgment against defendant for the sum of ..... dollars, interest and costs.

(2) Complaint on Account.

Defendant owes plaintiff ..... dollars according to the account hereto annexed as Exhibit A.

Wherefore, plaintiff demands judgment against defendant for the sum of ..... dollars, interest and costs.

(3) Complaint for Negligence.

1. On ....., 19.., at [name of place where accident occurred], defendant negligently drove a motor vehicle against plaintiff who was then crossing said street.

2. Defendant was negligent in that:

(a) Defendant drove at an excessive speed.

(b) Defendant drove through a red light.

(c) Defendant failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against defendant in the sum of ..... dollars and costs.

(4) Complaint for Negligence.

(Where Plaintiff Is Unable to Determine Definitely Whether One or the Other of Two Persons Is Responsible or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence.)

1. On ....., 19.., at ....., defendant X or defendant Y, or both

defendants X and Y, wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said street.

2. Defendant X or defendant Y, or both defendants X and Y were negligent in that:

(a) Either defendant or both defendants drove at an excessive speed.

(b) Either defendant or both defendants drove through a red light.

(c) Either defendant or both defendants failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against X or against Y or against both in the sum of ..... dollars and costs.

(5) Complaint for Specific Performance.

1. On or about ....., 19.., plaintiff and defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore, plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of ..... dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ..... dollars.

(6) Complaint in the Alternative.

I.

Defendant owes plaintiff ..... dollars according to the account hereto annexed as Exhibit A.

II. ALTERNATIVE COUNT

Plaintiff claims in the alternative that defendant owes plaintiff ..... dollars for goods sold and delivered by plaintiff to defendant between ...., 19.., and ....., 19..

(7) Complaint for Fraud.

1. On ....., 19.., at ....., defendant with intent to defraud plaintiff represented to plaintiff that .....

2. Said representations were known by defendant to be and were false. In truth, [what the facts actually were].

3. Plaintiff believed and relied upon the false representations, and thus was induced to .....

4. As a result of the foregoing, plaintiff has been damaged [nature and amount of damage].

Wherefore, plaintiff demands judgment against defendant for ..... dollars, interest and costs.

(8) Complaint for Money Paid by Mistake.

Defendant owes plaintiff ..... dollars for money paid by plaintiff to defendant by mistake under the following circumstances:

1. On ....., 19.., at ....., pursuant to a contract ....., plaintiff paid defendant ..... dollars.

(9) Motion for Judgment on the Pleadings.

Plaintiff moves that judgment be entered for plaintiff on the pleadings, on the ground that the undisputed facts appearing therein entitle plaintiff to such judgment as a matter of law.

(10) Motion for More Definite Statement.

Defendant moves for an order directing plaintiff to file a more definite statement of the following matters: [set out]

The ground of this motion is that plaintiff's complaint is so [vague] [ambiguous] in respect to these matters that defendant cannot reasonably be required to frame an answer hereto, in that the complaint .....

(11) Answer to Complaint.

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiff as alleged in the complaint, he is indebted to plaintiff jointly with X. X is alive; is a resident of the State of North Carolina, and is subject to the jurisdiction of this court as to service of process; and has not been made a party.

Third Defense

1. Defendant admits the allegations contained in paragraphs ..... and ..... of the complaint.

2. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph .... of the complaint.

3. Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within ..... year next before the commencement of this action.

Counterclaim

[Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.]

Crossclaim Against Defendant Y

[Here set forth the claim constituting a crossclaim against defendant Y in the manner in which a claim is pleaded in a complaint.]

Dated: .....

.....

Attorney for Defendant

(12) Motion to Bring in Third-Party Defendant.

Defendant moves for leave to make X a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A attached.

(13) Third-Party Complaint.

....., *Plaintiff,* v. ....., *Defendant and Third-Party Plaintiff,* v. ..... *Third-Party Defendant.* — *Third-Party Complaint*

Civil Action No. .....

1. Plaintiff ..... has filed against defendant ..... a complaint, a copy of which is attached as "Exhibit C."

2. [Here state the grounds upon which the defendant and third-party plaintiff is entitled to recover from the third-party defendant all or part of what plaintiff may recover from the defendant and third-party plaintiff.]

Wherefore, plaintiff demands judgment against third-party defendant ..... for all sums that may be adjudged against defendant ..... in favor of plaintiff.

(14) Complaint for Negligence Under Federal Employer's Liability Act.

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at ..... and known as Tunnel No. .....

2. On or about June 1, 19.., defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ..... dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of ..... dollars for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of ..... dollars and costs.

(15) Complaint for Interpleader and Declaratory Relief.

1. On or about June 1, 19.., plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ..... dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 19.., and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 19.., was ever paid and the policy ceased to have any force or effect on July 1, 19...

3. Thereafter, on September 1, 19.., G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of

K. L.; defendant X. Y. claims to have been duly designed as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(16) Averment of Capacity Under Rule 9 (a).

(North Carolina Corporation)

Plaintiff is a corporation incorporated under the law of North Carolina having its principal office in [address].

(Foreign Corporation)

Plaintiff is a corporation incorporated under the law of the State of Delaware having [not having] a registered office in the State of North Carolina.

(Unincorporated Association)

Plaintiff is an unincorporated association organized under the law of the State of New York having its principal office in [address] and (if applicable) having a principal office in the State of North Carolina at [address], and as such has the capacity to sue in its own name in North Carolina. (1967, c. 954, s. 1.)

Chapter 1B.

Contribution.

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.—(a) Except as otherwise provided in this article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, succeeds to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This article shall not apply to breaches of trust or of other fiduciary obligation. (1967, c. 847, s. 1.)

Editor's Note.—Section 4, c. 847, Session Laws 1967, provides that the act shall be in full force and effect from and after Jan. 1, 1968. Section 3½, c. 847, Session Laws 1967, provides that the act shall not apply to litigation pending on its effective date.

The cases cited in this note were decided under former § 1-240.

For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956). For note on effect of covenant not to sue, see 35 N.C.L. Rev. 141 (1956). For note on cross claim for contribution, see 40 N.C.L. Rev. 633 (1962). For comment on rights of contribution, see 41 N.C.L. Rev. 882 (1963). For comment on contribution among joint tort-feasors and rights

of insurers, see 44 N.C.L. Rev. 142 (1965). For case law survey as to contribution, indemnity and settlement, see 44 N.C.L. Rev. 1051 (1966). For comment on this chapter, see 47 N.C.L. Rev. 274 (1968); 5 Wake Forest Intra. L. Rev. 160 (1969).

Common Law.—At common law, as between joint tort-feasors, there was no right of contribution. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

At common law no right of action for contribution existed between or among joint tort-feasors who were in pari delicto, thus the right is statutory, and its use necessarily depends upon the terms of the statute. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Under the rules of the common law the right of one joint tort-feasor to compel contribution from another did not exist. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Legislative Intent.—It is safe to assume that the General Assembly was moved to enact this legislation by the reason underlying the entire law of contribution, namely, that where one person has been compelled to pay money which others were equally bound to pay, each of the latter in good conscience should contribute the proportion which he ought to pay of the amount expended to discharge the common burden or obligation. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

This statute creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

The common-law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by statute. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

The enactment of this statute created as to parties jointly and severally liable a new right and ready means for the enforcement of that right. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Prior to the enactment of this section one tort-feasor was, as a rule, not entitled to contribution from another. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

In this jurisdiction, the common-law rule has been modified by statute so as to provide for enforcement of contribution as between joint tort-feasors in accordance with its provisions. Shaw v. Baxley, 270 N.C. 740, 155 S.E.2d 256 (1967).

Purpose.—The purpose of this statute permitting the joinder of a third party against whom the defendant seeks contributions as joint tort-feasor, was to enable litigants in tort actions to determine in one action all matters in controversy growing out of the same subject of action. Read v. Young Roofing Co., 234 N.C. 273, 66 S.E.2d 821 (1951).

Right Must Be Enforced According to Form of Statute.—The right to contribution comes from this statute, and it is to be enforced according to the form of the statute. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

Contribution is made the rule and not the exception by this statute. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

This statute seems to abrogate the well-settled rule, that, subject to some exceptions (Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911)), there can be no contribution between joint tort-feasors. Lineberger v. Gastonia, 196 N.C. 445, 146 S.E. 79 (1929), citing Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

Joint tort-feasors and joint judgment debtors are given the right to contribution. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right of contribution is a personal right. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

And Cannot Be Assigned or Transferred.—The right of contribution is not one that can be assigned or transferred by operation of law under the doctrine of subrogation. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Right to Contribution Is Not Dependent on Plaintiff's Continued Right to Sue.—The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued

right to sue both or all the joint tort-feasors. Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736, 149 A.L.R. 1183 (1943). It is the joint tort and common liability to suit which gives rise to the right to enforce contribution under this statute. Tarkington v. Rock Hill Printing & Finishing Co., 230 N.C. 354, 53 S.E.2d 269 (1949); White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

There can be no contribution unless the parties are joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Liability for contribution under this statute cannot be invoked except among joint tort-feasors. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

An original defendant may not invoke the statutory right of contribution against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Where insureds are adjudged to be joint tort-feasors and judgments are rendered against them, they are within the specific provisions of this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

A defendant who has been sued for tort may bring into the action for the purpose of enforcing contribution under this statute only a joint tort-feasor whom plaintiff could have sued originally in the same action. Petrea v. Ryder Tank Lines, 264 N.C. 230, 141 S.E.2d 278 (1965).

In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant is not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother cannot be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liability are both based upon the liability of a joint tort-feasor. Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955).

Since an unemancipated infant who is a member of the household cannot maintain an action for negligence against his parents, in an action on behalf of an unemancipated child to recover for negligent injury, the defendants may not file a cross action against the plaintiff's parents for contribution under this section because such cross action would indirectly hold the unemancipated minor's parents liable to him for the injury. Watson v. Nichols, 270 N.C. 733, 155 S.E.2d 154 (1967).

Permission of Original Plaintiff Not Required.—When one joint tort-feasor is sued alone he may join other joint tort-feasors for contribution under this statute without permission from the original plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957); McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957).

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors. — Insofar as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of this statute to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but most recover, if at all, upon the liability of such party to him. Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

A defendant sued in tort cannot compel plaintiff to sue all responsible for the damage, but the party sued may have contribution from all responsible for the damage. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

This statute made no attempt to interfere with the right of the injured party to decide who would be called on for compensation. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

When a person has been injured through the concurring negligence of two or more persons, he may sue one or all the joint tort-feasors at his option. Insofar as he is concerned, the others are not necessary parties and he may not be compelled to bring them in. They may, however, be brought in by the original defendant on a cross complaint in which he alleges joint tort-feasorship and his right to contribution in the event plaintiff recovers judgment against him. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954).

Election to Sue Less Than All Tort-Feasors.—When the aggrieved party elects to sue only one, or less than all the tort-feasors, the original defendant or defendants may have the others made additional

defendants under this statute for the purpose of enforcing contribution in the event the plaintiff recovers. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

Right to Bring in Persons Not Necessary Parties.—A party is given the right to bring in others not necessary parties, i.e., the right to bring in joint obligors for contribution. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

The party brought in may assert any defense appropriate to the cause of action asserted against him. He may plead estoppel by settlement or a judgment binding the parties. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Additional Party under No Obligation to Answer Allegations in Original Complaint.—An additional party defendant has no cause of action stated against him except that asserted in the cross action and set out in the cross complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original complaint, but only those alleged against him in the cross complaint. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

When Too Late to Bring in Other Joint Tort-Feasors. — When joint tort-feasors, who have been sued in an action, fail to file an answer to a complaint that states a good cause of action, and the plaintiffs obtain a judgment by default and inquiry, which is regular in all respects, a motion, lodged thereafter, to bring in other joint tort-feasors so as to determine liability for contribution as between themselves, comes too late. Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956).

Allegations in Cross Action for Contribution.—In order to maintain a cross action against another for contribution under this statute, the original defendant must allege facts sufficient to show that both of them are liable to the plaintiff as joint tort-feasors. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

When a defendant in a negligent injury action files answer denying negligence but alleging, conditionally or in the alternative, that if he were negligent, a third party also was negligent and that the negligence of such third party concurred in causing the injury in suit, the defendant is entitled, on demand for relief by way of contribution, to have such third person joined as a codefendant under this statute. Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under this statute. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939); Lackey v. Southern Ry., 219 N.C. 195, 13 S.E.2d 234 (1941). See also Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order for one defendant to join another as additional defendant for the purpose of contribution he must show by his allegations facts sufficient to make them both liable to the plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient. Hayes v. City of Wilmington, 239 N.C. 238, 79 S.E.2d 792 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

In order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show joint tort-feasorship and his right to contribution in the event plaintiff recovers against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

In order to show joint tort-feasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965); Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

The allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired to do so, could have joined the third party as a defendant in the action. Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965).

To entitle the original defendant in a tort action to have some third party made an additional party defendant to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect to the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the

complaint. The facts must be such that the plaintiff, had he desired so to do, could have joined such third party as defendant in the action. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954). See Hobbs v. Goodman, 241 N.C. 297, 84 S.E.2d 904 (1954); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

Where cross complaint was insufficient to allege facts tending to show that the negligence of the other defendants concurred in proximately causing the injury in suit, the demurrer of such defendants was properly sustained. Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955).

For allegations sufficient to state cause of action against joint tort-feasor for contribution, see Read v. Young Roofing Co., 234 N.C. 273, 66 S.E.2d 821 (1951).

Burden Is on Original Defendant to Prove Cross Action.—Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Stansel v. McIntyre, 237 N.C. 148, 74 S.E.2d 345 (1953).

Where one joint tort-feasor has others joined for contribution, he is, as to the new defendants, a plaintiff and must establish his right of action, and such additional defendants may assert any appropriate defense to the cross action without regard to relevancy to the claim of plaintiff. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Procedure for Contribution between Defendants. — The procedure to be followed in this State, when the right of contribution between defendants is claimed, seems to be set forth in Whiteman v. Seashore Transp. Co., 231 N.C. 701, 58 S.E.2d 752 (1950). Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Original Defendant Becomes a Plaintiff as to Additional Defendant. — Where a plaintiff does not bring his action against all joint tort-feasors, and an original defendant sets up a cross action against a third party and has him brought in as an additional party defendant for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 560 (1959); Cox v. E.I. DuPont Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

When an injured party elects to sue some but not all of the tort-feasors responsible for his injuries, those sued have a right to bring the other wrongdoers in for contribution. The original defendant then becomes as to the tort-feasors not sued a plaintiff. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959); Cox v. E. I. DuPont de Nemours & Co., 269 F. Supp. 176 (D.S.C. 1967).

Additional Defendant May File Counterclaim against Original Defendant. — Where the original defendant has another joined as additional defendant for contribution on the ground of their concurring negligence in producing plaintiff's injury, the additional defendant may file a counterclaim against the original defendant for damages to the additional defendant's property allegedly resulting from the negligence of the original defendant, and such counterclaim is improperly stricken upon motion of the original defendant. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

Defendant may not exculpate himself from liability for his negligence by showing that codefendant was also negligent. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Judicial Admission of Negligence Need Not Be Made in Order to Interplead Third Party. — To interplead a third party for contribution the law does not require a defendant in a personal-injury suit to make a judicial admission that his negligence was one of the proximate causes of the injury for which plaintiff sues. He may deny negligence and allege, conditionally or alternatively, that if he was negligent, the third party's negligence concurred with his as a proximate cause of plaintiff's injuries. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

A defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross action. Hendricks v. Les-

lie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Cross Action for Indemnity. — Where two alleged tort-feasors are sued by the injured party, one may set up a cross action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

A tort-feasor whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to indemnity against the primary wrongdoer. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963).

Independently of this statute, the law permits an adjudication in one action of primary and secondary liability between joint tort-feasors who are not in pari delicto. A defendant secondarily liable, when sued alone, may have the tort-feasor primarily liable brought into the action by alleging a cross action for indemnification against him. Edwards v. Hamill, 262 N.C. 528, 138 S.E.2d 151 (1964).

Establishing Right to Indemnity from Second Defendant.—In order for one defendant to establish a right to indemnity from a second defendant, he must allege and prove (1) that the second defendant is liable to plaintiff, and (2) that the first defendant's liability to plaintiff is derivative, that is, based on tortious conduct of the second defendant, or that the first defendant is only passively negligent but is exposed to liability through the active negligence of the second defendant. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Constructive Tort-Feasor May Recover Full Indemnity against Actual Wrongdoer.—Where two persons are jointly liable in respect to a tort, one being liable because he is the actual wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tort-feasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Where liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of respondeat superior, the master, having discharged the liability, may recover full indemnity from the servant. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968).

Allegation by plaintiff that defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader and is not admitted by demurrer. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Section 1-166 Inapplicable to Cross Action against Unknown Joint Tort-Feasor. —The obvious purpose of § 1-166 is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity exists when a defendant desires to pursue a cross action for contribution against an unknown joint tort-feasor, since the statute does not begin to run on the claim for contribution until judgment has been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Only Pro Rata Share Required.—This statute does not contemplate that one brought in as an additional defendant shall pay more than a pro rata part of any verdict rendered against the original defendants. Jordan v. Blackwelder, 250 N.C. 189, 108 S.E.2d 429 (1959).

Interjecting Action Not Germane.—The cross action for contribution between defendants charged with tort may not be used, however, to interject into the litigation another action not germane to the plaintiff's action. White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955).

Enforcement of Contribution.—In substance this statute provides that where two or more persons are liable for their joint tort and judgment has been rendered against some, but not all, those who pay may enforce contribution against the others who are jointly liable. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right of the party sued to have contribution from all responsible for the damage may be enforced in either of two ways. The party sued may wait until a judgment has been obtained against him, whereupon he may maintain an action against the other tort-feasors; or defendant may, in the action against him, have the other tort-feasors made parties. In either event the party called on to compensate the injured party is a plaintiff in the action against his alleged joint tort-feasors. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

The plaintiff himself may, at his election, sue any one or all of the tort-feasors. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Section Inapplicable to Insurers.—Since the liability of insurance carriers of tort-feasors is contractual and not founded on tort, where no judgment had been recovered against such a carrier by any of the parties to an action, it was held that this statute was inapplicable as by its express terms it applies only to joint tort-feasors and to joint judgment debtors. Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 184 S.E. 46 (1936); Lumbermen's Mut. Cas. Co. v. United States Fid. & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936); Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

The insurance carrier who pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors. The statute cannot be stretched to include subrogation, which arises by reason of contract, into contribution, which arises by reason of participation in the tort. Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

Subrogation is not included within the framework of this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

An automobile insurer of one joint tort-feasor after discharging in full a judgment obtained by an injured party against its insured cannot maintain in its own name an action for contribution under this statute against a second joint tort-feasor whose negligence proximately caused and contributed to the injury for which the judgment was obtained where the second tort-feasor was not made a party to the original suit. The plaintiff's rights as insurer arise by contract of subrogation under its policy and not as a result of its joint liability as a tort-feasor who has paid the judgment and is entitled to force contribution under this statute. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

The right permitted to be enforced under this statute is one of contribution and not one of subrogation. Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d 114 (1966).

Payment of Judgment by Insurer Does Not Affect Original Defendant's Right to Contribution.—Where insurer of original defendant pays plaintiff's judgment against its insured and plaintiff's judgment is marked paid and satisfied, the original defendant's right to contribution from another defendant is not affected and the insurer is entitled to enforce his claim. Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

Neither Joint Tort-Feasor May Preclude Dismissal of Action against the Other.—Where plaintiff elects to sue both joint tort-feasors and alleges active negligence on the part of both which concurred in producing the injury, each is entitled to contribution from the other if there is a judgment of joint and several liability against them, but during the course of the trial each is a defendant as to the plaintiff only, and neither may preclude the dismissal of the action against the other if plaintiff fails to make out a prima facie case against the other, and allegations and prayer for contribution contained in the answer of one are properly stricken on motion to the other. Greene v. Charlotte Chem. Labs., 254 N.C. 680, 120 S.E.2d 82 (1961).

Unless Plaintiff Makes Out Prima Facie Case.—Where the plaintiff had made out a prima facie case against both defendants, the dismissal of other defendants was improper since this prevented the co-defendants from pressing their claim for contribution. Byerly v. Shell, 312 F.2d 141 (4th Cir. 1962).

Assertion of Right against Another Tort-Feasor Not Barred by Failure to Perfect Appeal.—Where plaintiff has established one tort-feasor's duty to compensate her, that tort-feasor, by its failure to perfect its appeal from the adjudication of its liability to plaintiff and the discharge thereof, is not thereby barred from asserting its right against another tort-feasor. Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963).

Effect of Settlement. — While the passengers, by making settlement with one joint tort-feasor, waived any right they might have possessed to seek compensation from the other, the tort-feasor making settlement with them waived no right it possessed to assert its claim to contribution against the other alleged joint tort-feasor in an action by a passenger with

whom no settlement has been made. Snyder v. Kenan Oil Co., 235 N.C. 119, 68 S.E.2d 805 (1952).

Res Judicata. — Where the initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, in which the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is res judicata in a subsequent action between the drivers. It is equally true in such a factual situation, where the plaintiff recovers judgment against the original defendant and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of this statute, such judgment is res judicata in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial. Hill v. Edwards, 255 N.C. 615, 122 S.E.2d 383 (1961); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

When Additional Defendant Entitled to Motion for Nonsuit. — For the failure of original defendant to allege and to offer any evidence tending to show that joint and concurring negligence on the part of herself and additional defendant proximately caused injury to plaintiff, additional defendant's motion for judgment of nonsuit should have been sustained. Clemmons v. King, 265 N.C. 199, 143 S.E.2d 83 (1965).

Consent Judgment in Foreign Action Is Binding. — While this statute makes no reference to consent judgments, it cannot successfully be contended that a consent judgment in a foreign action, based upon an automobile accident within this State, is not binding upon the parties thereto in the absence of fraud. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Effect of Workmen's Compensation Act.—In an action against a third person tort-feasor by an employee subject to the Workmen's Compensation Act, the defendant is not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability is secondary and that of the employer primary. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

Where a third person tort-feasor is sued for the wrongful death of an employee, he is not entitled to have the employer joined as a joint tort-feasor nor as a necessary party to the determination of the action when the original defendant does not rely upon the doctrine of primary and secondary liability. Clark v. Pilot Freight Carriers, 247 N.C. 705, 102 S.E.2d 252 (1958); Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

Where the personal representative of a deceased employee sued a third person tort-feasor in an action instituted in this State, and defendant had the employer and a fellow employee of the deceased employee joined for contribution, motions of the additional defendants to strike the cross action were properly allowed where it appeared that the deceased was employed in another state, that the injury came within the purview of the compensation act of such state, and that award had been entered therein adjudicating the liabilities of the additional defendants for the death. Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957).

Joint and Several Judgment in Favor of Plaintiff Held Error.—Where plaintiffs seek no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948); Shaw v. Eaves, 262 N.C. 656, 138 S.E.2d 520 (1964).

Improper Joinder. — When an alleged joint tort-feasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross action pleaded by another defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage. Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956).

The pleading filed by the original defendant must state facts which are sufficient to show that the original defendant is entitled to contribution from the additional defendant under this statute. If the facts alleged do not suffice to establish a right to contribution, the party or parties brought in as additional defendants are unnecessary parties and may on motion have the allegations stricken and the action dismissed as to them. Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959).

Lessees Not Entitled to Join Lessor on Principle of Primary and Secondary Liability. — Where plaintiff sued to recover for injuries sustained when a sign erected over a sidewalk by lessees fell and struck her, lessees were not entitled to join the lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees were primarily liable. Hobbs v. Goodman, 240 N.C. 192, 81 S.E.2d 413 (1954).

Action against Mining Company.—In an action by property owner to recover damages from mining company due to dumping of silt in river in its mining operations, the defendant could file a cross complaint for contribution against two other mining companies committing the same injurious acts in their operations. Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

Newspaper May Bring in Individual Author of Libelous Matter.—Where plaintiff sues a newspaper alone for alleged libel, the newspaper, upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, is entitled to have such individual joined as a joint tort-feasor for the purpose of contribution, and such individual's demurrer to the cross action of the newspaper against him is properly overruled. Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953).

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968).

§ 1B-2. Pro rata shares.—In determining the pro rata shares of tort-feasors in the entire liability

(1) Their relative degree of fault shall not be considered;

(2) If equity requires, the collective liability of some as a group shall constitute a single share; and

(3) Principles of equity applicable to contribution generally shall apply. (1967, c. 847, s. 1.)

§ 1B-3. Enforcement.—(a) Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

(d) If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either

(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,

(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or

(3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.

(e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution. (1967, c. 847, s. 1.)

Cited in Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§ 1B-4. Release or covenant not to sue.—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. (1967, c. 847, s. 1.)

Editor's Note.—For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

§ 1B-5. 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 that enact it. (1967, c. 847, s. 1.)

§ 1B-6. Short title.—This article may be cited as the Uniform Contribution among Tort-Feasors Act. (1967, c. 847, s. 1.)

Cited in Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968).

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.—(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment.

(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute

to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions. (1967, c. 847, s. 1.)

Editor's Note. — For comment on this chapter, see 5 Wake Forest Intra. L. Rev. 160 (1969).

ARTICLE 3.

Cross Claims and Joinder of Third Parties for Contribution.

§ 1B-8: Repealed by Session Laws 1969, c. 895, s. 19.

Cross References.—For provisions similar to those of subsection (b) of repealed § 1B-8, see Rule 14 (§ 1A-1). For provisions of Rules of Civil Procedure as to crossclaims, see Rule 13 (§ 1A-1).

Editor's Note. — Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

The repealed section was enacted by Session Laws 1967, c. 847, s. 1.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 3, 1969

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

ROBERT MORGAN
Attorney General of North Carolina